Case No. 11-23-00232-CV

COURT OF APPEALS
ELEVENTH DISTRICT OF TEXAS
EASTLAND, TEXAS

TARLETON STATE UNIVERSITY,

Appellant,

vs.

FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION,

Cross-Appellant.

Oral Argument Requested

BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE

Nature of the case: This cross-appeal arises out of a mandamus action to compel Tarleton State University to produce information on how it censored and seized editorial control over a student newspaper. After prevailing in the trial court, FIRE is cross-appealing its entitlement to reasonable attorney's fees under the Texas Public Information Act.

Course of Proceedings: FIRE filed a mandamus petition after Tarleton withheld public information under the Public Information Act's student-records exception. (CR 5–58.) Tarleton answered by generally denying the allegations and raising sovereign immunity as an affirmative defense. (CR 59–62.)

Both parties moved for summary judgment, (CR 63–195), and FIRE applied for costs and reasonable attorney's fees. (CR 198–251.) After a hearing on the motions, (RR2 at 1–27), the trial court granted summary judgment for FIRE, ordering the University to produce the records and awarding FIRE costs and attorney's fees. (CR 356–357.) FIRE submitted supplemental evidence of litigation costs and attorney's fees. (CR 370–91.)

Shortly after, Tarleton moved for reconsideration of the trial court's summary judgment order. (CR 360–368.) The court held another hearing to consider attorney's fees and the reconsideration motion on September 7, 2023. (CR 399; RR3 at 1–21.)

Trial Court's Disposition: On September 28, 2023, the trial court entered a final order granting FIRE's Petition for Writ of Mandamus and ordering Tarleton to disclose all responsive records. (CR 409–411.) The court awarded FIRE litigation costs but denied its request for attorney's fees. (CR 410.)

STATEMENT ON ORAL ARGUMENT

Cross-Appellant/Appellee FIRE believes oral argument would aid the Court in deciding the issue presented.

ISSUE PRESENTED

The Public Information Act requires public universities that violate the Act to pay attorney's fees where the University could not have reasonably relied on appellate or attorney general opinions to withhold public information. Tarleton State University both ignored the plain text of the Act and misconstrued appellate opinions and attorney general decisions to withhold public information about its censorship of a student newspaper for more than two years. Is Tarleton required to pay attorney's fees?

STATEMENT OF FACTS

A. FIRE sends Tarleton public-records requests after it censors a student newspaper.

The *Texan News Service*, a formerly editorially independent student newspaper at Tarleton, published a series of articles in 2018 about allegations of inappropriate behavior toward female students by then-professor Michael Landis. (CR 7 ¶ 9, 12.) A University investigation concluded Landis had engaged in "highly inappropriate" behavior and recommended his termination. (*Id.* ¶ 13.)

Roughly three years after the *Texan News Service* reported on the sexual harassment complaints and the University's investigation, Landis threatened to sue the paper for defamation unless the articles were removed. (*Id.* ¶ 15.) Rather than defend the student newspaper's reporting against Landis's baseless lawsuit threat, Tarleton administrators instructed the *Texan News Service* to remove the articles or risk losing funding. (CR 8 ¶ 16–20.) Tarleton then undertook a review of the status of the newspaper and stripped it of its independence, placing it under administrative control. (*Id.* ¶ 22.)

Alarmed by Tarleton's censorship, FIRE sought more information. FIRE is a non-profit dedicated to defending and sustaining the individual rights of all Americans to free speech and free thought. Because colleges and universities play a vital role in preserving free thought within a free society, FIRE places a special emphasis on defending the individual rights of students and faculty members on our nation's campuses. So, on October 5, 2021, FIRE issued two Public Information Act requests to Tarleton. The first request sought documents related to 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*. (CR 66,

81–82 ¶ 3, 85–87.) 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*. (CR 66, 81–82 ¶ 3, 88–90.)

B. Tarleton withholds public records, citing the Public Records Act's student-records exception.

In response to FIRE's requests, Tarleton produced some records while withholding others in their entirety. While FIRE does not know how many records the University continues to improperly withhold, it knows the University failed to produce *at least* two responsive, non-exempt documents. (CR 66, 82 ¶ 4, 124–29.) 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 (VP's Memo). (CR 66, 82 ¶ 5, 91–93, 270 ¶ 5, 320–24.) The VP's Memo, as published by the paper, redacts all student-identifying information. (CR 91–93, 320–24.) However, Tarleton did not produce this responsive and non-exempt memorandum in response to FIRE's public information request. (CR 66, 82 ¶ 5.) Tarleton also refused to produce a letter from the University's Provost to the Dean

of the College of Liberal & Fine Arts discussing the editorial independence of the *Texan News Service* (Provost's Letter). (CR 66, 83 ¶ 6, 94–95.) The Provost's Letter does not mention or refer to any student in any way. (CR 94–95.) 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. (CR 66, 83 ¶ 6.)

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. (CR 66, 83 ¶ 7, 96–114.) The Deputy General Counsel responded 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. (CR 66–67, 83 ¶ 8, 115–120.)

On December 3, 2021, FIRE submitted another public information request to Tarleton, substantively the same as its first two 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. (CR 67, 83–84 ¶ 9, 121–23.) Yet the University never obtained an Attorney General opinion. Instead, Tarleton claimed that any information still withheld was subject to Texas Government Code § 552.114, which excepts student records from disclosure. (CR 67, 84 ¶ 10, 124–26.) 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). Both parties agree that the student-records exception only allowed Tarleton to withhold students' personally identifiable information. (*See, e.g.*, CR 73–75; 351.)

Rather than redact students' personally identifiable information from records, the University continued to withhold documents in their entirety—like the VP's Memo and the Provost's Letter—that contain public information not subject to the student-records exception. (*See* CR 11 ¶ 34–37.) In its summary judgment motion, the University indicated it could be withholding additional documents. (CR 150 ("[E]ven though Petitioner has obtained some of the withheld documents from other non-university sources . . . .").)

C. FIRE sues Tarleton and both parties move for summary judgment.

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. (CR 14 ¶ 52.) FIRE also sought its costs of litigation and reasonable attorney's fees under Texas Government Code section 552.323. (*Id.* ¶ 53). From the outset, FIRE specified that it neither sought nor expected Tarleton to disclose information directly related to students. Indeed, FIRE's petition invited the University to redact students' personally identifiable information from otherwise public documents before producing them. (CR 11–12 ¶ 38.)

Tarleton answered FIRE's Petition on March 15, 2022, generally denying the allegations and raising sovereign immunity as an affirmative defense. (CR 59–60.) The University also claimed the Act barred FIRE's request for costs and fees because Tarleton had reasonably relied on prior court or Attorney General opinions. (CR 60 (citing Tex. Gov. Code § 552.323).)

To resolve the case promptly and limit litigation costs and fees, FIRE sent Tarleton's counsel a proposed settlement offer in June 2022, offering to withdraw the Petition in exchange for records redacted of student-identifying information. (CR 205 ¶ 11, 250 ¶ 20.) Tarleton never responded to FIRE's offer, forcing continued litigation. (CR 205 ¶ 11, 250 ¶ 20.)

FIRE moved for summary judgment on August 12, 2022, asking the court to issue a Writ of Mandamus compelling the University to release the withheld records and award FIRE litigation costs and attorney's fees. (CR 77.) Relying on the plain text of the Act, binding case law, and Attorney General opinions, FIRE argued that Tarleton must produce all responsive records after redacting students' personally identifying information. (CR 68–75.) FIRE applied for court costs and reasonable

attorney's fees on November 4, 2022. (CR 198–252.) Along with its application, FIRE submitted evidence and declarations from each attorney detailing their work on the case. (CR 210–252.)

Tarleton filed its own summary judgement motion in October 2022, claiming the Act authorized it to withhold documents containing students' personally identifiable information in their entirety without seeking an Attorney General opinion. (CR 150–153.) In support of its motion, the University offered an affidavit from its Public Information Officer, Kent Styron. (CR 155–161.) Styron asserted—without offering any evidentiary proof—that Tarleton could not produce any additional records because doing so "would necessarily identify the student or students for whose records are withheld because it is my understanding that the requestor knows the identity of the student or students to whom the education records relate." (CR 157 ¶ 6, 10.)

The parties opposed one another's summary judgment motions. (CR 253–268, 326–344.) In its opposition brief, FIRE relied in part on *University of Texas at Austin v. Gatehouse Media Texas Holdings, II, Inc.*, an instructive decision issued by the El Paso Court of Appeals in November 2022. (*See, e.g.*, CR 331.) In that case, the court held UT-

Austin violated the Public Records Act when it withheld responsive documents under the student-records exception without first seeking an Attorney General decision. 656 S.W.3d 791, 802–03 (Tex. App.— El Paso Nov. 29, 2022, pet. pending).[1] In addition, the court of appeals held the trial court had abused its discretion in denying Gatehouse Media's request for attorney's fees. *Id.* at 808. Tarleton, in its opposition, argued that the Act barred FIRE from recovering costs and fees because the University had acted in reasonable reliance on published appellate opinions and written decisions of the Attorney General. (CR 264–265.)

D. The court grants summary judgment for FIRE.

The trial court held a hearing on the parties' cross-motions on February 16, 2023, and took the matter under advisement. (CR 345; RR2 at 25:25–26:14.) On June 9, 2023, the court granted FIRE's motion for summary judgment, directed Tarleton to disclose all responsive records, and ordered the University to pay costs and reasonable attorney's fees under section 552.323. (CR 356–357.)

[1] The University of Texas at Austin petitioned the Supreme Court to review the case in January 2023 (Case No 23-0023). The Court ordered parties to submit briefing on the merits. Petitioner's reply brief on the merits is due February 20, 2024.

E. On reconsideration, the trial court reverses its decision to award fees without explanation.

Unsatisfied with the court's ruling, Tarleton moved to reconsider. (CR 360–369.) Once again, the University argued it should be absolved from paying costs and attorney's fees because "appellate opinions and written decisions of the Attorney General recogniz[ed] the University's discretion under PIA and FERPA to determine whether to release the requested education records." (CR 366.) As FIRE explained in its opposition brief, Tarleton merely re-asserted the same arguments the trial court had rejected and failed to identify any reason for the court to reconsider its sound judgment. (CR 394–398.)

On September 7, 2023, the trial court held a hearing on attorney's fees and Tarleton's motion for reconsideration. (CR 399; RR3 at 1–21.) First, the court explained that it believed the El Paso court of appeals had correctly decided *Gatehouse Media* and that it had ruled in FIRE's favor accordingly. (RR3 at 4:21–5:4.) It further explained that Tarleton could not rely on Styron's conclusory statements to circumvent the Act's requirements. (RR3 at 18:4–19.) The court, however, reversed its decision on fees, denying FIRE's request without explanation. (RR3 at 18:20–24.) The court issued a final order on September 28, 2023, once again

directing Tarleton to produce all responsive records after redacting any personally identifiable information. (CR 409–411.) The order denied FIRE's request for fees, again without explanation. (CR 410.)

SUMMARY OF ARGUMENT

FIRE issued Public Information Act requests to Tarleton State University seeking information about how it censored the student newspaper, *Texan News Service*, more than two years ago. Rather than disclose the public information FIRE requested—as the law requires—Tarleton invoked an irrelevant exemption for "student records." The Public Records Act mandates Tarleton pay attorney's fees for its blatant violation. The trial court abused its discretion holding otherwise.

The trial court ordered the University to comply with the Act—twice. As the prevailing party, FIRE is entitled to attorney's fees under the Act. Tex. Gov't Code § 552.323(a). While the court correctly awarded FIRE attorney's fees after a hearing on the parties' cross-motions for summary judgment, after reconsidering, it reversed its fee decision without any explanation, including why Tarleton might have met its burden to escape fees under subsections 552.323(1)–(3). With no reason

to reconsider its sound initial decision, the court should have awarded FIRE fees.

Tarleton could not have reasonably relied on existing precedent or written attorney general decisions to withhold responsive documents, and therefore cannot skirt its duty to pay fees under the Act. *See* Tex. Gov't Code § 552.323(a)(1)–(3). From the outset, Tarleton read the student-records exception in a way not supported by the Act's plain text or any other authority. The University misconstrued attorney general decisions and relied on inapposite appellate opinions to circumvent the Act's requirements. For example, Tarleton falsely claims Attorney General decisions allowed it to withhold the VP's Memo and the Provost's Letter in their entirety without first seeking the Attorney General's permission to do so, as required by § 552.301(a) of the Act. And the University's unsupported interpretation allows the student-records exception to swallow the rule: Tarleton claims the Act permits it to withhold documents—like the VP's Letter—that do not pertain to students whatsoever. Tarleton could not have reasonably relied on any Attorney General guidance or case law to justify its violations.

Tarleton continues to obscure the public's right to know. And its refusal to fulfill its duty under the Act has necessitated this prolonged litigation. FIRE expended significant attorney time to obtain the records Tarleton should have produced more than two years ago. By reversing the trial court's fees decision and compensating FIRE for the time and resources it dedicated to this case, this Court can incentivize non-profit civil liberties organizations to continue pursuing important public records claims.

Describing its express purpose for creating the Public Information Act, the Texas legislature reminded public bodies like Tarleton that citizens are "entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001(a). This Court should reverse the district court's denial of fees to ensure that Texas citizens "remain[] informed so that they may retain control over the instruments they have created." *Id.*

ARGUMENT

The trial court abused its discretion when it reversed its decision on attorney's fees despite guiding law compelling Tarleton to produce any

information not expressly protected by the narrow student-records exception. *See, e.g., Gatehouse Media*, 459 S.W.3d at 806–07 (finding trial court abused its discretion in denying attorney's fees where university could not have reasonably relied on existing authority to withhold information).

I. FIRE Is Entitled to Attorney's Fees Under the Public Records Act.

As the prevailing party, FIRE is entitled to attorney's fees because Tarleton did not—and could not—reasonably rely on any case law or Attorney General decisions to eschew the Act's requirements.

A. The court did not find that Tarleton reasonably relied on existing authority to withhold records.

FIRE is entitled to attorney's fees unless Tarleton shows it reasonably relied on existing authority to withhold public information. Section 552.323 of the Act requires the trial court to "assess costs of litigation and attorney's fees incurred by a plaintiff who substantially prevails," except where "the court finds that the governmental body acted in reasonable reliance on (1) a judgment or an order of a court applicable to the governmental body; (2) the published opinion of an appellate court; or (3) a written decision of the attorney general . . . ." Tex. Gov't Code § 552.323(a). A party seeking relief on its mandamus claim substantially

prevails when the court issues a final judgment compelling disclosure. *City of Houston v. Kallinen*, 516 S.W.3d 617, 623–24 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (holding that a party prevails and qualifies for a fee award "when [the] disclosure [of public records] is compelled by the court and incorporated into a final judgment").

The trial court ordered Tarleton to disclose public records, not only once, but twice. (CR 356, 409 ¶ 1, 3.) Thus, the Act required the trial court to award FIRE, the prevailing party, fees unless it found Tarleton reasonably relied on existing case law or written Attorney General opinions. The court made no such finding—it declined to offer any rationale whatsoever for overturning its initial decision to award FIRE fees. (RR3 at 18:20–24.) In fact, the court could not have held that Tarleton reasonably relied on existing authority because appellate decisions and Attorney General opinions, to the contrary, instruct universities to produce records after redacting confidential information.

B. Tarleton ignored and misread existing case law and Attorney General decisions to unlawfully withhold public information.

Tarleton claims it can dodge its obligation to pay fees because it reasonably relied on published appellate opinions and written Attorney

General decisions to withhold the records. (CR 264–265, 366–67, 404–05.) But the University cannot point to any authority that provides wholesale cover under the Act's narrow student-records exception.

1. Tarleton failed to seek an Attorney General decision before invoking the student-records exception.

The Public Information Act must be "liberally construed in favor of granting a request for information." Tex. Gov't Code § 552.001(b). 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). Tarleton attempts to avoid this duty by pointing to Section 552.114(d) of the Act, which allows educational institutions to *redact* information subject to FERPA protections without seeking an Attorney General decision. The plain meaning of the word "redact" within the context of the student-records exception, however, only permits universities to remove or obscure personally identifiable information covered by FERPA before submitting records to the Attorney General.

Gatehouse Media, 656 S.W.3d at 802–803. Tarleton, however, did not even try to redact responsive records, opting instead to skip this procedural requirement altogether and withhold entire documents without the Attorney General's blessing. (*See* CR 143–44.)

Prior Attorney General opinions—including the ones Tarleton cites—confirm that the University should have sought an Attorney General decision. In Open Records Decision No. 634, for example, the Attorney General stated: "[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-634 at 7 (1995). And the University's attempt to rely on two prior informal letter rulings issued to Texas universities proves equally unreasonable. (CR 261–62.) Both letters merely reiterate that universities can redact information that is protected by the student-records exception from documents before submitting them to the Attorney General. Tex Att'y Gen. Op. OR 2015-20788, 2015 WL 7430690, at *1 n.5 (2015) ("We note section 552.114(d) of the Government Code authorizes a governmental body to redact information covered under section 552.114(b) of the Government Code

without requesting a decision from this office under the Act."); Tex. Att'y Gen. Op. OR2015-20522, 2015 WL 7430618, at *1 n.4 (2015) (same).

In its recent brief submitted to the Supreme Court in *Gatehouse Media*, the State acknowledges that "in a situation in which some responsive information is subject to withholding under 552.114(b), and some is not, an educational institution could redact the covered material but would be required to seek an Attorney General decision regarding the remaining material." Brief for Petitioner at 21, *Univ. of Tex. Austin v. Gatehouse Media Tex. Holdings, II, Inc.*, No. 23-0023 (Tex. Oct. 23, 2023) (pet. pending). That's exactly what Tarleton should have done here. Instead, it withheld an untold number of documents, including the readily redactable VP's Memo, and the Provost's Letter that contains no student-identifying information, in their entirety without seeking Attorney General guidance.

Tarleton purports that seeking an Attorney General decision before withholding records would have been futile because *all* the information in *all* the records is protected by the student-records exception. (CR 150–53.) But the University hinges this entire argument on nothing more

than Styron's conclusory affidavit that the trial court correctly rejected. (*Id.*; RR3 at 18:4–19.)

2. Tarleton refused to segregate and release non-exempt information, as required by existing law.

Even if Tarleton were not required to seek an Attorney General decision before withholding information, existing case law instructs universities to disclose otherwise public documents after redacting only personally identifiable information. In *Jackson v. State Office of Administrative Hearings,* the Supreme Court required the state to redact confidential information contained in license suspension orders and then disclose them to the requestor. 351 S.W.3d 290, 292, 295–97 (Tex. 2011). 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 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). Most recently, the El Paso Court of Appeals conducted an exhaustive review of the student-records exception to determine that universities cannot misuse it to withhold information

that is not protected by FERPA. *Gatehouse Media*, 656 S.W.3d at 803–805.

Tarleton's cited appellate decisions provide it no support. (*See* CR 259–60.) *B.W.B v. Eanes Independent School District* held that FERPA did not provide a private right of action to a father to access his daughter's educational information. No. 03-16-00710-CV, 2018 WL 454783, at *8 (Tex. App.—Austin Jan. 10, 2018, no pet.) (mem. op.). It does not relieve Tarleton of its duties under the Public Information Act. And unlike petitioners in *IDEA Public Schools v. Socorro Independent School District*, FIRE does not seek personally identifiable information like names and addresses. No. 13-18-00422-CV, 2020 WL 103853, at *1 (Tex. App.—Corpus Christi Jan. 9, 2020, pet. denied) (mem. op.). In fact, FIRE has invited and still invites Tarleton to redact personally identifiable information and seeks only the disclosure of information not subject to FERPA's protections.

Tarleton could not have "acted in reasonable reliance" on existing case law and Attorney General opinions to withhold the VP's Memo and Provost's Letter. The VP's Memo, as published by the *Texan News Service*, is redacted—it refers to Complainant, Complainant 1 and

Complainant 3. (CR 91–93, 320–24.) So redacted, it does not contain any non-public information that would allow FIRE to identify the students mentioned within.[2] The redacted publication proves Tarleton can redact the VP's Memo, and likely other documents that Tarleton is withholding, for student-identifying information, like names. Tarleton's attempt to withhold the Provost's Letter under the narrow student-records exception is even more absurd. The letter does not mention, refer to, or concern any student whatsoever. Under any interpretation of the Act, the Provost Letter is a public record. Tarleton's withholding of these two documents casts serious doubt on its withholding of an untold number of additional documents, which it claims it cannot redact based on an unsupported, conclusory affidavit the trial court rightly rejected. (RR3 at 18:4–19.)

[2] The *Texan News Service* obtained the VP's Memo from two of the students to whom it relates. (CR 322.) One of the students chose to identify herself and provided the paper with quotes and information. (CR 322–23.) Thus, FIRE only knows this student's identity because she chose to come forward publicly. Withholding records for the sake of protecting the privacy of a student is not necessary where that student has already identified themselves publicly. S*ee Central Dauphin Sch. Dist. v. Hawkins*, 253 A.3d 820, 834 (Pa. Cmwlth. Ct. 2021) (holding no privacy interests at stake where student had already been publicly identified), *aff'd*, 286 A.3d 726 (Pa. 2022) (holding no privacy interests at stake where student had already been publicly identified).

Because the trial court did not—and could not—find that Tarleton relied on Attorney General guidance and appellate decision to violate the Act, the University must pay FIRE attorney's fees. This Court should reinstate the trial court's initial decision to award FIRE, the prevailing party in this litigation, fees.

II. Awarding FIRE Attorney's Fees Furthers the Successful Prosecution of Meritorious Public-Records Claims.

The Texas legislature enacted the Public Information Act to foster transparency and accountability. Tex Gov't Code § 552.001(a). The Act entitles citizens "at all times to complete information about the affairs of government," and reminds public employees that "[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 is not good for them to know." *Id.* The legislature mandated fee-shifting to serve these important interests. § 552.323(a). Tarleton State University betrayed these principles, stripping the public of access to information it rightfully owns and forcing more than two years of litigation as a result. Nonprofit civil-liberties organizations like FIRE incur significant costs while vindicating the public's right to know. (CR 204, 210–251, 370–387). Compensating nonprofits for the time and resources attorneys spend litigating public

records cases that individual citizens may not have the time, expertise, or funds to litigate themselves "further[s] the successful prosecution of meritorious claims." *See Jackson*, 351 S.W.3d at 300 (citing *Kay v. Ehrler*, 499 U.S. 432, 438 (1991)).

Both state and federal courts grant attorney's fees for work in-house counsel performed, recognizing that it allows organizations to save costs and compensates them for time in-house counsel could have spent on other cases. *See AMX Enters., LLP v. Master Realty Corp.*, 283 S.W.3d 506, 519 (Tex. App.— Fort Worth 2009, no pet.) (granting in-house counsel attorney's fees based on market-value "prevents a losing defendant from benefitting from the prevailing party's decision to control its own costs by employing in-house counsel"); *Tesoro Petroleum Corp. v. Coastal Refin. & Mktg., Inc.*, 754 S.W.2d 764, 766-67 (Tex. App.— Houston [1st Dist.] 1986, writ denied) ("[T]he award of reasonable attorney's fees for services performed by in-house counsel compensates the prevailing party for the time counsel could have spent on other corporate matters."); *see also Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989 (holding that Texas law permits a

successful claimant to recover fees for work performed by its in-house counsel).

These decisions distinguish *Jackson*, which held a *pro se* attorney-litigant could not recover attorney's fees under the Public Information Act because it would "disincentivize attorneys to retain counsel" where their own interests were at risk 351 S.W.3d at 300. The court reasoned that its holding would ensure litigation strategy was dictated by "reason, rather than emotion." *Id.* (quoting *Kay*, 499 U.S. at 437).

Unlike the attorney-petitioner in Jackson, who represented himself, FIRE's in-house attorneys litigate on behalf of the organization. FIRE's attorneys are experienced litigators and are uniquely suited to litigate cases concerning the First Amendment and public access to government records. They rely on this experience and an expert command of the relevant law—rather than emotion or personal interests—to make reasoned and rational decisions.

By compensating FIRE for the time and resources it dedicated to this case, this Court can incentivize other nonprofit organizations to champion Texans' rights to "remain[] informed" and "retain control over the instruments they have created". Tex. Gov't Code § 552.001(a).

CONCLUSION AND PRAYER

Tarleton ignored the plain text of the Public Information Act, appellate opinions, and Attorney General decisions to withhold public information about the censorship of a student newspaper. Tarleton must pay for obscuring citizens' access to information about the censorship of a student newspaper at a public University. FIRE respectfully asks the Court to affirm the trial court's final judgment, in part, and to reverse only the trial court's denial of attorney's fees.

Dated: February 12, 2024

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Certificate of Compliance With 9.4(e), (i)

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because according to the Microsoft Word 2024 word-count function, it contains 4,673 words, not including those sections excluded under Rule 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2024 software in Century Schoolbook 14-point font in text and Century Schoolbook 12 point font in footnotes.

Date: February 12, 2024

/s/ *JT Morris*

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FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

Under the Texas Rules of Appellate Procedure, I certify I served a copy of this brief on the following counsel of record via e-File service on February 12, 2024:

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APPENDIX

Tab A

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

[PROPOSED] FINAL ORDER

This matter is before the Court on Petitioner's Motion for Traditional Summary Judgment (Dkt. No.7), Respondent's Cross-Motion for Summary Judgment (Dkt. No. 16), Petitioner's request for costs and attorney's fees (Dkt. Nos. 18, 30), and Respondent's Motion to Reconsider the Court's June 9 Order granting Petitioner's Petition for a Writ of Mandamus. (Dkt. No 31.)

1. Upon consideration of the Motions, supporting evidence, and the parties' arguments, the Court has determined that Petitioner is entitled to judgment as a matter of law on its Original Petition seeking a Writ of Mandamus to compel Respondent to disclose public information under the Texas Public Information Act. Therefore, it is hereby ORDERED that Petitioner's Motion for Summary Judgment is GRANTED and Respondent's Cross-Motion for Summary Judgment is DENIED.

2. The Court does not find good cause to grant Respondent's Motion for Reconsideration as to its June 9, 2023, order granting the Writ of Mandamus. Thus, the

Court ORDERS that the Motion for Reconsideration is DENIED IN PART as to the Court's grant of summary judgment to Petitioner.

3. As a result, the Court **GRANTS** the Petition for a Writ of Mandamus and **DIRECTS** Respondent to disclose all records responsive to Petitioner's October 5, 2021 and December 3, 2021 records requests no later than 21 days after the date this order is filed. To the extent responsive records contain students' or parents' personally identifiable information, Respondent must redact such information and produce the records. Should Respondent timely perfect appeal of the Court's decision, Respondent will not be required to produce the aforementioned documents until 21 days after the appeals court issues an opinion and judgment affirming the grant of mandamus in full or in part.

4. Finally, the Court has fully considered Petitioner's request for costs and attorney's fees (Dkt. Nos. 18, 30), Respondent's opposition, and Respondent's motion for the Court to reconsider its grant of attorney's fees and litigation costs to Petitioner under Tex. Gov. Code § 552.323 in the Court's June 9, 2022 order.

5. The Court GRANTS IN PART Respondent's motion for reconsideration as to attorney's fees, and denies Petitioner's request for attorney's fees under Tex. Gov. Code § 552.323.

6. The COURT DENIES the motion to reconsider as to litigation costs, and ORDERS Respondent to pay Petitioner **$360.12** in court costs.

This Order is final and disposes of all issues in this matter.

It is so ORDERED on this ___ day of _____, 2023. 09/28/2023 9:53:31 AM

HON. JASON C. CASHON
266th Judicial District Judge

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Tab B

GOVERNMENT CODE

TITLE 5. OPEN GOVERNMENT; ETHICS

SUBTITLE A. OPEN GOVERNMENT

CHAPTER 552. PUBLIC INFORMATION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 552.001. POLICY; CONSTRUCTION. (a) Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

(b) This chapter shall be liberally construed in favor of granting a request for information.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Sec. 552.114. EXCEPTION: CONFIDENTIALITY OF STUDENT RECORDS. (a) In this section, "student record" means:

(1) information that constitutes education records as that term is defined by the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g(a)(4)); or

(2) information in a record of an applicant for admission to an educational institution, including a transfer applicant.

(b) Information is confidential and excepted from the Information is confidential and excepted from the requirements of Section 552.021 if it is information in a student record at an educational institution funded wholly or partly by state revenue. This subsection does not prohibit the disclosure or provision of information included in an education record if the disclosure or provision is authorized by 20 U.S.C. Section 1232g or other federal law.

(c) A record covered by Subsection (b) shall be made available on the request of:

(1) educational institution personnel;

(2) the student involved or the student's parent, legal guardian, or spouse; or

(3) a person conducting a child abuse investigation required by Subchapter D, Chapter 261, Family Code.

(d) Except as provided by Subsection (e), an educational institution may redact information covered under Subsection (b) from information disclosed under Section 552.021 without requesting a decision from the attorney general.

(e) If an applicant for admission to an educational institution described by Subsection (b) or a parent or legal guardian of a minor applicant to an educational institution described by Subsection (b) requests information in the record of the applicant, the educational institution shall disclose any information that:

(1) is related to the applicant's application for admission; and

(2) was provided to the educational institution by the applicant.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1997, 75th Leg., ch. 165, Sec. 7.38, eff. Sept. 1, 1997.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 828 (H.B. 4046), Sec. 1, eff. September 1, 2015.

SUBCHAPTER G. ATTORNEY GENERAL DECISIONS

Sec. 552.301. REQUEST FOR ATTORNEY GENERAL DECISION. (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for 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.

(a-1) For the purposes of this subchapter, if a governmental body receives a written request by United States mail and cannot adequately establish the actual date on which the governmental body received the request, the written request is considered to have been received by the governmental body on the third business day after the date of the postmark on a properly addressed request.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

(c) Repealed by Acts 2019, 86th Leg., R.S., Ch. 1340 (S.B. 944), Sec. 7, eff. September 1, 2019.

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:

(1) submit to the attorney general:

(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;

(B) a copy of the written request for information;

(C) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and

(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested; and

(2) label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy.

(e-1) A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

(f) A governmental body must release the requested information and is prohibited from asking for a decision from the attorney general about whether information requested under this chapter is within an exception under Subchapter C if:

(1) the governmental body has previously requested and received a determination from the attorney general concerning the precise information at issue in a pending request; and

(2) the attorney general or a court determined that the information is public information under this chapter that is not excepted by Subchapter C.

(g) A governmental body may ask for another decision from the attorney general concerning the precise information that was at issue in a prior decision made by the attorney general under this subchapter if:

(1) a suit challenging the prior decision was timely filed against the attorney general in accordance with this chapter concerning the precise information at issue;

(2) the attorney general determines that the requestor has voluntarily withdrawn the request for the information in writing or has abandoned the request; and

(3) the parties agree to dismiss the lawsuit.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, Sec. 18, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1231, Sec. 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 1319, Sec. 20, eff. Sept. 1, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 329 (S.B. 727), Sec. 10, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 474 (H.B. 2248), Sec. 1, eff. September 1, 2007.

Acts 2009, 81st Leg., R.S., Ch. 1377 (S.B. 1182), Sec. 8, eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1229 (S.B. 602), Sec. 39, eff. September 1, 2011.

Acts 2019, 86th Leg., R.S., Ch. 1340 (S.B. 944), Sec. 7, eff. September 1, 2019.

Sec. 552.302. FAILURE TO MAKE TIMELY REQUEST FOR ATTORNEY GENERAL DECISION; PRESUMPTION THAT INFORMATION IS PUBLIC. If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Sections 552.301(d) and (e-1), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1999, 76th Leg., ch. 1319, Sec. 21, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 329 (S.B. 727), Sec. 11, eff. September 1, 2005.

SUBCHAPTER H. CIVIL ENFORCEMENT

Sec. 552.321. SUIT FOR WRIT OF MANDAMUS. (a) A requestor or the attorney general 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 request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.

(b) A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located. A suit filed by the attorney general under this section must be filed in a district court of Travis County, except that a suit against a municipality with a population of 100,000 or less must be filed in a district court for the county in which the main offices of the municipality are located.

(c) A requestor may file suit for a writ of mandamus compelling a governmental body or an entity to comply with the requirements of Subchapter J.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1995, 74th Leg., ch. 1035, Sec. 24, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 1319, Sec. 27, eff. Sept. 1, 1999.
Amended by:

Acts 2019, 86th Leg., R.S., Ch. 1216 (S.B. 943), Sec. 8, eff. January 1, 2020.

Sec. 552.323. ASSESSMENT OF COSTS OF LITIGATION AND REASONABLE ATTORNEY FEES. (a) In an action brought under Section 552.321 or 552.3215, the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails, except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in reasonable reliance on:

(1) a judgment or an order of a court applicable to the governmental body;

(2) the published opinion of an appellate court; or

(3) a written decision of the attorney general, including a decision issued under Subchapter G or an opinion issued under Section 402.042.

(b) In an action brought under Section 552.324, the court may not assess costs of litigation or reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails unless the court finds the action or the defense of the action was groundless in fact or law. In exercising its discretion under this subsection, the court shall consider whether the conduct of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1999, 76th Leg., ch. 1319, Sec. 29, eff. Sept. 1, 1999. Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1377 (S.B. 1182), Sec. 9, eff. September 1, 2009.

Acts 2019, 86th Leg., R.S., Ch. 616 (S.B. 988), Sec. 1, eff. September 1, 2019.

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