Case No. 11-23-00232-CV

COURT OF APPEALS
ELEVENTH DISTRICT OF TEXAS
EASTLAND, TEXAS

TARLETON STATE UNIVERSITY,

Appellant and Cross-Appellee,

vs.

FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION,

Appellee and Cross-Appellant.

Oral Argument Requested

BRIEF OF APPELLEE

KELLEY BREGENZER*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106
kelley.bregenzer@thefire.org

**Admitted Pro Hac Vice*

JT MORRIS**
GABRIEL WALTERS***
Tx Bar No. 2409444
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org
gabe.walters@thefire.org

***Counsel of Record*
****Pro Hac Vice Forthcoming*

Attorneys for Cross-Appellant-Appellee Foundation for Individual Rights and Expression

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STATEMENT ON ORAL ARGUMENT

Cross-Appellant-Appellee Foundation for Individual Rights and Expression (FIRE) believes oral argument would aid the Court in deciding the issue presented.

ISSUE PRESENTED

The Public Information Act requires public universities and other governmental bodies to produce requested public information unless the information is subject to one or more enumerated exceptions. The trial court held that Tarleton State University's bare and conclusory affidavit lacked factual support to justify withholding public information. Did the trial court correctly hold that Tarleton failed to meet its burden of proving it could withhold public records In full, rather than redact students' personally identifiable information and produce the remaining information?

STATEMENT OF FACTS

After Tarleton censors a student newspaper, FIRE requests public records.

The *Texan News Service*, a formerly editorially independent student newspaper at Tarleton State University (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 Tarleton 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 Tarleton's investigation of the scandal, Landis threatened to sue the paper for defamation unless it removed its articles on the subject. (*Id.* ¶ 15.) Rather than defend the student newspaper's truthful reporting against Landis's baseless threat, Tarleton administrators instructed the *Texan News Service* to remove the articles or risk losing funding. (CR 8 ¶¶ 16–20.) Tarleton then stripped the newspaper of its editorial 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 submitted two Public Information Act requests to Tarleton. The first request sought documents related to Landis, his time at Tarleton, the investigation into his behavior, his eventual departure, and 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 records 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.)

Tarleton withholds requested public records, citing the Public Information Act's student-records exception.

In response to FIRE's requests, Tarleton produced some records while withholding others in full. (CR 66, 82 ¶ 4, 127–31.) Tarleton never disclosed how many records it continues to withhold or how many pages those records contain.

At least two of the undisclosed records are responsive, non-exempt documents that FIRE obtained from other sources. 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 students' personally identifiable information. (CR 91–93, 320–24.) Tarleton did not produce even a redacted copy of 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 its 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. (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 its obligation to produce responsive information under the Public Information Act. (CR 66, 83 ¶ 7, 96–114.) The Deputy General Counsel responded that FIRE had waived the Act's requirement that Tarleton 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, 115–20.)

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 under the Public Information Act's exceptions without

Tarleton first obtaining an opinion from the Office of the Attorney General. (CR 67, 83–84 ¶ 9, 121–23.) Yet Tarleton never obtained an Attorney General opinion. Instead, Tarleton claimed that any information still withheld was subject to the student-records exception under Texas Government Code § 552.114. (CR 67, 84 ¶ 10, 124–26.) That provision defines "student record" by reference to federal law, as "information directly related to a student" that is "maintained by an educational agency or institution or by a person acting for such agency or institution." Tex. Gov't Code § 552.114; Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(4)(A).

Rather than redact students' personally identifiable information from the records and produce the remainder, Tarleton withheld records 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, Tarleton revealed it was likely withholding additional documents beyond the VP's Memo and the Provost's Letter. (CR 150 ("[E]ven though Petitioner has obtained *some* of the withheld documents from other non-university sources . . . ." (emphasis added)).)

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 the Public Information Act, Texas Government Code § 552.321(a), to compel Tarleton to disclose the requested information, with any students' personally identifiable information redacted. (CR 14 ¶ 52.) FIRE also sought its costs of litigation and reasonable attorney's fees under the Act. (*Id.* ¶ 53.) From the outset, FIRE specified that it neither sought nor expected Tarleton to disclose information that identifies students. Indeed, FIRE's Petition invited Tarleton 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.) Tarleton 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't Code § 552.323).)

FIRE moved for summary judgment on August 12, 2022, asking the court to issue a Writ of Mandamus compelling disclosure of the withheld information and awarding 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 identifiable information. (CR 68–75.)

Tarleton moved for summary judgment in October 2022, claiming the Act authorized it to withhold, in their entirety, documents that contain students' personally identifiable information without seeking an Attorney General opinion. (CR 150–53.) In support, Tarleton submitted an affidavit from its Public Information Officer, Kent Styron. (CR 155–61.) Styron concluded that producing even redacted records "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; CR 158 ¶ 10.) Styron did not provide any facts in support of his "understanding." (*Id.*)

In its opposition to Tarleton's motion for summary judgment, FIRE relied in part on *University of Texas at Austin v. Gatehouse Media Texas Holdings, II, Inc.*, 656 S.W.3d 791 (Tex. App.—El Paso 2022, pet. pending), a decision the El Paso Court of Appeals issued in November

2022. (*See, e.g.*, CR 331.) In *Gatehouse Media*, the court held UT-Austin violated the Public Information Act when it withheld responsive documents under the student-records exception without first seeking an Attorney General decision. 656 S.W.3d at 802–03.[1]

The trial court grants summary judgment for FIRE.

On February 16, 2023, the trial court held a hearing on the parties' cross-motions for summary judgment 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 Tarleton to pay costs and reasonable attorney's fees under § 552.323. (CR 356–57.)

On reconsideration, the trial court affirms its decision requiring Tarleton to produce public information.

Tarleton moved for reconsideration. (CR 360–69.) In its opposition brief, FIRE explained that 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 394–98.)

[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 the parties to submit briefing on the merits. Petitioner's reply brief on the merits was filed February 20, 2024.

On September 7, 2023, the trial court held a hearing on FIRE's application for attorney's fees and Tarleton's motion for reconsideration. (CR 399; RR3 1–21.) First, the trial 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 4:21–5:4.) The trial court added that Tarleton could not rely on the conclusory statements in Styron's affidavit to circumvent the Act's requirements. (RR3 18:4–19.) The trial court, however, reversed its decision on fees, denying FIRE's request without explanation—the basis for FIRE's cross-appeal. (RR3 18:20–24.) The court issued a final order on September 28, 2023, granting mandamus and once again directing Tarleton to produce all responsive records after redacting any personally identifiable information. (CR 409–11.) The trial court, however, automatically stayed the production of records upon Tarleton perfecting this appeal. (*Id.*) The order also confirmed the trial court reversed course and denied FIRE's request for fees. (CR 410.)

Tarleton appealed, and FIRE cross-appealed from the denial of its fees.

SUMMARY OF ARGUMENT

This case boils down to a simple question: Must a public university produce records under the Public Information Act after redacting the personally identifiable information of students or may the university withhold entire documents because it asserts, without evidence, that the requestor could use even redacted documents to identify the students?

The Public Information Act provides the answer: The state must redact excepted information and produce the remainder. The Act contains no exception to this broad rule for records the state has deemed "student records," simply because they contain student names somewhere within. In fact, the Act specifically requires redaction of students' personally identifiable information—not complete withholding. Not only does the Act's plain text compel this rule, but the rule also comports with the legislature's express mandate that the Act must be liberally construed in favor of disclosure of public information. That mandate also requires courts to construe the Act's exceptions, including the student-records exception, narrowly and strictly against the governmental body bearing the burden of proving any claimed exception

applies to the public records requested. Any other outcome would depart from the Act's text and express policy.

In this case, FIRE requested from Tarleton records relating (1) to the investigation of a then-professor for inappropriate conduct toward female students, and (2) the subsequent administrative takeover of a student newspaper for reporting truthfully on that scandal. In response, Tarleton withheld an undisclosed number of documents of an undisclosed number of pages.

Tarleton argues that even if it redacts the personally identifiable information of students from those pages and produces the remainder, it has reason to believe FIRE will be able to discern the students' identities because those identities are already known to FIRE. But Tarleton never produced evidence to support that argument, which strains common sense. Instead, it relied solely on a conclusory statement in a self-serving affidavit. As the trial court ruled, "Trust me" cannot meet Tarleton's burden of proving that it could not redact the students' personally identifiable information from the requested documents.

Additionally, Tarleton argues that Texas courts may not review its decision to withhold whatever information it deems, in its sole discretion,

"student records." The Public Information Act, which creates a mandamus action to compel disclosure, says nothing of the sort. Taken to its logical end, Tarleton's theory would allow it to add a student name to every document it creates and withhold all information under the "student records" exception, immune from judicial review. The Court should reject Tarleton's view of the law that produces absurd results, encourages gamesmanship, and would flout the legislature's express commands to further its policy of responsive government.

Because the trial court did not err in its interpretation of the student-records exception, this Court should affirm.[2]

ARGUMENT

The Public Information Act requires governmental bodies like Tarleton to produce records to a requestor like FIRE. And Tarleton failed to meet its burden to justify avoiding the Act's heavy presumption "in favor of granting a request for information." Tex. Gov't Code § 552.001(b). The Act permits the withholding of information protected by its student-

[2] The trial court erred by denying FIRE's application for attorney's fees after FIRE prevailed on the merits, without finding that Tarleton reasonably relied upon case law or Attorney General opinions. As FIRE explains in its cross-appeal, the Court should reverse the trial court's denial of FIRE's reasonable fees. (*See generally* Br. of Cross-Appellant FIRE.)

records exception, borrowing a definition of student records from the federal Family Educational Rights and Privacy Act of 1974 (FERPA). Tex. Gov't Code § 552.114; 20 U.S.C. § 1232g(4)(A). But the Public Information Act also requires disclosure of information within student records when that information is not actually protected by FERPA. In other words, the Act requires Tarleton to redact students' personally identifiable information and produce the redacted records along with any others not requiring redaction.

Thus, Tarleton must redact information like names, addresses, telephone numbers, email addresses, social security numbers, or other student identifiers, and produce the redacted records to FIRE. The trial court correctly reached this conclusion under a reading of the plain language of the Act.

The trial court correctly held that there is no factual support for Tarleton's argument that it cannot redact the records because FIRE could discern the identities of the students even from redacted records. Tarleton bases that argument on nothing but a conclusory statement in an affidavit from its public information officer, Kent Styron. But Styron lacks any personal knowledge of FIRE's ability to identify students from

redacted records. Tarleton argues that supporting Styron's conclusory statement with factual matter would implicate the attorney-client privilege and attorney work product.

In other words, Styron's conclusion is nothing more than counsel's assertion, not evidence—and therefore it does not raise a fact issue to defeat FIRE's motion for summary judgment. The trial court rightly rejected the affidavit, and so should this Court.

Before it may have withheld records redacted of students' personally identifiable information, Tarleton must have sought an opinion from the Office of the Attorney General. Because Tarleton did not seek an opinion, the withheld records are presumed to be open to the public, apart from any personally identifiable information contained within, unless Tarleton can prove a compelling reason to continue withholding. It has not proven a legitimate reason, let alone a compelling one.

Tarleton failed to provide redacted records to the Attorney General for an opinion, and so also failed to provide to FIRE notice and the opportunity for comment, as the Act requires. Therefore, Tarleton bears the burden of proving a compelling reason to continue withholding the

records, after redacting students' personally identifiable information. Because Tarleton did not meet its burden of proving that the student-records exception permits withholding the records in their entirety, it also cannot meet its burden of proving a compelling reason to continue withholding properly redacted records. Therefore, the Public Information Act compels disclosure, and the Court should affirm the grant of mandamus.

I. Affirming Mandamus Aligns with the Texas Public Information Act's Strong Presumption in Favor of Granting FIRE's Request for Information.

This Court should affirm the trial court's grant of summary judgment to FIRE and denial of summary judgment to Tarleton. Exceptions, like the one Tarleton invokes, are not indiscriminate shields against public transparency. Rather, they are narrow, and the government carries a heavy burden to justify their application. The Texas Legislature enshrined in the Public Information Act a policy that records created or controlled by governmental bodies must be open to public inspection and directed Texas courts to interpret the Act broadly to give effect to that policy. As a necessary corollary to that general rule of

openness, Courts must interpret any exceptions to the Act narrowly and strictly against the state.

A. Courts must follow the legislature's mandate to interpret the act broadly.

The Public Information Act codifies 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." Tex. Gov't Code § 552.001(a). Therefore "it is the policy of [Texas] 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." *Id.* Accordingly, "public servants" do not have "the right to decide what is good for the people to know and what is not good for them to know." *Id.* And so the Act must be "liberally construed to implement this policy," *id.*, and "in favor of granting a request for information," *id.* § 552.001(b); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

Meeting that policy of broad transparency, the Act defines "public information" as:

> information that is written, produced, collected, assembled, or maintained under a law or ordinance or 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.

Tex. Gov't Code § 552.002(a). "Public information is available to the public," *id.* § 552.021, unless certain enumerated exceptions apply. *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001).

In sum, the Act presumes that government-created or controlled information is public unless an exception applies. As discussed below, Tarleton did not meet its burden of proving that the student-records exception applies to records relating to an investigation into a former professor's investigation and the subsequent administrative takeover of a student newspaper.

B. Courts must narrowly construe exceptions from disclosure, including the student-records exception.

As a "necessary corollary" to the rule that Texas courts must interpret the Public Information Act liberally in favor of disclosure, they must also interpret its exceptions narrowly. *Paxton v. Tex. Health and Human Servs. Comm'n*, 550 S.W.3d 207, 210 (Tex. App.—Austin 2017, pet. denied) (citing *Tex. St. Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 347 (Tex. App.—Austin 2013, no pet.) ("Exceptions to the

disclosure requirement of the PIA are narrowly construed.")); *see also Arlington Indep. Sch. Dist. v. Tex. Att'y Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.) (same).

This means that the governmental body must redact excepted information contained within otherwise public records—including personally identifiable information like the names of parents and minors in child support records—and disclose the remaining portions. *Jackson v. State Off. of Admin. Hearing*s, 351 S.W.3d 290, 299 (Tex. 2011) ("We decline to read the language of the statute broader than it is written and we conclude that the purpose and intent of the TPIA can be fulfilled by disclosing the requested documents with redactions.") (citing *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 326 (Tex. App.—Austin 2002, no pet.) ("To find otherwise would also be inconsistent with the Legislature's directive to liberally construe the Act in favor of disclosure.")).

Taken together, this means the Public Information Act only excepts from disclosure the specific information that FERPA protects, meaning personally identifiable information of students or parents. *Gatehouse Media*, 656 S.W.3d at 797, 802–03.

II. Affirming Mandamus Also Is Proper Because the Student-Records Exception Does Not Apply to the Records in Full.

Texas case law and Attorney General opinions support a narrow view of the student-records exception, and thus support the trial court's holding. So does federal and state case law interpreting the interaction of other states' public records laws with FERPA. No case or Attorney General opinion supports Tarleton's argument that it may withhold records in full rather than redact students' personally identifiable information.

A. Texas case law requires redaction of students' personally identifiable information and production of the remaining records.

As the trial court correctly concluded, Texas case law interpreting the student-records exception does not permit Tarleton to withhold records, in their entirety, that contain students' personally identifiable information. Of the few Texas courts to consider the student-records exception, the Eighth Court of Appeals analyzed it most deeply and rejected the same arguments that the Attorney General makes in this case. *See generally Gatehouse Media*, 656 S.W.3d 791. As in *Gatehouse Media*, here FIRE "narrowly [seeks] information not protected by FERPA"—FIRE does not ask Tarleton to produce students' personally

identifiable information, nor does FIRE want it—and therefore the Court's "concern here remains focused on the plain language of the [Public Information Act]." *Id.* at 803.

The student-records exception "does not prohibit the disclosure or provision of information included in an education record if the disclosure or provision is authorized by [FERPA] or other federal law." Tex. Gov't Code § 552.114(b). The *Gatehouse Media* court read this sentence plainly, to mean that when a document contains both information that is protected by FERPA and information that is not, the state must redact students' personally identifiable information and produce the rest. *Id.* at 804.

Tarleton relies on *B.W.B. v. Eanes Independent School District*, but that case cannot support its decision to withhold entire records. (Br. of Appellant 12, 27, 32.) There, in an unpublished opinion, the Third Court of Appeals simply held that FERPA does not create a private right of action to enforce its protections—it says nothing about the student-records exception to the Public Information Act. *B.W.B. v. Eanes Indep. Sch. Dist.*, No. 03-16-00710-CV, 2018 WL 454783, at *8 (Tex. App.—Austin 2018, no pet.) ("FERPA creates no private right of action.").

Tarleton plucks a quote from the opinion's fuller context for the proposition that "neither this Court, nor the trial court, nor OAG is the proper entity to interpret FERPA and its application to [the school district's] records—it is [the school district] that must make FERPA determinations." *Id.*

If anything, *B.W.B.* supports FIRE's position. The trial court in *B.W.B.* ordered the school district to disclose certain documents that failed to satisfy the requirements of the Public Information Act's litigation exception "with *redactions* for any FERPA information not regarding B.W.B. or his child." *B.W.B. v. Eanes Indep. Sch. Dist.*, No. D-1-GN-15-001653, 2016 WL 8653315, at *1 (Tex. Dist.—Travis County 2016) (emphasis added). And if the Third Court of Appeals truly believed it had no power to review the school district's FERPA determinations, then it would not have ordered the *unredacted* records to be filed with the court for *in camera* review, as it did. *B.W.B. v. Eanes Indep. Sch. Dist.*, No. 03-16-00710-CV, 2017 WL 4348215, at *1 (Tex. App.—Austin 2017).

And unlike here, in *B.W.B.* the school district submitted redacted documents for an Attorney General opinion; the Office of the Attorney General reviewed the unredacted portions of the documents; the school

district voluntarily produced a privilege log; and the Austin Court of Appeals reviewed the documents *in camera*. 2018 WL 454783, at *2–3, 7. None of those safeguards against impermissible withholding of public information are present in this case.

In *Gatehouse Media*, the El Paso Court of Appeals rejected the Attorney General's reliance on *B.W.B. Gatehouse Media*, 656 S.W.3d at 807. The court rejected the state's assertion that *B.W.B.* prohibits the Attorney General and the courts from reviewing the university's FERPA determinations. *Id.* The court wrote, "the issue in this case was not about FERPA, but whether the requested information was excepted from mandatory disclosure under [the Act]. . . . Because [the requestor] made its request pursuant to [the Act], no interpretation of FERPA was otherwise implicated." *Id.* "As a result, none of the cases cited by the University addressed the issues in this case, and the University could not have reasonably relied on them as justification for withholding information under [the Act.]" *Id.* In this case, Tarleton relies on those same cases, including *B.W.B.*, and this Court should reject that reliance, just as the El Paso Court of Appeals did.

This Court should likewise reject Tarleton's reliance on *IDEA Public Schools v. Socorro Independent School District*, No. 13-18-00422-CV, 2020 WL 103853 (Tex. App.—Corpus Christi 2020, pet. denied). That case is easily distinguishable and was wrongly decided. There, the information requested included student names, grades, addresses, telephone numbers, and other information about student attendees or applicants. *Id.* at *1. In short, the requestor sought *only* information that is plainly protected by FERPA, unlike FIRE here. The *IDEA Public Schools* majority misplaced its reliance upon *B.W.B.*, repeating its decontextualized line that courts may not review a school's FERPA determinations. *Id.* at *2. The majority missed that the trial court in *B.W.B.* required redaction of other student's personally identifiable information. The majority's shallow treatment of *B.W.B.* mirrored its shallow treatment of the plain language of the Public Information Act.

Justice Benavides, in dissent in *IDEA Public Schools*, correctly interpreted the plain language of the Act, as the trial court did in this case. She recognized that the majority opinion "fails to give effect to the limitations found in [FERPA] and fails to enforce the Texas Public Information Act (TPIA) as written," and therefore "erroneously allows

IDEA Public Schools to withhold public records." *IDEA Pub. Schs.*, 2020 WL 103853, at *3 (Benavides, J., dissenting); *see also id.* at *5 ("The TPIA is enforceable by Texas courts.").

Here, the trial court considered Tarleton's reliance on *B.W.B.* and *IDEA Public Schools* and rejected it. Instead, it recognized what the El Paso Court of Appeals recognized in *Gatehouse Media*—that the plain language of the Public Information Act compels redaction of students' personally identifiable information and production of the rest of the records.

B. The state misreads Attorney General opinions to attempt to justify its withholding of public information.

Tarleton misreads Attorney General opinions, which actually support FIRE's position. Tarleton reads Attorney General opinions for the proposition that the Attorney General may not review *any* information within documents the school has deemed "student records." (Br. of Appellant 12, 27–29.) But the Attorney General has repeatedly ruled that a governmental body may withhold "only information which identifies students or parents" and must produce the remaining information. Tex. Att'y Gen. Op. ORD-332 (1982) at 3; *see also* Tex. Att'y

Gen. Op. 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."). Therefore, Tarleton should redact information only "to the extent 'reasonable and necessary to avoid personally identifying a particular student.'" Tex. Att'y Gen. Op. ORD-332 at 3 (quoting Tex. Att'y Gen. Op. ORD-206 (1978) at 2).

C. Courts of other jurisdictions interpret student-records exceptions as the trial court correctly did here.

Tarleton tries to make hay of *United States v. Miami University*. (Br. of Appellant 25.) There, the U.S. Court of Appeals for the Sixth Circuit interpreted Ohio's student-records exception and held that *unredacted* student disciplinary records were not subject to disclosure under Ohio's public records law. *United States v. Miami Univ.*, 294 F.3d 797, 804, 815 (6th Cir. 2002). But the court determined that FERPA did not preclude the requestor from access to the information entirely. The requestor "may still request student disciplinary records that do not contain personally identifiable information. Nothing in the FERPA would prevent the Universities from releasing properly redacted records." *Id.* at

824. Likewise, nothing in FERPA prevents Tarleton from releasing properly redacted records to FIRE.

Accordingly, the Court of Appeals of Indiana relied on the Sixth Circuit's *Miami University* decision to determine that Indiana University must produce documents related to the investigation of a basketball coach after redacting students' personally identifiable information. *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).

Similarly, the Supreme Court of Pennsylvania ordered school district officials to produce video footage of a teacher physically disciplining a student on a school bus after redacting students' images—personally identifiable information. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 731 (Pa. 2020). And the Supreme Court of Ohio compelled the University of Miami to produce student disciplinary records after redacting the students' personally identifiable information. *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959–60 (Ohio 1997). Tarleton's reliance on *Miami Student* misses that critical holding. (Br. of Appellant 25.)

Just as in these cases, there is no reason why Tarleton cannot redact students' personally identifiable information from records relating to its investigation of Landis and its takeover of the *Texan News Service*.

III. Tarleton Cannot Prove a Compelling Reason for Withholding Documents Because It Did Not Even Meet Its Burden of Proving the Student-Records Exception Applies to the Documents in Full.

The Public Information Act required Tarleton to seek an Attorney General opinion prior to withholding information that does not specifically identify students. Tarleton failed to meet this requirement. Accordingly, the records it continues to withhold are presumed open to public inspection unless Tarleton can meet its heavy burden of proving that a compelling reason protects the information from disclosure. Even assuming student privacy provides that compelling reason, this Court should uphold the trial court's finding that Tarleton's self-serving and conclusory affidavit does not constitute evidence at all, let alone evidence sufficient to meet its heavy burden.

A. Tarleton failed its obligation to seek an Attorney General opinion.

Before Tarleton withheld the requested information under the student-records exception, it "must [have] ask[ed] 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." Tex. Gov't Code § 552.301(a). The Attorney General made no previous determination about whether the records relating to Landis and the takeover of the *Texan News Service* fall within the student-records exception, and so Tarleton could not have avoided this mandate to seek an Attorney General opinion.

Tarleton failed this requirement on all fronts. Tarleton did not request an opinion within 10 business days of receiving FIRE's request, let alone give required notice to FIRE of any request. *See id.* § 552.301(b), (d). Because Tarleton failed to seek an opinion, the Attorney General had no opportunity to examine the relevant public records and issue an opinion about the student-records exception's application. *See id.* § 552.301(e)(1). And, of course, Tarleton deprived FIRE and the public of the opportunity to submit any comments to the Attorney General about why Tarleton's records are open to the public. *See id.* § 552.304.

In sum, because Tarleton did not request an Attorney General opinion and did not provide FIRE with the required notice and written

comments, the information FIRE requested "is presumed to be subject to required public disclosure and must be released." *See id.* § 552.302.

B. Tarleton proved no compelling reason to withhold the requested documents.

True enough, where a governmental body has failed to request an Attorney General opinion, it may yet withhold the requested information if "there is a compelling reason." *Id.* But Tarleton bears the burden of proving the compelling reason. And it fell far short, as the trial court rightly held. Thus, FIRE was "entitled to summary judgment and the information must be disclosed." *See Gatehouse Media*, 656 S.W.3d at 800 (citing *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017)).

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." *City of Dallas*, 509 S.W.3d at 259 (holding that the attorney-client privilege provides a compelling reason to withhold information). And just as in *Gatehouse Media*, here too, "[a]side from relying on the proffered exceptions, [the

university] offered no reason—compelling or otherwise—for withholding" the requested information. 656 S.W.3d at 803.

Tarleton attempts to justify its failure by pointing to § 552.114(d) of the Public Information Act, which allows educational institutions to *redact* information subject to FERPA protections from otherwise public information without seeking an Attorney General opinion, and prior Attorney General opinions that reiterate § 552.114(d). (Br. of Appellant 30.)

The El Paso Court of Appeals recently rejected this same argument, holding that § 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*, 656 S.W.3d at 802. The court held that the plain meaning of the term "redact" within the Act 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.*[3]

The state even acknowledges its duty to redact in a recent brief submitted to the Supreme Court of Texas in *Gatehouse Media*. It writes, "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." Pet'r's Br. 21, *Univ. of Tex. at Austin v. Gatehouse Media Tex. Holdings, II, Inc.*, No. 23-0023 (Tex. Oct. 23, 2023) (pet. pending). That is exactly what Tarleton should have done here. Instead, it withheld an undisclosed number of documents—including the readily redactable VP's Memo and the Provost's Letter that contains no students' personally identifiable information—in full without seeking an Attorney General opinion, relying on nothing but a conclusory affidavit.

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[3] FERPA regulations 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.

Even if student privacy presents a compelling reason to continue to withhold information after a failure to seek an Attorney General opinion—and that is an open question—then Tarleton could meet that goal simply by redacting the students' personally identifiable information and disclosing the remainder. Again, FIRE has no interest in the students' identities and Tarleton's affidavit that FIRE could discern them is not supported with record evidence.

And even if Tarleton were not required to seek an Attorney General opinion, *Jackson v. State Office of Administrative Hearings* requires redaction and disclosure. In *Jackson*, the state sought to withhold "decisions and orders in license suspension cases related to delinquent child support" in their entirety. 351 S.W.3d 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 state could not withhold the records in their entirety. *Id.* at 295–96. Instead, the Court instructed the Office to redact confidential information—like parents' and minors' names—from the orders and decisions and then disclose them to the requestor. *Id.* "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 altogether." *Id.* at 296 (citing Tex. Gov't Code § 552.001.

Tarleton claims that it cannot redact students' personally identifiable information from the requested records because it "reasonably believes that the release of the records would necessarily identify the student or students whose records are being withheld because the requestor (FIRE) knows the identity of the student or students to whom the education records relate." (Br. of Appellant 25 (citing 34 C.F.R. § 99.3(g) (definition of personally identifiable information)).) In support of this claim, Tarleton cites the affidavit of its public information officer, Kent Styron. (Br. of Appellant 25 (citing CR 157–58).)

Styron asserts: "[T]he release of the records 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;

CR 158 ¶ 10 (same).) That is all. Styron fails to provide any facts to show why he believes this or how he came to understand it.

The trial court correctly held that this bare conclusion is not evidence, does not create a fact issue on summary judgment, and cannot meet Tarleton's burden of proving that all the withheld information personally identifies students. (RR3 18:8–19.) For the same reason, Styron's affidavit cannot meet Tarleton's burden of proving a compelling reason to continue to withhold the requested information after Tarleton failed to seek an Attorney General opinion.

The trial court held that Styron's statement "makes a conclusion. It doesn't state facts. It offers a conclusion. . . . That's not justification. That's why [Tarleton] lost this summary judgment and I'm standing by that. When [Tarleton] point[s] to that as the reason that [it] didn't follow the procedures, I think that . . . does not raise a fact issue. That's a conclusion unsupported by facts." (RR3 18:8–19.)

Tarleton argues that "[p]roviding any additional information as to *how* the University determined the requestor knows the identity of the student or students to who the records relate would reveal attorney-client privileged communications and attorney work product . . . ." (Br. of

Appellant 32 (citing CR 157–58).) In other words, Styron is but a mouthpiece for a bare assertion of counsel. He has no personal knowledge supporting his "understanding" that FIRE could identify students from redacted documents. This is yet another reason his statement is not evidence. Counsel's say-so cannot buttress Styron's say-so. And in all cases, counsel's arguments do not overcome the Act's heavy presumption of disclosure.

CONCLUSION AND PRAYER

Tarleton's position, that it may withhold documents in their entirety under the student-records exception rather than redact students' personally identifiable information and produce the remainder, defies the letter and the spirit of the Public Information Act. Its argument that it cannot produce redacted documents because FIRE could discern the identity of the students involved is baseless. For these reasons, the Court should affirm the trial court's grant of summary judgment to FIRE and denial of summary judgment to Tarleton.

Dated: March 25, 2024

/s/ JT Morris

JT MORRIS*
Tx Bar No. 2409444
GABRIEL WALTERS**
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org
gabe.walters@thefire.org

KELLEY BREGENZER***
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106
kelley.bregenzer@thefire.org

**Counsel of Record*
***Pro Hac Vice Forthcoming*
****Admitted Pro Hac Vice*

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 6,727 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: March 25, 2024

/s/ JT Morris

JT MORRIS
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

The undersigned certifies that on March 25, 2024, an electronic copy of the Brief of Appellee Foundation for Individual Rights and Expression was filed with the Clerk of the Court of Appeals for the Eleventh District of Texas using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: March 25, 2024 *\/s\/ JT Morris*

JT MORRIS
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org