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

REPLY BRIEF OF CROSS-APPELLANT

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SUMMARY OF ARGUMENT

In this Public Information Act case, the trial court correctly ruled Tarleton State University improperly withheld records relating to its (1) investigation of a professor for inappropriate conduct toward his female students and (2) subsequent administrative takeover of a student newspaper for reporting truthfully on that scandal. Specifically, the trial court ruled Tarleton improperly invoked the Act's student-records exception, Texas Government Code § 552.114, and failed to prove, let alone put forth admissible evidence, that Tarleton could not redact the records without somehow disclosing students' identities. Accordingly, the trial court ordered Tarleton to produce redacted records and pay reasonable attorney's fees. On Tarleton's motion for reconsideration, the trial court again ordered Tarleton to produce redacted records but reversed its decision on attorney's fees without explanation.

As the prevailing party, the Foundation for Individual Rights and Expression (FIRE) is entitled to its litigation costs and reasonable attorney's fees under the Act, unless the trial court finds that, in withholding the records, Tarleton reasonably relied on (1) published appellate opinions or (2) decisions of the Attorney General. Tarleton

unreasonably relied on these sources because the plain language of the Act, case law, and Attorney General decisions all require Tarleton to disclose the records—or seek an Attorney General decision to justify its withholding—after redacting any personally identifiable information of students. Consequently, the trial court awarded FIRE's fees but abused its discretion in denying FIRE's attorney's fees without finding that Tarleton reasonably relied on published appellate opinions or Attorney General decisions.

This Court should reverse the trial court's denial of fees and remand for further proceedings to determine the amount of FIRE's fee award.

STANDARD OF REVIEW

"A trial court's ruling on a motion for attorney's fees under § 552.323(a) of the PIA is reviewed for an abuse of discretion." *Univ. of Tex. at Austin v. Gatehouse Media Tex. Holdings, Inc.*, 656 S.W.3d 791, 806 (Tex. App.—El Paso 2022, pet. pending) (citing *Adkisson v. Paxton*, 459 S.W.3d 761, 779 (Tex. App.—Austin 2015, no pet.)). "[B]ecause trial courts have 'no discretion in determining what the law is' or applying the law to the facts, they abuse their discretion when they incorrectly analyze

or apply the law." *Id.* (quoting *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (per curiam)).

ARGUMENT

As FIRE argues in its prior briefing, the Public Information Act requires government bodies like Tarleton to redact the personally identifiable information of students from otherwise public records and to disclose the remaining information within those records. In this case, after correctly applying the plain language of the Act, authoritative case law, and Attorney General decisions, the trial court ordered Tarleton to produce the records at issue after redacting any personally identifiable information of students, like names, addresses, social security numbers, student identification numbers, or other identifiers.

The Act mandates that FIRE, as the prevailing party, receive its reasonable attorney's fees, unless the trial court concludes Tarleton reasonably relied on published appellate opinions or Attorney General decisions in withholding the requested information. However, the trial court denied FIRE's fee petition without finding that Tarleton reasonably relied on these authorities, and therefore abused its discretion. In fact, Tarleton could not have reasonably relied on these authorities because,

like the Act, published appellate opinions and Attorney General decisions require redaction of personally identifiable information of students and production of the remaining information.

I. Tarleton Did Not Reasonably Rely on Published Appellate Opinions or Attorney General Decisions.

We begin with the plain language of the Act. In a mandamus action to enforce the Act's grant of access to public records, the trial court "shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails." Tex. Gov't Code § 552.323(a). The use of "shall" leaves little room for discretion—the trial court must grant fees to the substantially prevailing plaintiff. But there is one exception:

> [T]he 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 a governmental body; (2) the published opinion of an appellate court; or (3) a written decision of the attorney general[.]

Id. § 552.323(a)(1)–(3).

Tarleton does not dispute that FIRE substantially prevailed below. Rather, Tarleton argues that it reasonably relied on case law and Attorney General decisions, under subsections (a)(2) and (a)(3). (Resp. Br. of Cross-Appellee 14–18.)

Crucially, Tarleton makes the same arguments and relies on the same unpublished appellate opinions and Attorney General decisions that the El Paso Court of Appeals rejected in *Gatehouse Media*. *Compare Gatehouse Media*, 656 S.W.3d at 807–08 (analyzing State's reliance upon *B.W.B. v. Eanes Indep. Sch. Dist.*, No. 03-16-00710-CV, 2018 WL 454783 (Tex. App.—Austin 2018, no pet.) and Attorney General opinions), *with* Resp. Br. of Cross-Appellee 14–18 (citing same sources).

Gatehouse Media is the only published appellate opinion interpreting the Act's student-records exception, and it supports FIRE, not Tarleton. There, the El Paso Court of Appeals held that the university (like Tarleton here) violated the Act by failing to seek an Attorney General decision allowing it to withhold information that does not fall within the student-records exception. *Gatehouse Media*, 656 S.W.3d at 808. The court rejected the State's reliance on *B.W.B.*—the case Tarleton primarily relies on here. *Gatehouse Media*, 656 S.W.3d at 807. *B.W.B.* does not prevent the Attorney General and the courts from reviewing the university's determinations to withhold records, in their entirety, under the Act's student-records exception and the Federal Educational Rights and Privacy Act (FERPA). *Gatehouse Media*, 656 S.W.3d at 807.

The issue in *Gatehouse Media* "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," and therefore "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 in *Gatehouse Media*.

Tarleton mistakenly believes *B.W.B.* stands for the proposition that no court can review its withholding decision under the Act's student-records exception. (*See* Resp. Br. of Cross-Appellee 16–17.) *B.W.B.* cannot support Tarleton's argument that it reasonably relied on case law. First, the opinion is not published and therefore the Act's exception to a mandatory fee award simply does not apply. Tex. Gov't Code § 552.323(a)(2) (requiring that the opinion of an appellate court be *published*). Second, *B.W.B.* simply held that FERPA does not create a private right of action to enforce its protections. *B.W.B.*, 2018 WL 454783,

at *8 ("FERPA creates no private right of action."). *B.W.B.* does not hold that Texas courts lack jurisdiction to review whether a university may withhold entire records under the Public Information Act's student-records exception.

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). (*See* Resp. Br. of Cross-Appellee 17.) First, *IDEA Public Schools* is unpublished and therefore, like *B.W.B.*, Tarleton cannot use it to invoke the Act's exception to a mandatory fee award. Tex. Gov't Code § 552.323(a)(2). Second, *IDEA Public Schools* is easily distinguishable because the requested information in that case included student names, grades, addresses, telephone numbers, and other information about student attendees or applicants. *IDEA Pub. Schs.*, 2020 WL 103853, at *1. In short, unlike FIRE, the requestor sought *only* information that is plainly protected by FERPA. Third, the *IDEA Public Schools* majority—over a dissent by Justice Benavides—mistakenly relied on *B.W.B.*, *id.* at *2–3, which did not purport to deprive Texas courts of their jurisdiction

to hear student-records cases under the Public Information Act, as explained above.

Additionally, Tarleton cannot reasonably rely on *United States v. Miami University*. (*See* Resp. Br. of Cross-Appellee 17–18.) There, the U.S. Court of Appeals for the Sixth Circuit interpreted the student-records exception to Ohio's public records law and held that *unredacted* student disciplinary records were not subject to disclosure. *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 records 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.

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

Tarleton similarly cannot rely on Attorney General decisions, which actually support FIRE's position on redactions. Tarleton apparently reads the Attorney General decisions it cites for the proposition that an educational institution's withholding of entire records as "student records" is unreviewable, whether by the Attorney General or by the courts. (Resp. Br. of Cross-Appellee 14–15.) That is an extreme position, unsupported by these decisions and contrary to the Act's text.

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) 3; *see also* Tex. Att'y Gen. Op. ORD-634 (1995) 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 3 (quoting Tex. Att'y Gen. Op. ORD-206 (1978) 2).

For this reason, *Gatehouse Media* rejected the State's reliance on some of the same Attorney General decisions it relies on here. 656 S.W.3d

at 807–08. The court held that "the plain language of [the student-records exception] shows that it can only apply to redactions," and accordingly, "none of the OAG decisions 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 PIA" outside of redactions properly drawn to obscure only the personally identifiable information that is actually covered by FERPA. *Id.* at 808. So too, here.

Tarleton's attempt to distinguish *Gatehouse Media* fails. (*See* Resp. Br. of Cross-Appellee 20 ("In that case, the requestor sought information *permitted to be disclosed* under FERPA." (citing *Gatehouse Media*, 656 S.W.3d at 794–95)).) There, the requestor sought "final results" of student disciplinary hearings where the student was alleged to have committed a violent crime and was found to have violated university rules or policies. *Gatehouse Media*, 656 S.W.2d at 794. As in this case, in *Gatehouse Media* the university denied the request for records, claiming that FERPA protects the requested records in their entirety. *Id.* at 795. The university, as here, failed to seek a decision from the Attorney General as required by the Public Information Act. *Id.*; *see also* Tex. Gov't Code §§ 552.301–552.310 (requiring Attorney General decisions prior to

withholding under the Act); Tex. Gov't Code § 552.114(d) ("an educational institution may *redact* [FERPA-protected information] from information *disclosed* [to the public] without requesting a decision from the attorney general." (emphasis added)).

Although the particular type of "student record" differed, *Gatehouse Media* is otherwise on all fours with this case. As that case correctly held, nothing in the Act or in FERPA permits an educational institution to withhold records in their entirety simply because they may contain some amount of personally identifiable information. Tarleton must redact information that is actually covered by FERPA, including names and other student identifiers, and produce the remaining information within the records.

II. The Trial Court Abused Its Discretion by Denying FIRE's Attorney's Fees Without Finding That Tarleton's Reliance Was Reasonable.

As discussed above, the Act requires the trial court to award attorney's fees to the plaintiff who substantially prevails, unless the court makes a finding that the governmental body reasonably relied on published appellate opinions or Attorney General decisions in withholding information. Tex. Gov't Code § 552.323(a). But the trial court

made no finding that Tarleton reasonably relied on published appellate opinions or Attorney General decisions, and therefore the court could not invoke the exception at § 552.323(a). In ruling for FIRE, the trial court held that Tarleton failed to meet its burden of proving that FIRE could discern the identities of students even from redacted records. (RR3 18:4–19.) The trial court did not explain its decision to deny FIRE its attorney's fees. (RR3 18:20–24; CR 410.)

The fee-award provision, written in the conjunctive, leaves no discretion to the trial court to award litigation costs without an award of attorney's fees. Tex. Gov't Code § 552.323(a) (the court "*shall* assess costs of litigation *and* reasonable attorney fees" (emphasis added)). But here, the trial court awarded FIRE its costs but not its fees. (RR3 18:20–19:1; CR 409–11.) This was an abuse of discretion because it is contrary to the Act's plain language and mandatory command. Under the Act, costs and fees are awarded or denied together, not independently. Tex. Gov't Code § 552.323(a).

Even if we assume the trial court impliedly found that Tarleton reasonably relied upon case law or Attorney General opinions in denying FIRE its fees, the court abused its discretion because Tarleton could not

have reasonably relied on the sources it cites. *See supra* Section I. Tarleton's argument in support of its reliance misreads and misapplies unpublished case law and Attorney General decisions interpreting the student-records exception.

CONCLUSION AND PRAYER

This Court should reverse the trial court's denial of fees to FIRE and remand to the trial court for further proceedings to determine the amount of FIRE's attorney's fees because Tarleton did not reasonably rely on published appellate opinions or Attorney General decisions in withholding entire records from FIRE. And the trial court abused its discretion by denying FIRE's fees without making a finding that Tarleton reasonably relied on those sources.

Dated: April 16, 2024

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Date: April 16, 2024

/s/ JT Morris

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 16, 2024, an electronic copy of the Reply Brief of Cross-Appellant 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: April 16, 2024 *\/s\/ JT Morris*

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