



November 9, 2020

Justin Gordon  
Chief, Open Records Division  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

*Sent via the Public Information Act Electronic Filing System*

**Re: Public Information Request to Collin College**  
Request: October 13, 2020  
Requestor: Adam Steinbaugh /  
Foundation for Individual Rights in Education (FIRE)

Dear Mr. Gordon:

This letter is a public comment submitted pursuant to Texas Government Code section 552.304 in response to the October 27, 2020, letter request of Collin College (the “College”) concerning FIRE’s October 13, 2020, request for records.

We write to address the Gov’t Code § 552.103 exception asserted by the College. First, the College has not met its burden of demonstrating that litigation was reasonably anticipated at the time of the request, relying on correspondence and events subsequent to the request. Second, the College’s anticipation is not reasonable, as evidenced by contemporaneous records, because it relies on a third party’s retention of an attorney—not the undersigned—and FIRE’s advocacy concerning freedom of expression unaccompanied by any threat of litigation.

## **I. Factual Background**

Lora D. Burnett is a faculty member at the College. During the October 7, 2020, debate between Vice President Michael Pence and Senator Kamala Harris, Burnett used her personal Twitter account to criticize Pence. On October 8 and 9, Burnett’s tweets were the subject of

articles by two conservative media outlets.<sup>1</sup> On October 12, the College posted a public statement condemning Burnett’s comments and its president sent an email remarking that “calls and contacts from legislators” were among the public comments that had “poured in over the weekend,” most calling for Burnett’s termination.<sup>2</sup>

FIRE is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America’s college campuses. I am the director of FIRE’s Individual Rights Defense Program, which provides support for the expressive rights of students and faculty members, typically through letters, press releases, and media commentary. As explained on our website, FIRE does not form an attorney-client relationship with the students and faculty we assist “in the absence of a retainer agreement, which we only pursue in a very narrow range of cases.”<sup>3</sup>

FIRE often utilizes public records requests to research how and why institutions like Collin College fail to defend the freedom of speech of their students and faculty, such as a faculty member terminated by a college that falsely claimed to have been “inundated” with complaints after she appeared on Fox News,<sup>4</sup> a college that falsely claimed to be working with the Massachusetts State Police after a faculty member’s “threatening” Facebook post about Iran went viral,<sup>5</sup> an administrator censoring an art installation memorializing Japanese-American internment camps to avoid offending a wealthy donor,<sup>6</sup> or a college using selective redactions of public records to hide its deferential treatment of elected officials.<sup>7</sup>

FIRE issued the instant request on October 13, 2020, at 2:26 P.M. EDT. *See* Request attached as **Exhibit G**. On October 15, FIRE offered public commentary criticizing the College and sent the College a letter detailing our concerns. That letter enclosed a privacy waiver endorsed by

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<sup>1</sup> Haley Worth, ‘Racist,’ ‘demon,’ ‘scumbag,’ ‘white boy’: Profs take aim at Pence during VP debate, *CAMPUS REFORM*, Oct. 8 2020, <https://www.campusreform.org/?ID=15900>; Paul Best, *College professors let loose profane criticism of Pence during VP debate*, *FOX NEWS*, Oct. 9, 2020, <https://www.foxnews.com/us/college-professors-expetive-criticism-vp-debate>.

<sup>2</sup> E-mail from Neil Matkin, Dist. Pres., Collin Coll., to All College Distribution (Oct. 12, 2020, 11:45 AM) (on file with author).

<sup>3</sup> FIRE, *FAQ About Case Submissions*, <https://www.thefire.org/resources/submit-a-case/frequently-asked-questions-about-case-submissions/#q19>.

<sup>4</sup> Adam Steinbaugh, *After FIRE lawsuit, Essex County College finally turns over documents about firing of Black Lives Matter advocate*, FIRE, Jan. 23, 2018, <https://www.thefire.org/after-fire-lawsuit-essex-county-college-finally-turns-over-documents-about-firing-of-black-lives-matter-advocate>.

<sup>5</sup> Adam Steinbaugh, *Babson falsely claimed it was ‘cooperating’ with Massachusetts State Police over professor’s ‘threatening’ Facebook post*, FIRE, Feb. 17, 2020, <https://www.thefire.org/babson-falsely-claimed-it-was-cooperating-with-massachusetts-state-police-over-professors-threatening-facebook-post>.

<sup>6</sup> Adam Steinbaugh, *Why did a Bellevue College administrator censor an art installation memorializing Japanese-American internment camps? Public records suggest a motive.*, FIRE, <https://www.thefire.org/why-did-a-bellevue-college-administrator-censor-an-art-installation-memorializing-japanese-american-internment-camps-public-records-suggest-a-motive>.

<sup>7</sup> Adam Steinbaugh, *At Medgar Evers College, selective redactions cover up administrators’ interactions with City Council member over a student critic*, FIRE, Sept. 23, 2020, <https://www.thefire.org/at-medgar-evers-college-selective-redactions-cover-up-administrators-interactions-with-city-council-member-over-a-student-critic>.

Burnett on October 15, noting that “execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.” See Authorization and Waiver for Release of Personal Information attached as **Exhibit H**. The letter, which did not identify the undersigned as an attorney<sup>8</sup> nor assert that FIRE represents Burnett, explained that *FIRE* was asking the College to uphold Burnett’s expressive rights. See Exhibit F, provided by the College, at pp. 1, 9.

## II. Analysis

### A. *Freedom of expression in higher education is of particular public importance, bolstering the Act’s liberal construction favoring transparency.*

The state of freedom of expression of students and faculty—at the College or elsewhere—has long been a matter of critical public importance. In one of many cases addressing the importance of freedom of expression in higher education, the Supreme Court rejected the notion that “First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”<sup>9</sup> The issue has recently attracted the attention of Texas legislators, including Senator Ted Cruz and the Texas Senate State Affairs Committee.<sup>10</sup>

### B. *The College has failed to clearly establish that litigation was reasonably anticipated at the time of the request.*

For information to be excepted from public disclosure by section 552.103(a), (1) litigation involving the governmental body must be pending or reasonably anticipated and (2) the information must relate to that litigation.<sup>11</sup>

That burden requires the College to establish, through “concrete evidence,” that it “reasonably anticipated” litigation because “concrete evidence” indicated “that litigation will ensue.”<sup>12</sup> Mere “conjecture that litigation may ensue is insufficient,” and the “mere chance of litigation does not demonstrate” the first prong.<sup>13</sup> Importantly, this evaluation is measured at the time of the request, and the attorney general can only consider the circumstances that

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<sup>8</sup> I am an attorney barred in Pennsylvania and California. I am not and do not hold myself out as being licensed to practice in Texas.

<sup>9</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting, in part, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>10</sup> Jakob Rodriguez, *Texas Senate State Affairs Committee holds free speech hearing in LBJ*, UNIVERSITY STAR, Feb. 1, 2018, <https://star.txstate.edu/2018/02/texas-senate-state-affairs-committee-holds-free-speech-hearing-in-lbj>.

<sup>11</sup> *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding).

<sup>12</sup> Open Records Decision No. JM-266 at 4 (1984) (“[L]itigation cannot be reasonably anticipated until concrete evidence suggests that litigation will ensue.”).

<sup>13</sup> *Id.*

existed when the request for information was received, not information about occurrences after the request was made.<sup>14</sup>

The College has not met its burden.

*First*, the great weight of the College’s proffered evidence consists of material and events that transpired *after* the October 13 request. In particular, the College cites a letter on FIRE’s behalf, sent October 15—two days after the request. Even if it could be considered, that letter could not engender anything more than conjecture that litigation might ensue: the letter did not identify the undersigned as an attorney, did not threaten or raise the possibility of litigation, and enclosed a waiver *disclaiming* an attorney-client relationship between Burnett and FIRE. Similarly, any social media comments posted after October 13 have no bearing on whether the College reasonably anticipated on that date that litigation would ensue.

*Second*, stripped of the subsequent events, the College’s basis for anticipating that litigation would ensue rests upon (1) the professor’s desire to bring an attorney to a meeting; and (2) unidentified social media posts referencing her retention of a lawyer.<sup>15</sup> However, there is no reasonable anticipation of litigation where a person aggrieved by a government agency’s decisions retains an attorney.<sup>16</sup> Even assuming that the professor had been referring to the undersigned, an attorney’s request for records in connection with a dispute is not sufficient to invoke the exception.<sup>17</sup> Moreover, “the mere fact that an individual hires an attorney and alleges damages”—a step the professor has not taken—is not sufficient “to establish that litigation is reasonably anticipated,” nor do public threats to bring suit unaccompanied by “objective steps toward filing suit[.]”<sup>18</sup>

Here, the College does not identify any objective steps toward litigation, much less any *threat* of litigation. Instead, the College mischaracterizes a public interest group’s *subsequent* letter as a “demand” letter and invokes the professor’s assertion that she had represented an attorney—who did not contact the College and made no outward steps toward litigation. Further, the College’s actions at the time manifest a belief that litigation was unlikely: When Prof. Barnett indicated her desire to bring an attorney to a meeting, the College explained—on October 13, the same date as the request—that there was “no need to have your lawyer present.” *See* October 13 email, attached as **Exhibit I**.

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<sup>14</sup> Open Records Decision No. 677 at 2–3 (2002).

<sup>15</sup> FIRE asked the College’s attorney to provide copies of the exhibits relied upon in the instant request. This information was required to be provided pursuant to Gov’t Code § 552.301(d)(2), which obligates the governmental body to provide “the governmental body’s written communication to the attorney general asking for a decision,” redacting information disclosing the substance of the requested records. Because the College failed to timely provide this information, FIRE is unable to fully evaluate the merits of the College’s position. For this reason, the requested information is “presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302.

<sup>16</sup> Open Records Decision No. 361 at 2 (1983).

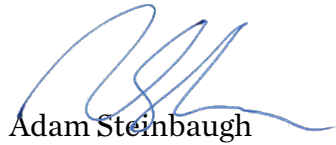
<sup>17</sup> *Id.*

<sup>18</sup> Open Records Decision No. 638 at 3 (1996).

### III. Conclusion

Collin College has disappointingly chosen to shield elected public representatives from public scrutiny. Under the College's theory, transparency ends whenever a public interest organization raises concerns about a public actor's basic obligations under the Constitution, on the speculation that litigation might follow. The Office of the Attorney General should reject the College's invitation to permit this obfuscation.

Sincerely,

A handwritten signature in blue ink, appearing to read 'AS', with a long horizontal flourish extending to the right.

Adam Steinbaugh

Cc: Pete Thompson, via email

# **EXHIBIT G**



Adam Steinbaugh &lt;adam@thefire.org&gt;

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## FIRE Public Records Request

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Adam Steinbaugh <adam@thefire.org>  
To: publicinfo@collin.edu

Tue, Oct 13, 2020 at 2:26 PM

To whom it may concern:

This is a request for the following records pursuant to the Texas Public Information Act (Gov't Code § 552.001, *et seq.*)

**Records Requested:**

From October 7, 2020, to the present date:

1. Any email, voicemail, text message, social media message, or other communication, or any document reflecting such communication, constituting the "calls and contacts from legislators" referred to in Neil Matkin's October 12, 2020 email to the "All College Distribution" email list.

**Fee waiver request:** This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties on college campuses. We request a waiver of any fees or costs associated with this request.

This request concerns a matter of public interest. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

Pursuant to Gov't Code § 552.275 (l), FIRE may not be required to pay costs for public records requests. Further, FIRE qualifies under Gov't Code § 552.275(j)(3)-(4), as FIRE's website is a news medium engaged in the dissemination of news and information to the general public.

Request for expedited processing: The records pertain to a matter of public importance and current debate. Providing expedited production of the records will facilitate the public understanding of these matters before they are fully resolved. Any undue delay in production will undermine the purpose of the public records laws, which serve to allow public input and oversight of government affairs.

**Request for Privilege Log:** If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which it is the document is withheld.

**Please note that this request does not seek a search of faculty or student email accounts or records.** These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention which are controlled by students, alumni, or faculty members, nor by governmental or advisory bodies controlled by the same. Any search should be limited to documents held by the administration and/or its staff members, including records created or maintained by persons acting in the capacity of administrators or staff members.

If I can be of assistance in interpreting or narrowing this request, please don't hesitate to ask.

Best,

**Adam B. Steinbaugh**

Director, Individual Rights Defense Program\*  
Foundation for Individual Rights in Education  
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Philadelphia, PA 19106  
(215) 717-3473  
[adam@thefire.org](mailto:adam@thefire.org)

*This communication may contain information that is confidential or privileged. Unless you are the addressee (or authorized to receive this message by the addressee), you may not use, copy, or disclose the contents of this message or information contained in this message to anyone. If you believe that you have received this message in error, please advise the sender and delete this message.*

\* Admitted in California and Pennsylvania



# **EXHIBIT H**

## Authorization and Waiver for Release of Personal Information


I, Lora D. Burnett, do hereby authorize Collin College (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

  
Signature

10/15/2020

Date

# **EXHIBIT I**



Adam Steinbaugh [REDACTED]

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**Fw: Quick Zoom today**

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**From:** "Daphne H. Babcock" <[REDACTED]@collin.edu>  
**Date:** Tuesday, October 13, 2020 at 12:24 PM  
**To:** Lora Burnett <[REDACTED]@collin.edu>  
**Subject:** RE: Quick Zoom today

Lora

Thank you for your quick reply. I have attached the form that I would like to discuss with you. This is an effort to help you understand the expectations surrounding the use of college email. The form outlines what I had planned to discuss.

My preference is to still meet today via Zoom if possible. If not, I am available at 2pm on Monday, October 19<sup>th</sup> for a phone call or Zoom. Since this is not a disciplinary meeting, there is no need to have your lawyer present.

If you choose not to meet with me, I ask that you please review and sign the attached, acknowledging your receipt of it. Please return a signed copy to me.

[Quoted text hidden]

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**Lora Burnett 10 13 2020 pdf**  
727K