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October 27, 2020

Office of the Attorney General
Open Records Division
209 W. 14th Street
Austin, Texas 78701

RE: Collin County Community College: Public Information Act Request, October 13, 2020
(Collin College Reference # CC0010)

Dear Attorney General:

We respectfully request a decision under the Public Information Act ("the Act"), Chapter 552 of the Texas Government Code, concerning information requested by Adam Steinbaugh (the "Requestor") received by Collin County Community College District ("Collin College" or "the College") on October 13, 2020 (the "Request" – attached as **Exhibit A**).

This letter is timely made within ten (10) business days after Collin College received the Request in accordance with Section 552.301 of the Act.

THE REQUEST

Requestor seeks the following information:

"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."

Collin College requests that information responsive to the current Request be withheld subject to Texas Government Code Section 552.103, Section 552.107, and Texas Rule of Evidence 503. As part of this letter, we are submitting to your office responsive information that we are seeking to protect (attached as **Exhibits B-C**). Collin College reserves the right to submit any additional documents within the time period prescribed by Section 552.301(e).

Support for the attached information is discussed below under the following headings: (1) Information Related to Anticipated Litigation under Section 552.103; and (2) Responsive Information Protected by the Attorney-Client Privilege under Section 552.107.

EXCEPTIONS FROM DISCLOSURE

Collin College requests that information and documents responsive to the Request be withheld from disclosure based upon the following exceptions provided for in the Texas Government Code:

1. Information Related to Anticipated Litigation under Section 552.103

Responsive information includes information that relates to litigation that was reasonably anticipated at the time of the Request. Subsection (c) of Section 552.103 provides that "[i]nformation relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies . . . for public information . . . ."

Section 552.103(a) was specifically intended to prevent parties from improperly circumventing the rules of discovery by using the Public Information Act. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); Attorney General Opinion JM-1048 380 at 4 (1989). The exception allows a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery procedures." *See* Open Records Decision No. 551 at 3 (1990).

The test for this exception requires a showing that, as of the date that the request for information was received by the governmental body: (1) litigation involving the governmental body is pending or reasonably anticipated, and (2) the information relates to the litigation. *See* Open Records Decision No. 677 at 2–3 (2002).

Therefore, in determining whether a governmental body has met its burden under Section 552.103, the Attorney General or a court can only consider the circumstances that existed on the date the governmental body received the request for information. *See* Section 552.103(c). To meet its burden under Section 552.103(a) in requesting an Attorney General decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues. *See* Open Records Decision No. 551 at 5 (1990).

Because Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, Texas courts have accepted that this includes a very broad category of information. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, orig. proceeding). Similarly, the Attorney General has found that the protection of Section 552.103 may overlap with that of other exceptions that encompass discovery privileges. *See* Open Records Decision No. 677 at 2 (2002). However, the standard for proving that Section 552.103 applies to information is the same regardless of whether the information is also subject

to a discovery privilege – there must be a showing that the requested information relates to pending or reasonably anticipated litigation. *See id.*

The Attorney General previously considered a case where a City asserted Section 552.103 in response for information from a Requestor who was previously employed with the City. TEX. ATT'Y GEN. OP. OR2019-16457 (2019). The Requestor's attorney submitted a demand letter to the City threatening to file a charge of discrimination with the Texas Workforce Commission and with the United States Equal Employment Opportunity Commission ("EEOC") on behalf of the Requestor if his demands were not met. *See id.* at *2. The Attorney General found that "based on [the City's] representations, our review of the submitted documents, and the totality of circumstances, we find you have demonstrated the city reasonably anticipated litigation when it received the request for information." *See id.* Therefore, the City could withhold the submitted information under Section 552.103(a) of the Government Code. *See id.* The Attorney General has similarly found that a governmental body could withhold information under Section 552.103(a) where an attorney submitted a demand letter to the governmental body. *See* TEX. ATT'Y GEN. OP. OR2020-04492 (2020) (finding that school district reasonably anticipated litigation after receiving demand letters threatening to file suit for discrimination); TEX. ATT'Y GEN. OP. OR2017-28142 (2017) (finding that housing authority reasonably anticipated litigation after Requestor's attorney submitted demand letter).The Attorney General's office recently also held that Collin College was not obligated to provide information excepted from disclosure under Section 552.103 of the Act.. *See* TEX. ATT'Y GEN. OP. OR2020-22137 (2020).

The Request is related to a matter involving a current employee of Collin College and the attorney that she has indicated represents her in the matter. Based on statements made by the current employee, Requestor is the attorney for employee. As a matter of background, the employee at issue posted comments to social media in early October. The comments resulted in media coverage and complaints sent to the College shortly thereafter. Approximately three days later, the employee indicated on social media that she was already represented by attorneys. *See* Social Media Posts attached as **Exhibit D**. When the College sought a meeting with the employee regarding her use of the college email systems to respond to some commentators on her social media posts, the employee instructed the College that she wished to have an attorney present on the call. *See* Email from Employee attached as **Exhibit E**. Requestor, representing the interests of the employee, then submitted a demand letter to Collin College. *See* Letter from Attorney, attached as **Exhibit F**. In that letter, Requestor asked Collin College to "reassure [employee] that no formal consequences will result from her protected expression." *See id.* at *1. In addition, Requestor made three specific formal demands with respect to the employee on the final page of the letter. *See id.* at *9.

One document responsive to the Request includes a message from a local elected official who inquired whether the College was aware of the employee's comments. *See* Responsive Information, attached as **Exhibit B**.

Under the two-prong test of Section 552.103, the information requested is clearly subject to the litigation exception. Under the first prong, litigation is reasonably anticipated in this matter. As a primary concern, Requestor is an attorney who issued a demand letter to Collin College which included three specific issues relating to this incident. Based on Requestor's demand letter submitted to the College, the employee's indication that she was represented by attorneys on social media, and the employee's request that her attorney be present at a meeting requested by the College, litigation is reasonably anticipated by the College in this matter.

Under the second prong, the responsive document that directly discusses the employee's comments on social media would be relevant to any potential litigation relating to these comments. Requestor should not be able to circumvent traditional rules of discovery to request litigation-related materials under the PIA, which are protected by the litigation exception. Therefore, because these documents relate directly to the anticipated litigation, they should be withheld under Section 552.103.

2. Responsive Information Protected by the Attorney-Client Privilege under Section 552.107

Portions of the responsive information contain confidential information protected under the attorney-client privilege under Section 552.107 of the Texas Public Information Act. The standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Texas Rule of Evidence 503. Rule 503 encompasses the attorney-client privilege and provides in part:

> (1) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (B) between the lawyer and the lawyer's representative;
>
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). Thus, a communication is "confidential" for purposes of the Texas Rules of Evidence if it is "not intended to be disclosed to third persons other than those to whom

disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5).

Responsive information also includes an email that was sent from a College official to the College's general counsel for the purpose of seeking legal advice. *See* Responsive Information, marked as **Exhibit C**. This email was not intended to be disclosed to a third person and includes content on which the College sought the opinion of its own internal attorney. The email involves the presentation of an issue with potential future legal implications, and should therefore be withheld under Section 552.107.

In summary, we submit these arguments in support of our request for an Attorney General's decision. Thank you for your consideration in this matter. Please do not hesitate to contact me at 214-651-2033 with questions or concerns.

Sincerely,

Pete Thompson

CC: Requestor (via email)(without enclosures)

Enclosures

EXHIBIT A

Request

From: Adam Steinbaugh <adam@thefire.org>
Sent: Tuesday, October 13, 2020 1:26 PM
To: Public Info <publicinfo@collin.edu>
Subject: FIRE Public Records Request

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
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

** Admitted in California and Pennsylvania*

EXHIBIT D
Social Media Posts

Tweet

L.D. Burnett
@LDBurnett

I am watching as well. All lawyered up.

> **Cathy Williamson** @toby1977 · Oct 10
> @collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone

Thread

Collin College

15 71 879

L.D. Burnett
@LDBurnett

Replying to @LDBurnett

The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join @AAUP, even if you're not in a collective bargaining state.

12:04 PM · Oct 12, 2020 · Twitter Web App

EXHIBIT E
Email from Employee

From: Lora Burnett
Sent: Tuesday, October 13, 2020 1:17 PM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Hi Daphne,

Honestly, I very much wish I could speak with you today as well—I don't like to think of you going on vacation when you have something still left on your to-do list, and I don't like things hanging over my head either. Additionally, my collegial instincts are such that I think keeping things informal and conversational is always best, and I enjoy talking to you. I know this would be a good conversation. My email to you at the end of September about the modus operandi of Campus Reform and right-wing social media outrage was pretty accurate, but I guess I was off by a week!

However, because this conversation would involve a document I am expected to sign, a document that includes fairly broad statements about general practices, I can't sign it or discuss it with you without first consulting my attorney.

Though this is not a disciplinary matter, the document does indicate that it may lay the groundwork for future disciplinary action. So I will either need my counsel present or I will need to provide them with specific examples of the issues referenced in paragraphs two and three of this document.

The wording of paragraph two is of particular concern, as I am contacted regularly on my Collin College email account by editors, colleagues from other institutions, contributors to the website that I edit as a service to the profession, prospective graduate students, bloggers, and so forth.

Without even having shown this document to my attorney, I can tell you now that I cannot sign off on any document that states that I am not allowed to reply to an email sent to my Collin College account. Perhaps you could provide some examples of problematic replies from me that warrant this warning.

I would have the same concern about paragraph three. Please provide some examples where I have copied personal or private messages to others via their Collin.edu email accounts.

So, regretfully, I will need to keep our appointment on the 19th. I sincerely hope that my counsel will be able to look over this document and whatever examples you provide and happily sign off on what should be a congenial conversation. But I must not take any steps without a sign off from legal counsel, and I still haven't heard back from them about your first message of the day.

I am so sorry to leave this unfinished business for you and I hope to be able to talk to you informally on the 19th.

Thanks so much for your understanding, and I do wish you rest and relaxation on your vacation.

Dr. Lora Burnett
Professor of History
Collin College

EXHIBIT F

Demand Letter

FIRE
Foundation for Individual Rights in Education

October 15, 2020

H. Neil Matkin, Ed.D.
District President
Collin College
3452 Spur 399
Collin Higher Education Center
Room 406
McKinney, Texas 75069

Sent via Electronic Mail (nmatkin@collin.edu)

URGENT

Dear President Matkin:

The Foundation for Individual Rights in Education (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.

FIRE is concerned by Collin College's recent response to the extramural political expression of Prof. Lora D. Burnett. Invoking the "execution of [the college's] personnel policies"—intimating that punishment might follow— and following that statement with a written warning against use of "Collin College systems or resources to engage in private or personal communications" is retaliatory. Because the First Amendment prohibits Collin College from disciplining Burnett for her extramural political speech and the warning misinterprets the college's written policy, we ask that you rescind any warning and reassure Burnett that no formal consequences will result from her protected expression.

I. After Burnett's Tweets About the Vice-Presidential Debate Draw Criticism, Collin College Responds

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE.

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

Lora D. Burnett is a professor of history at Collin College. She maintains a personal Twitter account, which at all times relevant here has consistently noted that her "[t]weets do not rep[resent] my employer."[1]

On October 8, 2020, *Campus Reform*, a conservative media outlet dedicated to "expos[ing] liberal bias and abuse on the nation's college campuses,"[2] published a roundup of tweets from faculty members criticizing Vice President Michael Pence during the previous evening's vice presidential debate.[3] The article was repackaged by *Fox News* the following day.[4]

Burnett was among the professors whose tweets were highlighted in the articles, including a tweet commenting that the moderator "needs to talk over Mike Pence until he shuts his little demon mouth up"[5] and sharing another's tweet referring to Pence as a "scumbag lying sonofabitch."[6]

On Monday, October 12, the college posted a public statement condemning Burnett's tweets as "hateful, vile and ill-considered[.]"[7] The statement acknowledged that the tweets "may be protected" but added that "[f]aculty members . . . have a special obligation to remember that their public statements reflect on their unique roles both in educating students and modeling behavior, as well as on the college," and that "in our free exercise of expression, professionalism should dictate decorum rather than resorting to profanity."

That same day, you sent an email to a college-wide distribution list, noting that Burnett's tweets had been "picked up by national media and has been in broad circulation among some of our college constituents."[8] You shared that complaints—including "calls and contacts from legislators"—had "poured in over the weekend." Most of these contacts "ask[ed] us to terminate" Burnett, but a "handful" were "encouraging us to uphold 'academic freedom' and 'free speech'. . . ." You averred that you did not see "an issue with academic freedom nor is the

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[1] *See, e.g.*, L.D. Burnett (@ldburnett), TWITTER, http://web.archive.org/web/20190422100801/https://twitter.com/ldburnett (archived Apr. 22, 2019).

[2] CAMPUS REFORM, *About*, https://www.campusreform.org/about (last visited Oct. 13, 2020).

[3] 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.

[4] 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-expletive-criticism-vp-debate.

[5] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 9:02 PM), https://twitter.com/LDBurnett/status/1314023216034320391.

[6] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 8:21 PM), https://twitter.com/LDBurnett/status/1314013018716622848.

[7] COLLIN COLL., *Collin College Statement* (Oct. 12, 2020), http://www.collincollegenews.com/2020/10/12/collin-college-statement-october-12-2020.

[8] E-mail from Neil Matkin, Dist. Pres., Collin Coll., to All College Distribution (Oct. 12, 2020, 11:45 AM) (on file with author).

scholarship of [Burnett] in question," but that the "college's execution of its personnel policies will not be played out in a public manner. . . ."

On Tuesday, October 13, Burnett was presented with an "Employee Coaching Form" with "Performance Feedback" styled as "Constructive Feedback" and providing, in full:

> This is to serve as acknowledgement that you are entitled to your views and may freely post these views on your personal social media.
>
> This is also to clearly communicate that you are not to use Collin College systems or resources to engage in private or personal conversations. If you are contacted through your Collin.edu account, you are not to respond from the college email system. You should use your personal email account on any and all personal communications.
>
> In addition, please refrain from copying what appears to be private or personal communications to others via their Collin.edu email accounts. The Collin.edu system is for professional communications and those related to the educational mission of the college.

Burnett has declined to sign the "Employee Coaching Form," which the college's website indicates is used to respond to "behavior or performance that has previously been discussed informally but is still not meeting expectations."[9] Burnett has not previously had a discussion with Collin College concerning use of email.

II. Collin College's Reprimand of Burnett Ignores its Written Policy and Threatens to Chill its Faculty Members' First Amendment Rights

Burnett's tweets are extramural political expression protected by the First Amendment, which limits public universities and colleges in their responses to faculty members' expression. While the college is free to criticize Burnett's tweets, it cannot take—or imply that it will take—adverse action, including through misapplication of the college's technology resources policy.

A. The First Amendment Applies to Collin College as a Public Institution

It has long been settled law that the First Amendment is binding on public colleges like Collin College.[10] Accordingly, the decisions and actions of a public university—including the pursuit

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[9] COLLIN COLL., *Coaching and Discipline Instructions*, http://www.collin.edu/perf_mgmt/coach_discipline_forms.html (last visited Oct. 13, 2020).

[10] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, 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.'") (internal citation omitted).

of disciplinary sanctions,[11] recognition and funding of student organizations,[12] interactions with student journalists,[13] conduct of police officers,[14] and maintenance of policies implicating student and faculty expression[15]—must be consistent with the First Amendment.

B. Burnett's Tweets Are Protected by the First Amendment and Academic Freedom

Employees of government institutions like Collin College do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[16] A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]"[17] No such interest is applicable here.

i. Burnett's tweets, addressing matters of public concern, are in her capacity as a private citizen.

Burnett's tweets are made in capacity as a private citizen, not as an employee. The "critical question" in determining whether the speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[18] Colleges ordinarily do not employ their faculty to post on their personal social media pages.[19] Even if others became aware that Burnett was employed by Collin College—whether through *Campus Reform* or *Fox News*, or through their own research—the mere knowledge of a speaker's employment does not render their speech pursuant to their official duties.[20]

Burnett's tweets also address matters of significant public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"[21] One would be hard pressed to identify

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[11] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[12] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).
[13] *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).
[14] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[15] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[16] *Connick v. Myer*s, 461 U.S. 138, 140 (1983).
[17] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
[18] *Lane v. Franks*, 573 U.S. 228, 240 (2014).
[19] *See, e.g.*, *Higbee v. Eastern Michigan University*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at *14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university's response to racial incidents "would not appear to be within a history professor's official duties").
[20] *See, e.g.*, *Pickering*, 391 U.S. at 576–78 (appendix reproducing teacher's letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).
[21] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (picketers' signs outside of a fallen soldier's funeral, including "Thank God for dead soldiers," related to matters of public concern).

a matter of greater public interest than a vice presidential debate watched by 58 million people.[22]

ii. Burnett's tweets cannot be punished on the basis that others find them subjectively offensive, "hateful," "vile," or "ill-considered."

Although some—including you—may find the remarks offensive, the "inappropriate or controversial character" of the speech "is irrelevant to the question of whether it deals with a matter of public concern."[23] This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[24] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[25] penalize satirical advertisements depicting a pastor losing his virginity to his mother in an outhouse,[26] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[27] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[28]

This principle does not lose its salience in the context of the public college. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a front-page "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[29] These images were no doubt deeply offensive to many at a time of political polarization and

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[22] John Koblin, *Pence-Harris Debate Is No. 2 in Vice-Presidential Ratings, With 58 Million TV Viewers*, N.Y. TIMES, Oct. 8, 2020, https://www.nytimes.com/2020/10/08/business/media/pence-harris-debate-is-no-2-in-vice-presidential-ratings-with-58-million-tv-viewers.html.

[23] *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

[24] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[25] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[26] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[27] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[28] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[29] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

civil unrest, yet "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[30]

iii. Collin College's policies recognize that academic freedom protects extramural expression.

Collin College's policies are in accord with these fundamental principles of expressive rights. The College's "Employee Expression and Use of College Facilities" policy—updated by the college just two months ago—provides that the college's "position on academic freedom" extends broad protection to extramural speech:

> Faculty members are citizens, and, therefore, possess the rights of citizens to speak freely outside the classroom on matters of public concern and to participate in lawful political activities.
>
> Prior restraint or sanctions will not be imposed upon faculty members in the exercise of their rights as citizens or duties as teachers. Nor will faculty members fear reprisals for exercising their civic rights and academic freedom.
>
> Faculty members have a right to expect the Board and the College District's administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals.[31]

This approach is consistent with the widely accepted principles of academic freedom embraced by academic institutions across the country. A recent decision from the Wisconsin Supreme Court is illustrative.[32] After a private university punished a professor for his internet commentary criticizing a graduate student at the university, the court held that the imposition of discipline was improper, as the university's commitment to academic freedom rendered the blog post "a contractually-disqualified basis for discipline."[33] The court explained that "the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments."[34] The blog post, an "expression made in [the professor's] personal, not professorial, capacity," fell into the "extramural" category.[35] Such remarks are protected under a commitment to academic freedom unless the remark "clearly demonstrates the faculty member's unfitness for his or her position" in light of their "entire

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[30] *Id.*
[31] COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (Aug. 12, 2020), https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf.
[32] *McAdams v. Marquette University*, 914 N.W.2d 708, 731 (Wis. 2018).
[33] *Id.* at 737.
[34] *Id.* at 730.
[35] *Id.*

record as a teacher and scholar."[36] This "stringent standard" is "[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member's fitness for the position."[37]

Accordingly, academic freedom protects not only a faculty member's research or teaching but limits the ability of an institution to restrict faculty members' speech outside of the classroom. This provides an important safeguard against external pressures on an institution that would chill research or teaching: if speech outside of a classroom were the proper subject of regulation, then institutions—under the pressure of the public, legislators, or donors—could impose ideological litmus tests on who can conduct research or teaching based on their extramural speech. Indeed, we are not far removed from public university faculty being required to submit to state interrogation regarding their possible involvement with "subversive" organizations or being forced to sign loyalty oaths disavowing socialism or communism as a condition of employment.[38]

Because Collin College recognizes in policy that protecting faculty members' extramural speech against censorship is important to its core functions, the college's interests are insufficient to justify limits on a citizen's expressive rights involving political speech—where the First Amendment's protection is "at its zenith."[39] While the college's administration may fear that allowing its faculty to exercise their civic rights may reflect poorly on the institution's reputation, "[p]ublic perception alone cannot justify a restriction on free speech. . ." and "concern" about "brand or reputation is not sufficient to outweigh" First Amendment rights:

> Voters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either. The idea that the government should be permitted to censor speech in order to avoid public outcry was raised and dismissed in the Civil Rights era. . . . The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public. . . .[40]

C. Collin College's Condemnation and Written Warning Go Beyond Mere Criticism

The First Amendment provides no privilege to be free from criticism, however caustic, including from the leadership of universities and colleges. Indeed, criticism is a form of "more

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[36] *Id.* at 731–32, citing AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).
[37] *Id.* at 732 (cleaned up).
[38] *See, e.g.*, *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 594 (1967).
[39] *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).
[40] *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2, 29–31 (W.D. Tenn. June 14, 2019).

speech," the remedy to offensive expression that the First Amendment prefers to censorship.[41] However, courts across the country have held that "retaliatory speech" violates the First Amendment where it "intimat[es] that some form of punishment or adverse regulatory action"[42] may follow, and the "mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect."[43]

Here, Collin College's public-facing statement recognized that Burnett's tweets "may" be protected by the First Amendment. However, the email sent to those at the college intimated that adverse action might follow, sharing that the "execution of [the college's] personnel policies will not be played out in a public manner[.]" If Burnett's speech were more than *theoretically* protected speech, then there are no "personnel policies" to "execut[e]."

We do not need a crystal ball to determine whether or not it is reasonable to read this statement as intimating that adverse action would follow: Adverse action *did* follow, when Burnett was presented with a written warning concerning her "personal" use of college resources. That warning—utilized by the college in progressive employee discipline[44]—expressly invokes Burnett's posting of her "views" on her "personal social media," establishing a causal link between her speech and the issuance of the "feedback." The form does not identify what conduct, in particular, by Burnett violated any policy concerning personal use of institutional resources.

This lack of specificity is concerning. District policy governing use of college technological resources expressly *permits* "incidental personal use that does not otherwise violate" college policy "or have an adverse effect on [college] resources[.]"[45] It is difficult to imagine that responding to unsolicited emails—sent to that address because critical media outlets, through no effort of the faculty member, identified the professor's employer—is not an "incidental" use. If there is some other "use" that the college believes violates that policy, it should identify that impermissible use in order to give Burnett an opportunity to avoid violating policy.[46]

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[41] *Whitney v. California*, 274 U.S. 357, 377 (1927).

[42] *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the "question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . . .").

[43] *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original). Notably, the United States Court of Appeals for the Fifth Circuit recently held that even a "formal reprimand" may be violate the First Amendment. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

[44] *Coaching and Discipline Instructions*, *supra* note 9.

[45] COLLIN CNTY. CMTY. COLL. DIST., TECHNOLOGY RESOURCES (Nov. 7, 2017), https://www.collin.edu/hr/boardpolicies/Nov2017/CRlocalApproved.pdf.

[46] The college's form also warns Burnett against "copying what appears to be private or personal communications to others via their Collin.edu email accounts." This is ambiguous. Is Burnett being warned against using the carbon copy function to send "private or personal" emails to others at the college? If so, the college should identify those emails. Alternatively, is she being directed not to *reproduce* emails sent to her

Moreover, invoking an inapplicable policy in a response flowing from Burnett's protected expression is designed to have a chilling effect. The college may be in search of some action it can take in order to sate Burnett's critics, but the law forbids it from doing so.

III. Conclusion

Collin College cannot punish a faculty member for commenting as a citizen on national political affairs, even if others—whether colleagues, the public, or their representatives in the halls of the legislature—find her comments offensive. District policy provides—rightly— that faculty members have "a right to expect the Board and the [college's] administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals."

Accordingly, we call on Collin College to:

(1) Confirm to Burnett, by 12:00 p.m. on Monday, October 19, that Collin College will cancel the Monday meeting concerning the written warning;
(2) Affirm, without reservation, that Burnett's comments are protected by the First Amendment; and
(3) Withdraw the written warning concerning "personal" use of college resources.

We respectfully request receipt of a response to this letter no later than the close of business on October 23, 2020.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

college email address? If so, that restriction would violate Burnett's First Amendment right to share information lawfully obtained or received without solicitation. *See, Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

EXHIBIT J
Social Media Posts

Tweet

L.D. Burnett
@LDBurnett

I am watching as well. All lawyered up.

> **Cathy Williamson** @toby1977 · Oct 10
> @collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone

Thread

L.D. Burnett @LDBurnett · Oct 12

LOL. @CollinCollege is publicly throwing me under the bus, while the college president sends out an email saying that personnel decisions will not be played out in public.

Wanna bet?
#highered
#twitterstorians
cc @AAUP

p.s. The all-college email is the first I heard about it.

86 189 761

L.D. Burnett @LDBurnett · Oct 12

Here is the President's email to all faculty in the entire college -- the first notice or acknowledgment I received from my college about any of this.

From: Neil Matkin <nmatkin@collin.edu>
Date: Monday, October 12, 2020 at 11:45 AM
To: All College Distribution <AllCollegeDistribu
Subject: Faculty Member Comments on Social

Friends,
Recently, one of our faculty members chose to pc
accounts. One of the posts referencing Vice Pres
broad circulation among some of our college con
from legislators, and voicemails poured in over th
faculty member although a handful are encourag
writing to tell me that the faculty member in que

We are not aware of an issue with academic freed
The college's execution of its personnel policies w
address what has become an intense public issue
regardless of our political or social viewpoints, m
forbearance. The statement follows:

idered Twitter posts by one of its faculty members. As a
deeply apologize for the offense her comments have
ot consistent with the values of Collin College, particularly
iews were not conveyed in any manner we wish members

r Constitution, but that does not lessen our individual
care and consideration. At the very least, in our free
decorum rather than resorting to profanity.
itected, incendiary comments such as these do not best
ve solution. Hate and profanity are never welcome,
e searching for the best path forward for our Nation. Such
o hold diverse views to come together, as our country so
itback to the hard work and dedication of our campus
is year.
on and of our distinguished institution, have a special
reflect on their unique roles both in educating students and
ides them with the opportunity to educate. Hateful and
should strive to conduct ourselves.
xpress themselves with grace, civility, and respect for
values we share.

77 112 405

L.D. Burnett @LDBurnett · Oct 12

And here is my reply, which also went to all faculty in the entire college.

Re: Faculty Member Comments on Social Media

Lora Burnett Today at 11:54 AM
To: Neil Matkin; Allen ISD Distribution List; Central Park Distribution List; +6 more

Dear Dr. Matkin,

It would have been kind, or at least professional, to have communicated with me first before publicly calling any of my writing "vile and ill-considered."

Though you disavowed the intent to do so in this email—an email with scare-quotes around the ideas of academic freedom and free speech—by posting that statement you are, in effect, executing personnel policies in public.

I don't appreciate that, and it speaks more poorly of Collin College's reputation than anything on my Twitter feed.

Dr. Lora Burnett
Professor of History
Collin College

15 71 883

L.D. Burnett @LDBurnett · Oct 12

The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join @AAUP, even if you're not in a collective bargaining state.

35 58 972

Replies

Bob Ramsey @BRamseyJr · Oct 12
Replying to @LDBurnett and @AAUP

1 6

Jenna Magnuski (she/her/hers) @JennaMagnuski · Oct 12
Replying to @LDBurnett and @AAUP
Found the CR article. Let's talk about the college prez' own failed professionalism and modeling, eh?

2

Duane Larson @larsondh1 · Oct 12
Replying to @LDBurnett and @AAUP
Wow. So sorry this is happening to you. Glad you're lawyering!

3

View more replies

More Tweets

L.D. Burnett @LDBurnett · Nov 9
I am pleased to report that I am now not the only Dr. Burnett in our family, and I'm quite sure that I'm not the smartest Dr. Burnett in our family either. Props to my brilliant kid, who just defended his dissertation in mathematics.

> **L.D. Burnett** @LDBurnett · Nov 9
> I thought MY dissertation defense was intense. Holy shit. Tuned in to my kid's defense via Zoom and the whole damn department is tuned in. Kid can barely get through a slide without fielding multiple questions. I would die.
> Show this thread

91 9 1.1K

Search Twitter

EXHIBIT K

Email Exchange

From: Lora Burnett
Sent: Tuesday, October 13, 2020 11:12 AM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Dear Daphne,

What an interesting topic.

I should be available on the date and time that you've identified, but I will need to have counsel on the call with me. I will share the Zoom link with my attorney.

Thank you.

Dr. Lora Burnett
Professor of History
Collin College

From: "Daphne H. Babcock" <dbabcock@collin.edu>
Date: Tuesday, October 13, 2020 at 10:44 AM
To: Lora Burnett <lburnett@collin.edu>
Subject: RE: Quick Zoom today

Lora:

My request for a zoom is not in regards to your academic freedom or Dr. Matkin's email. It does relate to your using Collin's Technology Resources to engage in private or personal conversations.

My day has gotten busy since I first emailed you since I will be out on vacation beginning tomorrow. I see from your Outlook Calendar that you are available at 2:00 pm on Monday, October 19th. Does that work for you? If it does I will send you a Zoom Link for that time. Please let me know of your availability.

Regards,

Daphne

Daphne Babcock
Associate Dean, Academic Affairs
Collin College Wylie Campus
Student Center 331 E
391 Country Club Road
Wylie, Texas
972-378-8835

EXHIBIT L
Highlighted Request

From: Adam Steinbaugh <adam@thefire.org>
Sent: Tuesday, October 13, 2020 1:26 PM
To: Public Info <publicinfo@collin.edu>
Subject: FIRE Public Records Request

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
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

** Admitted in California and Pennsylvania*

CLARK HILL | Strasburger

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Pete Thompson
T (214) 651-2033
F (214) 659-4042
Email:Pete.Thompson@clarkhillstrasburger.com

November 16, 2020

Office of the Attorney General
Open Records Division
209 W. 14th Street
Austin, Texas 78701

RE: **Response to Letter from Requestor**
Collin County Community College: Public Information Act Request, October 13, 2020
(Collin College Reference # CC0010)

Dear Attorney General:

Collin County Community College District n/k/a Collin College ("Collin College" or the "College") previously requested a decision under the Public Information Act ("the Act"), Chapter 552 of the Texas Government Code, concerning information requested by requested by Mr. Adam Steinbaugh (the "Requestor") received by the College on October 13, 2020. In a letter dated October 27, 2020, Collin College sought to withhold information under Sections 552.103, 552.107 and Texas Rule of Evidence 503.

Mr. Steinbaugh filed a response to the College's letter on November 10, 2020. At this time, the College seeks to address the assertions in Mr. Steinbaugh's letter, specifically those regarding the application of Section 552.103.

Collin College meets the requirements of Section 552.103 of the Act.

In this matter, Collin College has met the two requirements of the litigation exception set out in Section 552.103 of the Act. Specifically, the College: (1) reasonably anticipated litigation at the time of the Request given the public statements of the underlying employee at issue; and (2) the requested materials directly relate to the anticipated litigation in accordance with Texas Government Code Section 552.103.

Substantial evidence existed on the date of the Request to demonstrate the College reasonably anticipated litigation. While Mr. Steinbaugh indicates in his letter that the employee's hiring of an attorney is "a step the professor has not taken" yet, the employee's own statements on social

media, in which she is clearly identified, directly contradict this assertion. According to a publicly available Twitter post from October 10, 2020 (three days before the Request), previously submitted as **Exhibit D** in the College's original letter, she states clearly in reference to criticism of her comments, "*All lawyered up*." Similarly, in another social media post from October 12, 2020 (one day before the Request), the employee references a communication from the College's district president to her stating the following: "*The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers*." She goes on to state that "*This is why you get professional insurance and join @AAUP even if you're not in a collective bargaining state*." *See* Updated Social Media Posts, attached as **Exhibit J**. The employee's reference is to the American Association of University Professors (AAUP), a professional membership group, that in some states or locations serves as a collective bargaining representative, which provides legal support and attorney referrals to professors in higher education.

As previously explained, the employee's initial Tweets and ensuing comments led to substantial public reaction on social media and several complaints sent to the College. The College sought to meet, via Zoom, with the employee to discuss her use of a College email system to contact and counterattack several external individuals who responded to her comments on social media. That request was sent to the employee at **7:31 a.m**. on October 13, 2020. *See* Email Exchange, attached as **Exhibit K**. As previously detailed in the College's Oct. 27th letter to the Attorney General's office, at **9:00 a.m**. on October 13, 2020, the employee specifically responded: "*I cannot speak with you without my attorney present (unless I am advised differently).*" *See id*. While Mr. Steinbaugh points out that the College responded that there is "no need to have your lawyer present", that statement only weighs in the College's favor in determining whether litigation was reasonably anticipated by the College since the employee was unequivocally indicating that she sought to bring *her* attorney into this matter, which put the College on notice that legal action could be forthcoming. The fact that the employee's prior multiple statements about retaining legal counsel were, in fact, misleading because she had not actually hired any attorney as of October 13th (or as of Mr. Steinbaugh's letter to the Attorney General dated November 9th) is immaterial to the analysis under Section 552.103.

When the College received the Request at 1:26 p.m. on October 13th, the College reasonably anticipated litigation. The Request came from Mr. Steinbaugh as a Director with the Foundation for Individual Rights in Education ("FIRE"). In addition to advocacy and support for the rights of students and faculty detailed in the Nov. 10th letter, the Requestor's organization, FIRE, also provides services through the FIRE Legal Network, the call for submission of cases, and the filing of amicus briefs.[1] FIRE lists its cases by institution of higher education.[2] FIRE has been maintaining a case file under its "Legal" tab directly related to the underlying matter between the employee and the College.[3] Notably, the Request itself included a request for a privilege log in the general style of those requested under Texas Rule of Civil Procedure 193.3 or Federal Rule

[1] *See* FIRE Legal tab, available at: https://www.thefire.org/legal/.
[2] *See* FIRE All Cases tab, available at: https://www.thefire.org/cases/?limit=all.
[3] *See* FIRE, Legal, Cases, Free Speech tab, available at: https://www.thefire.org/cases/collin-college-email-alludes-to-discipline-under-personnel-policies-after-tweets-criticizing-vice-president-pence/.

of Civil Procedure Rule 26.5(b)(5)(a). *See* Request with Highlighted Portion, attached as **Exhibit L.** Accordingly, as of the date of the Request, the College reasonably anticipated litigation based on concrete evidence – including the underlying employee's own statements – that litigation was likely either from the employee, FIRE, or any other source.[4]

Regarding the timing of the October 15th demand letter, it should be noted that Mr. Steinbaugh is the author of both the PIA request and the demand letter. Mr. Steinbaugh filed the initial Request and within 72 hours submitted the formal demand letter to the College, and now conveniently asserts that the litigation exception cannot apply. This appears to be nothing more than a strategic maneuver to evade the application of the relevant timeframe noted in Section 552.103. Regardless, as noted above, direct evidence existed on and before the date of the Request to demonstrate that the College reasonably anticipated litigation. In addition to the employee's own statements, the letter Mr. Steinbaugh submitted would be interpreted by any reasonable party to be a demand letter from which the College could reasonably anticipate litigation. This is based on the following facts: (1) Mr. Steinbaugh is a licensed attorney who was voicing in the demand letter the particular interests of the employee; (2) he accused the College in the demand letter of purportedly violating the employee's freedom of expression; (3) he specifically requested three forms of particular relief for the employee, including that the College rescind any warning and reassure the employee that no formal consequences would result from her actions, within the last page of the demand letter. While Mr. Steinbaugh asserts that the employee signed an authorization form stating that no attorney-client relationship was formed, the document he references is merely an authorization form that relates only to a release of various categories of documents, including personnel and disciplinary documents from the College. This fails to address the much larger issue whether an attorney-client relationship may be formed in numerous other ways.

Based on numerous statements from the employee that she was represented by *"my"* attorneys, the public controversy that ensued from her comments on social media, complaints submitted to the College regarding the employee's comments, receipt of a demand letter from Requestor who unequivocally represents the employee's interests, and the active case file maintained by Requestor on his organization's website, Collin College reasonably anticipated litigation in this matter. In addition, the responsive information submitted with the original letter directly addresses the employee's comments, and thus directly relates to the anticipated litigation.

Thank you for your consideration of this matter. Please do not hesitate to contact me at 940-704-3774 with any questions or concerns.

[4] The College is also concerned about the potential for third-party claims based on the communications the employee shared with external parties using the College's email system. In at least one email exchange, the employee contacted the external party through a work email address, instead of through the private email address where the email exchange originated. The College reasonably believed that such conduct exposed the College and/or the employee to anticipated legal claims from external parties. Since this example of the email exchange is responsive to another PIA request upon which the College is currently seeking a ruling, the College is withholding it at this time. If the Attorney General's office wishes to review this communication, please contact me at pthompson@clarkhill.com or 940-704-3774.

Sincerely,

Pete Thompson

CC: Requestor (via email)(without enclosures)

Enclosures

FIRE
Foundation for Individual Rights in Education

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.[1] 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.[2]

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."[3]

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,[4] 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,[5] an administrator censoring an art installation memorializing Japanese-American internment camps to avoid offending a wealthy donor,[6] or a college using selective redactions of public records to hide its deferential treatment of elected officials.[7]

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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[1] 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-expletive-criticism-vp-debate.

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

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

[4] 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.

[5] 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.

[6] 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.

[7] 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[8] 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.'"[9] The issue has recently attracted the attention of Texas legislators, including Senator Ted Cruz and the Texas Senate State Affairs Committee.[10]

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.[11]

That burden requires the College to establish, through "concrete evidence," that it "reasonably anticipated" litigation because "concrete evidence" indicated "that litigation will ensue."[12] Mere "conjecture that litigation may ensue is insufficient," and the "mere chance of litigation does not demonstrate" the first prong.[13] 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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[8] 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.
[9] *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting, in part, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).
[10] 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.
[11] *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding).
[12] Open Records Decision No. JM-266 at 4 (1984) ("[L]itigation cannot be reasonably anticipated until concrete evidence suggests that litigation will ensue.").
[13] *Id.*

existed when the request for information was received, not information about occurrences after the request was made.[14]

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.[15] However, there is no reasonable anticipation of litigation where a person aggrieved by a government agency's decisions retains an attorney.[16] 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.[17] 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[.]"[18]

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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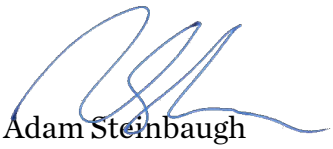
[14] Open Records Decision No. 677 at 2–3 (2002).
[15] FIRE asked the College's attorney to provide copies of the exhibits relied upon in the instant request. This information was required to be provided pursuant to Gov't Code § 552.301(d)(2), which obligates the governmental body to provide "the governmental 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.
[16] Open Records Decision No. 361 at 2 (1983).
[17] *Id.*
[18] 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,



Adam Steinbaugh

Cc: Pete Thompson, via email

EXHIBIT G

Adam Steinbaugh <adam@thefire.org>

FIRE Public Records Request

Adam Steinbaugh <adam@thefire.org> Tue, Oct 13, 2020 at 2:26 PM
To: publicinfo@collin.edu

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
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

** 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.

DocuSigned by:
Lora Burnett
3020805C952B423...
Signature

10/15/2020
Date

EXHIBIT I

FIRE

Adam Steinbaugh [redacted]

Fw: Quick Zoom today

[redacted]

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 di cu with you Thi i an effort to help you under tand the expectation urrounding the u e of college email The form outline what I had planned to di cu

My preference i to till meet today via Zoom if po ible If not, I am available at 2pm on Monday, October 19th for a phone call or Zoom Since thi i not a di ciplinary meeting, there i no need to have your lawyer pre ent

If you choo e not to meet with me, I a k that you plea e review and ign the attached, acknowledging your receipt of it Plea e return a igned copy to me
[Quoted text hidden]

Lora Burnett 10 13 2020 pdf
727K

CLARK HILL | Strasburger

Clark Hill Strasburger
901 Main Street
Suite 6000
Dallas, TX 75202-3794
T 214.651.4300
F 214.651.4330

clarkhill.com

Pete Thompson
T (214) 651-2033
F (214) 659-4042
Email:Pete.Thompson@clarkhillstrasburger.com

November 3, 2020

Office of the Attorney General
Open Records Division
209 W. 14th Street
Austin, Texas 78701

RE: Collin County Community College: Public Information Act Request, October 20, 2020
(Collin College Reference # CC0011)

Dear Attorney General:

We respectfully request a decision under the Public Information Act ("the Act"), Chapter 552 of the Texas Government Code, concerning information requested by Daxton Stewart (the "Requestor") received by Collin County Community College District ("Collin College" or "the College") on October 20, 2020 (the "Request" – attached as **Exhibit A**).

This letter is timely made within ten (10) business days after Collin College received the Request in accordance with Section 552.301 of the Act.

THE REQUEST

Requestor seeks the following information:

"Copies of emails received and sent by Collin College President Neil Matkin regarding two faculty members, Dr. Michael Phillips and Dr. Lora Burnett, from Oct. 7, 2020, to today, Oct. 20, 2020."

Collin College requests that information responsive to the current Request be withheld subject to Texas Government Code Section 552.103, Section 552.107, and Texas Rule of Evidence 503. As part of this letter, we are submitting to your office representative samples that we are seeking to protect (attached as **Exhibits B-C**). Collin College reserves the right to submit any additional documents within the time period prescribed by Section 552.301(e).

Support for the attached information is discussed below under the following headings: (1) Information Related to Anticipated Litigation under Section 552.103; and (2) Responsive Information Protected by the Attorney-Client Privilege under Section 552.107.

EXCEPTIONS FROM DISCLOSURE

Collin College requests that information and documents responsive to the Request be withheld from disclosure based upon the following exceptions provided for in the Texas Government Code:

1. Information Related to Anticipated Litigation under Section 552.103

Responsive information includes information that relates to litigation that was reasonably anticipated at the time of the Request. Subsection (c) of Section 552.103 provides that "[i]nformation relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies . . . for public information . . . ."

Section 552.103(a) was specifically intended to prevent parties from improperly circumventing the rules of discovery by using the Public Information Act. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); Attorney General Opinion JM-1048 380 at 4 (1989). The exception allows a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery procedures." *See* Open Records Decision No. 551 at 3 (1990).

The test for this exception requires a showing that, as of the date that the request for information was received by the governmental body: (1) litigation involving the governmental body is pending or reasonably anticipated, and (2) the information relates to the litigation. *See* Open Records Decision No. 677 at 2–3 (2002).

Therefore, in determining whether a governmental body has met its burden under Section 552.103, the Attorney General or a court can only consider the circumstances that existed on the date the governmental body received the request for information. *See* Section 552.103(c). To meet its burden under Section 552.103(a) in requesting an Attorney General decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues. *See* Open Records Decision No. 551 at 5 (1990).

Because Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, Texas courts have accepted that this includes a very broad category of information. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, orig. proceeding). Similarly, the Attorney General has found that the protection of Section 552.103 may overlap with that of other exceptions that encompass discovery privileges. *See* Open Records Decision No. 677 at 2 (2002). However, the standard for proving that Section 552.103 applies to information is the same regardless of whether the information is also subject

to a discovery privilege – there must be a showing that the requested information relates to pending or reasonably anticipated litigation. *See id.*

The Attorney General previously considered a case where a City asserted Section 552.103 in response for information from a Requestor who was previously employed with the City. TEX. ATT'Y GEN. OP. OR2019-16457 (2019). The Requestor's attorney submitted a demand letter to the City threatening to file a charge of discrimination with the Texas Workforce Commission and with the United States Equal Employment Opportunity Commission ("EEOC") on behalf of the Requestor if his demands were not met. *See id.* at *2. The Attorney General found that "based on [the City's] representations, our review of the submitted documents, and the totality of circumstances, we find you have demonstrated the city reasonably anticipated litigation when it received the request for information." *See id.* Therefore, the City could withhold the submitted information under Section 552.103(a) of the Government Code. *See id.* The Attorney General has similarly found that a governmental body could withhold information under Section 552.103(a) where an attorney submitted a demand letter to the governmental body. *See* TEX. ATT'Y GEN. OP. OR2020-04492 (2020) (finding that school district reasonably anticipated litigation after receiving demand letters threatening to file suit for discrimination); TEX. ATT'Y GEN. OP. OR2017-28142 (2017) (finding that housing authority reasonably anticipated litigation after Requestor's attorney submitted demand letter).The Attorney General's office recently also held that Collin College was not obligated to provide information excepted from disclosure under Section 552.103 of the Act. *See* TEX. ATT'Y GEN. OP. OR2020-22137 (2020).

The Request is related to a matter involving a current employee of Collin College. That employee is specifically named in the Request. As a matter of background, the employee at issue posted comments to social media in early October. The comments resulted in media coverage and complaints sent to the College shortly thereafter. Approximately three days later, the employee indicated on social media that she was already represented by attorneys. *See* Social Media Posts attached as **Exhibit D**. When the College sought a meeting with the employee regarding her use of the college email systems to respond to some commentators on her social media posts, the employee instructed the College that she wished to have an attorney present. *See* Email from Employee attached as **Exhibit E**. An attorney with an organization that represents the employee's interests then submitted a demand letter to Collin College. *See* Letter from Attorney, attached as **Exhibit F**. In that letter, the attorney asked Collin College to "reassure [employee] that no formal consequences will result from her protected expression." *See id.* at *1. In addition, the attorney made three specific formal demands with respect to the employee on the final page of the letter. *See id.* at *9.

Responsive documents include emails received and sent by a College official which directly relate to the employee's comments posted to social media. *See* Representative Sample, attached as **Exhibit B**. Specifically, responsive information includes (1) communications that address the employee's comments; and (2) communications that address the College's response to the employee's comments. While two College faculty members are directly named in the Request, a significant majority of the responsive communications relate to the particular faculty member

who posted the comments to social media. Because the college anticipates litigation regarding that employee, it seeks to withhold all responsive communications under Section 552.103.

Under the two-prong test of Section 552.103, the information requested is clearly subject to the litigation exception. Under the first prong, litigation is reasonably anticipated in this matter. As a primary concern, an attorney issued a demand letter to Collin College which included three specific issues relating to this incident. Based on the attorney's demand letter submitted to the College, the employee's indication that she was represented by attorneys on social media, and the employee's request that her attorney be present at a meeting requested by the College, litigation is reasonably anticipated by the College in this matter.

Under the second prong, the responsive information includes communications with the College official named in the Request that discuss the employee's comments on social media and the College's response to the employee's comments. Because these communications directly address the employee's comments on social media, they would be relevant to any potential litigation relating to these comments. Requestor should not be able to circumvent traditional rules of discovery to request litigation-related materials under the PIA, which are protected by the litigation exception. Therefore, because these documents relate directly to the anticipated litigation, they should be withheld under Section 552.103.

2. Responsive Information Protected by the Attorney-Client Privilege under Section 552.107

Portions of the responsive information contain confidential information protected under the attorney-client privilege under Section 552.107 of the Texas Public Information Act. The standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Texas Rule of Evidence 503. Rule 503 encompasses the attorney-client privilege and provides in part:

(1) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). Thus, a communication is "confidential" for purposes of the Texas Rules of Evidence if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5).

Responsive information also includes emails that were sent from a College official to the College's general counsel for the purpose of seeking legal advice. *See* Representative Sample, marked as **Exhibit C**. These emails were not intended to be disclosed to a third person and includes content on which the College sought the opinion of its own internal attorney. The email involves the presentation of an issue with potential future legal implications, and should therefore be withheld under Section 552.107.

In summary, we submit these arguments in support of our request for an Attorney General's decision. Thank you for your consideration in this matter. Please do not hesitate to contact me at 214-651-2033 with questions or concerns.

Sincerely,

Pete Thompson

CC: Requestor (via email)(without enclosures)

Enclosures

EXHIBIT A

PIA Request

From: Chip Stewart
Sent: Tuesday, October 20, 2020 3:11 PM
To: Public Info <publicinfo@collin.edu>
Subject: Public Information Act request

Dear Ms. Cadena-Smith --

This request is made under the Texas Public Information Act, Chapter 552, Texas Government Code, which guarantees the public's access to information in the custody of governmental agencies. I respectfully request the following information:

Copies of emails received and sent by Collin College President Neil Matkin regarding two faculty members, Dr. Michael Phillips and Dr. Lora Burnett, from Oct. 7, 2020, to today, Oct. 20, 2020.

If it is of assistance to help narrow your search, I am most interested in emails from members of the public or from the Collin College community expressing concern about or support for the professors in question, as well as President Matkin's responses to those messages.

I specifically request digital copies of these records, in the interest of saving costs. Additionally, and since time is a factor, please communicate with me by telephone or email rather than by mail. My telephone number is 817-240-4832 and my email address is

As an attorney and a First Amendment scholar, I hope to use these documents to inform the public's understanding of the free speech climate at college campuses. As such, disclosure of this information is in the public interest because providing a copy of the information primarily benefits the general public. I therefore request a waiver of all fees and charges pursuant to Section 552.267 of the act.

I shall look forward to hearing from you promptly, as specified in the law. Thank you for your cooperation.

Sincerely,

Daxton R. Stewart

3196 Westcliff Road W

Fort Worth, TX 76109

EXHIBIT D
Social Media Posts

Tweet

L.D. Burnett
@LDBurnett

I am watching as well. All lawyered up.

> **Cathy Williamson** @toby1977 · Oct 10
> @collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone

Thread

Collin College

15 71 879

L.D. Burnett
@LDBurnett

Replying to @LDBurnett

The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join @AAUP, even if you're not in a collective bargaining state.

12:04 PM · Oct 12, 2020 · Twitter Web App

EXHIBIT E
Email from Employee

From: Lora Burnett
Sent: Tuesday, October 13, 2020 1:17 PM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Hi Daphne,

Honestly, I very much wish I could speak with you today as well—I don't like to think of you going on vacation when you have something still left on your to-do list, and I don't like things hanging over my head either. Additionally, my collegial instincts are such that I think keeping things informal and conversational is always best, and I enjoy talking to you. I know this would be a good conversation. My email to you at the end of September about the modus operandi of Campus Reform and right-wing social media outrage was pretty accurate, but I guess I was off by a week!

However, because this conversation would involve a document I am expected to sign, a document that includes fairly broad statements about general practices, I can't sign it or discuss it with you without first consulting my attorney.

Though this is not a disciplinary matter, the document does indicate that it may lay the groundwork for future disciplinary action. So I will either need my counsel present or I will need to provide them with specific examples of the issues referenced in paragraphs two and three of this document.

The wording of paragraph two is of particular concern, as I am contacted regularly on my Collin College email account by editors, colleagues from other institutions, contributors to the website that I edit as a service to the profession, prospective graduate students, bloggers, and so forth.

Without even having shown this document to my attorney, I can tell you now that I cannot sign off on any document that states that I am not allowed to reply to an email sent to my Collin College account. Perhaps you could provide some examples of problematic replies from me that warrant this warning.

I would have the same concern about paragraph three. Please provide some examples where I have copied personal or private messages to others via their Collin.edu email accounts.

So, regretfully, I will need to keep our appointment on the 19th. I sincerely hope that my counsel will be able to look over this document and whatever examples you provide and happily sign off on what should be a congenial conversation. But I must not take any steps without a sign off from legal counsel, and I still haven't heard back from them about your first message of the day.

I am so sorry to leave this unfinished business for you and I hope to be able to talk to you informally on the 19th.

Thanks so much for your understanding, and I do wish you rest and relaxation on your vacation.

Dr. Lora Burnett
Professor of History
Collin College

EXHIBIT F

Demand Letter

FIRE
Foundation for Individual Rights in Education

October 15, 2020

H. Neil Matkin, Ed.D.
District President
Collin College
3452 Spur 399
Collin Higher Education Center
Room 406
McKinney, Texas 75069

Sent via Electronic Mail (nmatkin@collin.edu)

URGENT

Dear President Matkin:

The Foundation for Individual Rights in Education (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.

FIRE is concerned by Collin College's recent response to the extramural political expression of Prof. Lora D. Burnett. Invoking the "execution of [the college's] personnel policies"—intimating that punishment might follow— and following that statement with a written warning against use of "Collin College systems or resources to engage in private or personal communications" is retaliatory. Because the First Amendment prohibits Collin College from disciplining Burnett for her extramural political speech and the warning misinterprets the college's written policy, we ask that you rescind any warning and reassure Burnett that no formal consequences will result from her protected expression.

I. After Burnett's Tweets About the Vice-Presidential Debate Draw Criticism, Collin College Responds

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE.

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

Lora D. Burnett is a professor of history at Collin College. She maintains a personal Twitter account, which at all times relevant here has consistently noted that her "[t]weets do not rep[resent] my employer."[1]

On October 8, 2020, *Campus Reform*, a conservative media outlet dedicated to "expos[ing] liberal bias and abuse on the nation's college campuses,"[2] published a roundup of tweets from faculty members criticizing Vice President Michael Pence during the previous evening's vice presidential debate.[3] The article was repackaged by *Fox News* the following day.[4]

Burnett was among the professors whose tweets were highlighted in the articles, including a tweet commenting that the moderator "needs to talk over Mike Pence until he shuts his little demon mouth up"[5] and sharing another's tweet referring to Pence as a "scumbag lying sonofabitch."[6]

On Monday, October 12, the college posted a public statement condemning Burnett's tweets as "hateful, vile and ill-considered[.]"[7] The statement acknowledged that the tweets "may be protected" but added that "[f]aculty members . . . have a special obligation to remember that their public statements reflect on their unique roles both in educating students and modeling behavior, as well as on the college," and that "in our free exercise of expression, professionalism should dictate decorum rather than resorting to profanity."

That same day, you sent an email to a college-wide distribution list, noting that Burnett's tweets had been "picked up by national media and has been in broad circulation among some of our college constituents."[8] You shared that complaints—including "calls and contacts from legislators"—had "poured in over the weekend." Most of these contacts "ask[ed] us to terminate" Burnett, but a "handful" were "encouraging us to uphold 'academic freedom' and 'free speech'. . . ." You averred that you did not see "an issue with academic freedom nor is the

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[1] *See, e.g.*, L.D. Burnett (@ldburnett), TWITTER, http://web.archive.org/web/20190422100801/https://twitter.com/ldburnett (archived Apr. 22, 2019).

[2] CAMPUS REFORM, *About*, https://www.campusreform.org/about (last visited Oct. 13, 2020).

[3] 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.

[4] 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-expletive-criticism-vp-debate.

[5] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 9:02 PM), https://twitter.com/LDBurnett/status/1314023216034320391.

[6] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 8:21 PM), https://twitter.com/LDBurnett/status/1314013018716622848.

[7] COLLIN COLL., *Collin College Statement* (Oct. 12, 2020), http://www.collincollegenews.com/2020/10/12/collin-college-statement-october-12-2020.

[8] E-mail from Neil Matkin, Dist. Pres., Collin Coll., to All College Distribution (Oct. 12, 2020, 11:45 AM) (on file with author).

scholarship of [Burnett] in question," but that the "college's execution of its personnel policies will not be played out in a public manner. . . ."

On Tuesday, October 13, Burnett was presented with an "Employee Coaching Form" with "Performance Feedback" styled as "Constructive Feedback" and providing, in full:

> This is to serve as acknowledgement that you are entitled to your views and may freely post these views on your personal social media.
>
> This is also to clearly communicate that you are not to use Collin College systems or resources to engage in private or personal conversations. If you are contacted through your Collin.edu account, you are not to respond from the college email system. You should use your personal email account on any and all personal communications.
>
> In addition, please refrain from copying what appears to be private or personal communications to others via their Collin.edu email accounts. The Collin.edu system is for professional communications and those related to the educational mission of the college.

Burnett has declined to sign the "Employee Coaching Form," which the college's website indicates is used to respond to "behavior or performance that has previously been discussed informally but is still not meeting expectations."[9] Burnett has not previously had a discussion with Collin College concerning use of email.

II. Collin College's Reprimand of Burnett Ignores its Written Policy and Threatens to Chill its Faculty Members' First Amendment Rights

Burnett's tweets are extramural political expression protected by the First Amendment, which limits public universities and colleges in their responses to faculty members' expression. While the college is free to criticize Burnett's tweets, it cannot take—or imply that it will take—adverse action, including through misapplication of the college's technology resources policy.

A. The First Amendment Applies to Collin College as a Public Institution

It has long been settled law that the First Amendment is binding on public colleges like Collin College.[10] Accordingly, the decisions and actions of a public university—including the pursuit

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[9] COLLIN COLL., *Coaching and Discipline Instructions*, http://www.collin.edu/perf_mgmt/coach_discipline_forms.html (last visited Oct. 13, 2020).

[10] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, 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.'") (internal citation omitted).

of disciplinary sanctions,[11] recognition and funding of student organizations,[12] interactions with student journalists,[13] conduct of police officers,[14] and maintenance of policies implicating student and faculty expression[15]—must be consistent with the First Amendment.

B. Burnett's Tweets Are Protected by the First Amendment and Academic Freedom

Employees of government institutions like Collin College do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[16] A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]"[17] No such interest is applicable here.

i. Burnett's tweets, addressing matters of public concern, are in her capacity as a private citizen.

Burnett's tweets are made in capacity as a private citizen, not as an employee. The "critical question" in determining whether the speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[18] Colleges ordinarily do not employ their faculty to post on their personal social media pages.[19] Even if others became aware that Burnett was employed by Collin College—whether through *Campus Reform* or *Fox News*, or through their own research—the mere knowledge of a speaker's employment does not render their speech pursuant to their official duties.[20]

Burnett's tweets also address matters of significant public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"[21] One would be hard pressed to identify

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[11] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[12] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).
[13] *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).
[14] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[15] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[16] *Connick v. Myer*s, 461 U.S. 138, 140 (1983).
[17] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
[18] *Lane v. Franks*, 573 U.S. 228, 240 (2014).
[19] *See, e.g.*, *Higbee v. Eastern Michigan University*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at *14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university's response to racial incidents "would not appear to be within a history professor's official duties").
[20] *See, e.g.*, *Pickering*, 391 U.S. at 576–78 (appendix reproducing teacher's letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).
[21] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (picketers' signs outside of a fallen soldier's funeral, including "Thank God for dead soldiers," related to matters of public concern).

a matter of greater public interest than a vice presidential debate watched by 58 million people.[22]

ii. Burnett's tweets cannot be punished on the basis that others find them subjectively offensive, "hateful," "vile," or "ill-considered."

Although some—including you—may find the remarks offensive, the "inappropriate or controversial character" of the speech "is irrelevant to the question of whether it deals with a matter of public concern."[23] This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[24] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[25] penalize satirical advertisements depicting a pastor losing his virginity to his mother in an outhouse,[26] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[27] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[28]

This principle does not lose its salience in the context of the public college. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a front-page "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[29] These images were no doubt deeply offensive to many at a time of political polarization and

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[22] John Koblin, *Pence-Harris Debate Is No. 2 in Vice-Presidential Ratings, With 58 Million TV Viewers*, N.Y. TIMES, Oct. 8, 2020, https://www.nytimes.com/2020/10/08/business/media/pence-harris-debate-is-no-2-in-vice-presidential-ratings-with-58-million-tv-viewers.html.

[23] *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

[24] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[25] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[26] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[27] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[28] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[29] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

civil unrest, yet "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[30]

iii. Collin College's policies recognize that academic freedom protects extramural expression.

Collin College's policies are in accord with these fundamental principles of expressive rights. The College's "Employee Expression and Use of College Facilities" policy—updated by the college just two months ago—provides that the college's "position on academic freedom" extends broad protection to extramural speech:

> Faculty members are citizens, and, therefore, possess the rights of citizens to speak freely outside the classroom on matters of public concern and to participate in lawful political activities.
>
> Prior restraint or sanctions will not be imposed upon faculty members in the exercise of their rights as citizens or duties as teachers. Nor will faculty members fear reprisals for exercising their civic rights and academic freedom.
>
> Faculty members have a right to expect the Board and the College District's administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals.[31]

This approach is consistent with the widely accepted principles of academic freedom embraced by academic institutions across the country. A recent decision from the Wisconsin Supreme Court is illustrative.[32] After a private university punished a professor for his internet commentary criticizing a graduate student at the university, the court held that the imposition of discipline was improper, as the university's commitment to academic freedom rendered the blog post "a contractually-disqualified basis for discipline."[33] The court explained that "the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments."[34] The blog post, an "expression made in [the professor's] personal, not professorial, capacity," fell into the "extramural" category.[35] Such remarks are protected under a commitment to academic freedom unless the remark "clearly demonstrates the faculty member's unfitness for his or her position" in light of their "entire

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[30] *Id.*
[31] COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (Aug. 12, 2020), https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf.
[32] *McAdams v. Marquette University*, 914 N.W.2d 708, 731 (Wis. 2018).
[33] *Id.* at 737.
[34] *Id.* at 730.
[35] *Id.*

record as a teacher and scholar."[36] This "stringent standard" is "[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member's fitness for the position."[37]

Accordingly, academic freedom protects not only a faculty member's research or teaching but limits the ability of an institution to restrict faculty members' speech outside of the classroom. This provides an important safeguard against external pressures on an institution that would chill research or teaching: if speech outside of a classroom were the proper subject of regulation, then institutions—under the pressure of the public, legislators, or donors—could impose ideological litmus tests on who can conduct research or teaching based on their extramural speech. Indeed, we are not far removed from public university faculty being required to submit to state interrogation regarding their possible involvement with "subversive" organizations or being forced to sign loyalty oaths disavowing socialism or communism as a condition of employment.[38]

Because Collin College recognizes in policy that protecting faculty members' extramural speech against censorship is important to its core functions, the college's interests are insufficient to justify limits on a citizen's expressive rights involving political speech—where the First Amendment's protection is "at its zenith."[39] While the college's administration may fear that allowing its faculty to exercise their civic rights may reflect poorly on the institution's reputation, "[p]ublic perception alone cannot justify a restriction on free speech. . ." and "concern" about "brand or reputation is not sufficient to outweigh" First Amendment rights:

> Voters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either. The idea that the government should be permitted to censor speech in order to avoid public outcry was raised and dismissed in the Civil Rights era. . . . The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public. . . .[40]

C. Collin College's Condemnation and Written Warning Go Beyond Mere Criticism

The First Amendment provides no privilege to be free from criticism, however caustic, including from the leadership of universities and colleges. Indeed, criticism is a form of "more

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[36] *Id.* at 731–32, citing AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).
[37] *Id.* at 732 (cleaned up).
[38] *See, e.g.*, *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 594 (1967).
[39] *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).
[40] *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2, 29–31 (W.D. Tenn. June 14, 2019).

speech," the remedy to offensive expression that the First Amendment prefers to censorship.[41] However, courts across the country have held that "retaliatory speech" violates the First Amendment where it "intimat[es] that some form of punishment or adverse regulatory action"[42] may follow, and the "mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect."[43]

Here, Collin College's public-facing statement recognized that Burnett's tweets "may" be protected by the First Amendment. However, the email sent to those at the college intimated that adverse action might follow, sharing that the "execution of [the college's] personnel policies will not be played out in a public manner[.]" If Burnett's speech were more than *theoretically* protected speech, then there are no "personnel policies" to "execut[e]."

We do not need a crystal ball to determine whether or not it is reasonable to read this statement as intimating that adverse action would follow: Adverse action *did* follow, when Burnett was presented with a written warning concerning her "personal" use of college resources. That warning—utilized by the college in progressive employee discipline[44]—expressly invokes Burnett's posting of her "views" on her "personal social media," establishing a causal link between her speech and the issuance of the "feedback." The form does not identify what conduct, in particular, by Burnett violated any policy concerning personal use of institutional resources.

This lack of specificity is concerning. District policy governing use of college technological resources expressly *permits* "incidental personal use that does not otherwise violate" college policy "or have an adverse effect on [college] resources[.]"[45] It is difficult to imagine that responding to unsolicited emails—sent to that address because critical media outlets, through no effort of the faculty member, identified the professor's employer—is not an "incidental" use. If there is some other "use" that the college believes violates that policy, it should identify that impermissible use in order to give Burnett an opportunity to avoid violating policy.[46]

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[41] *Whitney v. California*, 274 U.S. 357, 377 (1927).

[42] *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the "question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . . .").

[43] *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original). Notably, the United States Court of Appeals for the Fifth Circuit recently held that even a "formal reprimand" may be violate the First Amendment. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

[44] *Coaching and Discipline Instructions*, *supra* note 9.

[45] COLLIN CNTY. CMTY. COLL. DIST., TECHNOLOGY RESOURCES (Nov. 7, 2017), https://www.collin.edu/hr/boardpolicies/Nov2017/CRlocalApproved.pdf.

[46] The college's form also warns Burnett against "copying what appears to be private or personal communications to others via their Collin.edu email accounts." This is ambiguous. Is Burnett being warned against using the carbon copy function to send "private or personal" emails to others at the college? If so, the college should identify those emails. Alternatively, is she being directed not to *reproduce* emails sent to her

Moreover, invoking an inapplicable policy in a response flowing from Burnett's protected expression is designed to have a chilling effect. The college may be in search of some action it can take in order to sate Burnett's critics, but the law forbids it from doing so.

III. Conclusion

Collin College cannot punish a faculty member for commenting as a citizen on national political affairs, even if others—whether colleagues, the public, or their representatives in the halls of the legislature—find her comments offensive. District policy provides—rightly— that faculty members have "a right to expect the Board and the [college's] administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals."

Accordingly, we call on Collin College to:

(1) Confirm to Burnett, by 12:00 p.m. on Monday, October 19, that Collin College will cancel the Monday meeting concerning the written warning;
(2) Affirm, without reservation, that Burnett's comments are protected by the First Amendment; and
(3) Withdraw the written warning concerning "personal" use of college resources.

We respectfully request receipt of a response to this letter no later than the close of business on October 23, 2020.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

college email address? If so, that restriction would violate Burnett's First Amendment right to share information lawfully obtained or received without solicitation. *See, Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

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November 12, 2020

Office of the Attorney General
Open Records Division
209 W. 14th Street
Austin, Texas 78701

RE: Collin County Community College: Public Information Act Request, October 29, 2020
(Collin College Reference # CC0012)

Dear Attorney General:

We respectfully request a decision under the Public Information Act ("the Act"), Chapter 552 of the Texas Government Code, concerning information requested by Kristopher Nelson (the "Requestor") received by Collin County Community College District ("Collin College" or "the College") on October 29, 2020 (the "Request" – attached as **Exhibit A**).

This letter is timely made within ten (10) business days after Collin College received the Request in accordance with Section 552.301 of the Act.

THE REQUEST

Requestor seeks in relevant part the following information:

"2. All public information already in electronic form, including e-mails, regarding complaints or concerns about the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.

3. All public information already in electronic form, including e-mails, regarding potential limitations or restrictions on the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.

4. All public information already in electronic form, including e-mails, regarding potential or actual violations of policies or procedures regarding the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020."

Collin College requests that information responsive to the current Request be withheld subject to Texas Government Code Section 552.103, Section 552.107, and Texas Rule of Evidence 503. As part of this letter, we are submitting to your office representative samples that we are seeking to protect (attached as **Exhibits B-C**). Collin College reserves the right to submit any additional documents within the time period prescribed by Section 552.301(e).

Support for the attached information is discussed below under the following headings: (1) Information Related to Anticipated Litigation under Section 552.103; and (2) Responsive Information Protected by the Attorney-Client Privilege under Section 552.107.

EXCEPTIONS FROM DISCLOSURE

Collin College requests that information and documents responsive to the Request be withheld from disclosure based upon the following exceptions provided for in the Texas Government Code:

1. Information Related to Anticipated Litigation under Section 552.103

Responsive information includes information that relates to litigation that was reasonably anticipated at the time of the Request. Subsection (c) of Section 552.103 provides that "[i]nformation relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies . . . for public information . . . ."

Section 552.103(a) was specifically intended to prevent parties from improperly circumventing the rules of discovery by using the Public Information Act. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); Attorney General Opinion JM-1048 380 at 4 (1989). The exception allows a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery procedures." *See* Open Records Decision No. 551 at 3 (1990).

The test for this exception requires a showing that, as of the date that the request for information was received by the governmental body: (1) litigation involving the governmental body is pending or reasonably anticipated, and (2) the information relates to the litigation. *See* Open Records Decision No. 677 at 2–3 (2002).

Therefore, in determining whether a governmental body has met its burden under Section 552.103, the Attorney General or a court can only consider the circumstances that existed on the date the governmental body received the request for information. *See* Section 552.103(c). To meet its burden under Section 552.103(a) in requesting an Attorney General decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues. *See* Open Records Decision No. 551 at 5 (1990).

Because Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, Texas courts have accepted that this includes a very broad category of information. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, orig. proceeding). Similarly, the Attorney General has found that the protection of Section 552.103 may overlap with that of other exceptions that encompass discovery privileges. *See* Open Records Decision No. 677 at 2 (2002). However, the standard for proving that Section 552.103 applies to information is the same regardless of whether the information is also subject to a discovery privilege – there must be a showing that the requested information relates to pending or reasonably anticipated litigation. *See id.*

The Attorney General previously considered a case where a City asserted Section 552.103 in response for information from a Requestor who was previously employed with the City. TEX. ATT'Y GEN. OP. OR2019-16457 (2019). The Requestor's attorney submitted a demand letter to the City threatening to file a charge of discrimination with the Texas Workforce Commission and with the United States Equal Employment Opportunity Commission ("EEOC") on behalf of the Requestor if his demands were not met. *See id.* at *2. The Attorney General found that "based on [the City's] representations, our review of the submitted documents, and the totality of circumstances, we find you have demonstrated the city reasonably anticipated litigation when it received the request for information." *See id.* Therefore, the City could withhold the submitted information under Section 552.103(a) of the Government Code. *See id.* The Attorney General has similarly found that a governmental body could withhold information under Section 552.103(a) where an attorney submitted a demand letter to the governmental body. *See* TEX. ATT'Y GEN. OP. OR2020-04492 (2020) (finding that school district reasonably anticipated litigation after receiving demand letters threatening to file suit for discrimination); TEX. ATT'Y GEN. OP. OR2017-28142 (2017) (finding that housing authority reasonably anticipated litigation after Requestor's attorney submitted demand letter). The Attorney General's office recently also held that Collin College was not obligated to provide information excepted from disclosure under Section 552.103 of the Act. *See* TEX. ATT'Y GEN. OP. OR2020-22137 (2020).

The Request seeks information related to a matter involving a current employee of Collin College. The Request seeks information about complaints, restrictions, or violations involving speech or writings of Collin College employees which occurred after October 1, 2020. The information responsive to the Request pertains to one employee of the College, in particular. As a matter of background, the employee at issue posted comments to social media in early October. The comments resulted in media coverage and complaints sent to the College shortly thereafter. Approximately three days later, the employee indicated on social media that she was already represented by attorneys and included references to representation by a professional union paid by professional insurance. *See* Social Media Posts attached as **Exhibit D**. Thereafter, when the College sought a meeting with the employee regarding her use of the college email systems to respond to some commentators on her social media posts, the employee instructed the College that she wished to have her attorney present. *See* Email from Employee attached as **Exhibit E**. An attorney with an organization that represents the employee's interests then submitted a demand letter to Collin College seeking specific relief for the employee. *See* Letter from

Attorney, attached as **Exhibit F**. In that letter, the attorney asked Collin College to "reassure [employee] that no formal consequences will result from her protected expression." *See id.* at *1. In addition, the attorney made three specific formal demands with respect to the employee on the final page of the letter. *See id.* at *9. Further, the College has received complaints from third parties in response to the Employee's comments, including direct exchanges with the College's President; based on these interactions, the College reasonably believes that third party claims may exist. (These communications are included in the Representative Sample, attached as **Exhibit B**, discussed below).

Responsive documents include communications which directly relate to the employee's comments posted to social media. *See* Representative Sample, attached as **Exhibits B-C**. Specifically, responsive information includes (1) communications that address the employee's comments; (2) communications that address the College's response to the employee's comments; and (3) a counseling form that was provided to the employee regarding her use of the College server to respond to complaints regarding her comments. The responsive communications relate to the particular faculty member who posted the comments to social media. Responsive communications also include emails referencing both the faculty member at issue and another professor who was also targeted by certain media stories. Because the college anticipates litigation regarding that employee and the employee's comments, it seeks to withhold all responsive communications under Section 552.103.

Under the two-prong test of Section 552.103, the information requested is clearly subject to the litigation exception. Under the first prong, litigation is reasonably anticipated in this matter. As a primary concern, an attorney issued a demand letter to Collin College which included three specific issues relating to this incident. Based on the attorney's demand letter submitted to the College seeking specific relief on behalf of the employee, the employee's indication that she was represented by attorneys and/or a professional union on social media, and the employee's request that her attorney be present at a meeting requested by the College, litigation is reasonably anticipated by the College in this matter.

Under the second prong, the responsive information includes communications that discuss the employee's comments on social media, the College's response to the employee's comments, and a counseling form that relates to the employee's use of a College email server to respond to people who complained about her social media posts. Because these documents directly relate to the employee's comments on social media, they would be relevant to any potential litigation regarding these comments. Requestor should not be able to circumvent traditional rules of discovery to request litigation-related materials under the PIA, which are protected by the litigation exception. Therefore, because these documents relate directly to the anticipated litigation, they should be withheld under Section 552.103.

2. Responsive Information Protected by the Attorney-Client Privilege under Section 552.107

Portions of the responsive information contain confidential information protected under the attorney-client privilege under Section 552.107 of the Texas Public Information Act. The standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Texas Rule of Evidence 503. Rule 503 encompasses the attorney-client privilege and provides in part:

(1) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). Thus, a communication is "confidential" for purposes of the Texas Rules of Evidence if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5).

Responsive information also includes emails that were sent from a College official to the College's general counsel for the purpose of seeking legal advice. *See* Representative Sample, marked as **Exhibit C**. These emails were not intended to be disclosed to a third person and includes content on which the College sought the opinion of its own internal attorney. The emails involve the presentation of an issue with potential future legal implications, and should therefore be withheld under Section 552.107.

In summary, we submit these arguments in support of our request for an Attorney General's decision. Thank you for your consideration in this matter. Please do not hesitate to contact me at 214-651-2033 with questions or concerns.

Sincerely,

Pete Thompson

CC: Requestor (via email)(without enclosures)

Enclosures

EXHIBIT A

PIA Request

From: Kristopher Nelson
Sent: Thursday, October 29, 2020 8:48 PM
To: Public Info <publicinfo@collin.edu>
Subject: Public Information Requests re speech or writing

Dear Ms. Cadena-Smith:

I am writing to request the following public information under Texas Government Code Chapter 552:

1. **Current official Collin College policies or procedures placing limits on, or for handling complaints about, the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty.**

2. **All public information already in electronic form, including e-mails, regarding complaints or concerns about the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.**

3. **All public information already in electronic form, including e-mails, regarding potential limitations or restrictions on the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.**

4. **All public information already in electronic form, including e-mails, regarding potential or actual violations of policies or procedures regarding the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.**

I agree to the redaction of information that is subject to mandatory exceptions, provided such redactions are clearly labeled on the information I received.

I also agree to the redaction of information that is subject to discretionary exceptions, provided such redactions are clearly labeled on the information I receive.

I would like copies of the requested public information to be provided to me in electronic format.

The information resulting from this request is intended to be used as a public service to educate and inform the general public. As such, I request a waiver or reduction of any charges associated with this request under § 552.267. If there is nonetheless a charge associated with this request, please inform me in advance and provide a breakdown of the costs, per TAC § 70.7, such that I may approve the charge or modify my request to reduce or eliminate any costs.

Please let me know of any questions or clarifications that would assist with responding to these four requests for public information.

Thank you,

Kristopher Nelson

EXHIBIT D
Social Media Posts

Tweet

L.D. Burnett
@LDBurnett

I am watching as well. All lawyered up.

> **Cathy Williamson** @toby1977 · Oct 10
> @collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone

Thread

L.D. Burnett @LDBurnett · Oct 12

LOL. @CollinCollege is publicly throwing me under the bus, while the college president sends out an email saying that personnel decisions will not be played out in public.

Wanna bet?
#highered
#twitterstorians
cc @AAUP

p.s. The all-college email is the first I heard about it.

86 189 761

L.D. Burnett @LDBurnett · Oct 12

Here is the President's email to all faculty in the entire college -- the first notice or acknowledgment I received from my college about any of this.

From: Neil Matkin <nmatkin@collin.edu>
Date: Monday, October 12, 2020 at 11:45 AM
To: All College Distribution <AllCollegeDistribu
Subject: Faculty Member Comments on Social

Friends,
Recently, one of our faculty members chose to pc
accounts. One of the posts referencing Vice Pres
broad circulation among some of our college con
from legislators, and voicemails poured in over th
faculty member although a handful are encourag
writing to tell me that the faculty member in que

We are not aware of an issue with academic freed
The college's execution of its personnel policies w
address what has become an intense public issue
regardless of our political or social viewpoints, m
forbearance. The statement follows:

idered Twitter posts by one of its faculty members. As a
deeply apologize for the offense her comments have
ot consistent with the values of Collin College, particularly
iews were not conveyed in any manner we wish members

r Constitution, but that does not lessen our individual
care and consideration. At the very least, in our free
decorum rather than resorting to profanity.
itected, incendiary comments such as these do not best
ve solution. Hate and profanity are never welcome,
e searching for the best path forward for our Nation. Such
o hold diverse views to come together, as our country so
itback to the hard work and dedication of our campus
is year.
on and of our distinguished institution, have a special
reflect on their unique roles both in educating students and
ides them with the opportunity to educate. Hateful and
should strive to conduct ourselves.
xpress themselves with grace, civility, and respect for
values we share.

77 112 405

L.D. Burnett @LDBurnett · Oct 12

And here is my reply, which also went to all faculty in the entire college.

Re: Faculty Member Comments on Social Media

Lora Burnett Today at 11:54 AM
To: Neil Matkin; Allen ISD Distribution List; Central Park Distribution List; +6 more

Dear Dr. Matkin,

It would have been kind, or at least professional, to have communicated with me first before publicly calling any of my writing "vile and ill-considered."

Though you disavowed the intent to do so in this email—an email with scare-quotes around the ideas of academic freedom and free speech—by posting that statement you are, in effect, executing personnel policies in public.

I don't appreciate that, and it speaks more poorly of Collin College's reputation than anything on my Twitter feed.

Dr. Lora Burnett
Professor of History
Collin College

15 71 883

L.D. Burnett @LDBurnett · Oct 12

The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join @AAUP, even if you're not in a collective bargaining state.

35 58 972

Replies

Bob Ramsey @BRamseyJr · Oct 12
Replying to @LDBurnett and @AAUP

1 6

Jenna Magnuski (she/her/hers) @JennaMagnuski · Oct 12
Replying to @LDBurnett and @AAUP
Found the CR article. Let's talk about the college prez' own failed professionalism and modeling, eh?

2

Duane Larson @larsondh1 · Oct 12
Replying to @LDBurnett and @AAUP
Wow. So sorry this is happening to you. Glad you're lawyering!

3

View more replies

More Tweets

L.D. Burnett @LDBurnett · Nov 9
I am pleased to report that I am now not the only Dr. Burnett in our family, and I'm quite sure that I'm not the smartest Dr. Burnett in our family either. Props to my brilliant kid, who just defended his dissertation in mathematics.

> **L.D. Burnett** @LDBurnett · Nov 9
> I thought MY dissertation defense was intense. Holy shit. Tuned in to my kid's defense via Zoom and the whole damn department is tuned in. Kid can barely get through a slide without fielding multiple questions. I would die.
> Show this thread

91 9 1.1K

Search Twitter

EXHIBIT E
Email from Employee

From: Lora Burnett
Sent: Tuesday, October 13, 2020 1:17 PM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Hi Daphne,

Honestly, I very much wish I could speak with you today as well—I don't like to think of you going on vacation when you have something still left on your to-do list, and I don't like things hanging over my head either. Additionally, my collegial instincts are such that I think keeping things informal and conversational is always best, and I enjoy talking to you. I know this would be a good conversation. My email to you at the end of September about the modus operandi of Campus Reform and right-wing social media outrage was pretty accurate, but I guess I was off by a week!

However, because this conversation would involve a document I am expected to sign, a document that includes fairly broad statements about general practices, I can't sign it or discuss it with you without first consulting my attorney.

Though this is not a disciplinary matter, the document does indicate that it may lay the groundwork for future disciplinary action. So I will either need my counsel present or I will need to provide them with specific examples of the issues referenced in paragraphs two and three of this document.

The wording of paragraph two is of particular concern, as I am contacted regularly on my Collin College email account by editors, colleagues from other institutions, contributors to the website that I edit as a service to the profession, prospective graduate students, bloggers, and so forth.

Without even having shown this document to my attorney, I can tell you now that I cannot sign off on any document that states that I am not allowed to reply to an email sent to my Collin College account. Perhaps you could provide some examples of problematic replies from me that warrant this warning.

I would have the same concern about paragraph three. Please provide some examples where I have copied personal or private messages to others via their Collin.edu email accounts.

So, regretfully, I will need to keep our appointment on the 19th. I sincerely hope that my counsel will be able to look over this document and whatever examples you provide and happily sign off on what should be a congenial conversation. But I must not take any steps without a sign off from legal counsel, and I still haven't heard back from them about your first message of the day.

I am so sorry to leave this unfinished business for you and I hope to be able to talk to you informally on the 19th.

Thanks so much for your understanding, and I do wish you rest and relaxation on your vacation.

Dr. Lora Burnett
Professor of History
Collin College

EXHIBIT F

Demand Letter

FIRE
Foundation for Individual Rights in Education

October 15, 2020

H. Neil Matkin, Ed.D.
District President
Collin College
3452 Spur 399
Collin Higher Education Center
Room 406
McKinney, Texas 75069

Sent via Electronic Mail (nmatkin@collin.edu)

URGENT

Dear President Matkin:

The Foundation for Individual Rights in Education (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.

FIRE is concerned by Collin College's recent response to the extramural political expression of Prof. Lora D. Burnett. Invoking the "execution of [the college's] personnel policies"—intimating that punishment might follow— and following that statement with a written warning against use of "Collin College systems or resources to engage in private or personal communications" is retaliatory. Because the First Amendment prohibits Collin College from disciplining Burnett for her extramural political speech and the warning misinterprets the college's written policy, we ask that you rescind any warning and reassure Burnett that no formal consequences will result from her protected expression.

I. After Burnett's Tweets About the Vice-Presidential Debate Draw Criticism, Collin College Responds

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE.

510 Walnut Street, Suite 1250 Philadelphia, PA 19106
phone: 215-717-3473 fax: 215-717-3440
thefire.org

Lora D. Burnett is a professor of history at Collin College. She maintains a personal Twitter account, which at all times relevant here has consistently noted that her "[t]weets do not rep[resent] my employer."[1]

On October 8, 2020, *Campus Reform*, a conservative media outlet dedicated to "expos[ing] liberal bias and abuse on the nation's college campuses,"[2] published a roundup of tweets from faculty members criticizing Vice President Michael Pence during the previous evening's vice presidential debate.[3] The article was repackaged by *Fox News* the following day.[4]

Burnett was among the professors whose tweets were highlighted in the articles, including a tweet commenting that the moderator "needs to talk over Mike Pence until he shuts his little demon mouth up"[5] and sharing another's tweet referring to Pence as a "scumbag lying sonofabitch."[6]

On Monday, October 12, the college posted a public statement condemning Burnett's tweets as "hateful, vile and ill-considered[.]"[7] The statement acknowledged that the tweets "may be protected" but added that "[f]aculty members . . . have a special obligation to remember that their public statements reflect on their unique roles both in educating students and modeling behavior, as well as on the college," and that "in our free exercise of expression, professionalism should dictate decorum rather than resorting to profanity."

That same day, you sent an email to a college-wide distribution list, noting that Burnett's tweets had been "picked up by national media and has been in broad circulation among some of our college constituents."[8] You shared that complaints—including "calls and contacts from legislators"—had "poured in over the weekend." Most of these contacts "ask[ed] us to terminate" Burnett, but a "handful" were "encouraging us to uphold 'academic freedom' and 'free speech'. . . ." You averred that you did not see "an issue with academic freedom nor is the

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[1] *See, e.g.*, L.D. Burnett (@ldburnett), TWITTER, http://web.archive.org/web/20190422100801/https://twitter.com/ldburnett (archived Apr. 22, 2019).

[2] CAMPUS REFORM, *About*, https://www.campusreform.org/about (last visited Oct. 13, 2020).

[3] 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.

[4] 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-expletive-criticism-vp-debate.

[5] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 9:02 PM), https://twitter.com/LDBurnett/status/1314023216034320391.

[6] L.D. Burnett (@ldburnett), TWITTER (OCT. 7, 2020 8:21 PM), https://twitter.com/LDBurnett/status/1314013018716622848.

[7] COLLIN COLL., *Collin College Statement* (Oct. 12, 2020), http://www.collincollegenews.com/2020/10/12/collin-college-statement-october-12-2020.

[8] E-mail from Neil Matkin, Dist. Pres., Collin Coll., to All College Distribution (Oct. 12, 2020, 11:45 AM) (on file with author).

scholarship of [Burnett] in question," but that the "college's execution of its personnel policies will not be played out in a public manner. . . ."

On Tuesday, October 13, Burnett was presented with an "Employee Coaching Form" with "Performance Feedback" styled as "Constructive Feedback" and providing, in full:

> This is to serve as acknowledgement that you are entitled to your views and may freely post these views on your personal social media.
>
> This is also to clearly communicate that you are not to use Collin College systems or resources to engage in private or personal conversations. If you are contacted through your Collin.edu account, you are not to respond from the college email system. You should use your personal email account on any and all personal communications.
>
> In addition, please refrain from copying what appears to be private or personal communications to others via their Collin.edu email accounts. The Collin.edu system is for professional communications and those related to the educational mission of the college.

Burnett has declined to sign the "Employee Coaching Form," which the college's website indicates is used to respond to "behavior or performance that has previously been discussed informally but is still not meeting expectations."[9] Burnett has not previously had a discussion with Collin College concerning use of email.

II. Collin College's Reprimand of Burnett Ignores its Written Policy and Threatens to Chill its Faculty Members' First Amendment Rights

Burnett's tweets are extramural political expression protected by the First Amendment, which limits public universities and colleges in their responses to faculty members' expression. While the college is free to criticize Burnett's tweets, it cannot take—or imply that it will take—adverse action, including through misapplication of the college's technology resources policy.

A. The First Amendment Applies to Collin College as a Public Institution

It has long been settled law that the First Amendment is binding on public colleges like Collin College.[10] Accordingly, the decisions and actions of a public university—including the pursuit

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[9] COLLIN COLL., *Coaching and Discipline Instructions*, http://www.collin.edu/perf_mgmt/coach_discipline_forms.html (last visited Oct. 13, 2020).

[10] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, 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.'") (internal citation omitted).

of disciplinary sanctions,[11] recognition and funding of student organizations,[12] interactions with student journalists,[13] conduct of police officers,[14] and maintenance of policies implicating student and faculty expression[15]—must be consistent with the First Amendment.

B. Burnett's Tweets Are Protected by the First Amendment and Academic Freedom

Employees of government institutions like Collin College do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[16] A government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]"[17] No such interest is applicable here.

i. Burnett's tweets, addressing matters of public concern, are in her capacity as a private citizen.

Burnett's tweets are made in capacity as a private citizen, not as an employee. The "critical question" in determining whether the speech was that of an employee or private citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[18] Colleges ordinarily do not employ their faculty to post on their personal social media pages.[19] Even if others became aware that Burnett was employed by Collin College—whether through *Campus Reform* or *Fox News*, or through their own research—the mere knowledge of a speaker's employment does not render their speech pursuant to their official duties.[20]

Burnett's tweets also address matters of significant public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]"[21] One would be hard pressed to identify

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[11] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[12] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).
[13] *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).
[14] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).
[15] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).
[16] *Connick v. Myer*s, 461 U.S. 138, 140 (1983).
[17] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
[18] *Lane v. Franks*, 573 U.S. 228, 240 (2014).
[19] *See, e.g.*, *Higbee v. Eastern Michigan University*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at *14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university's response to racial incidents "would not appear to be within a history professor's official duties").
[20] *See, e.g.*, *Pickering*, 391 U.S. at 576–78 (appendix reproducing teacher's letter to a local newspaper criticizing his employer, explaining that he teaches at the high school).
[21] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (picketers' signs outside of a fallen soldier's funeral, including "Thank God for dead soldiers," related to matters of public concern).

a matter of greater public interest than a vice presidential debate watched by 58 million people.[22]

ii. Burnett's tweets cannot be punished on the basis that others find them subjectively offensive, "hateful," "vile," or "ill-considered."

Although some—including you—may find the remarks offensive, the "inappropriate or controversial character" of the speech "is irrelevant to the question of whether it deals with a matter of public concern."[23] This is because the First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[24] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[25] penalize satirical advertisements depicting a pastor losing his virginity to his mother in an outhouse,[26] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[27] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[28]

This principle does not lose its salience in the context of the public college. To the contrary, a commitment to expressive rights must be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a front-page "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[29] These images were no doubt deeply offensive to many at a time of political polarization and

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[22] John Koblin, *Pence-Harris Debate Is No. 2 in Vice-Presidential Ratings, With 58 Million TV Viewers*, N.Y. TIMES, Oct. 8, 2020, https://www.nytimes.com/2020/10/08/business/media/pence-harris-debate-is-no-2-in-vice-presidential-ratings-with-58-million-tv-viewers.html.

[23] *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation).

[24] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[25] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[26] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[27] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[28] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

[29] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

civil unrest, yet "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[30]

iii. Collin College's policies recognize that academic freedom protects extramural expression.

Collin College's policies are in accord with these fundamental principles of expressive rights. The College's "Employee Expression and Use of College Facilities" policy—updated by the college just two months ago—provides that the college's "position on academic freedom" extends broad protection to extramural speech:

> Faculty members are citizens, and, therefore, possess the rights of citizens to speak freely outside the classroom on matters of public concern and to participate in lawful political activities.
>
> Prior restraint or sanctions will not be imposed upon faculty members in the exercise of their rights as citizens or duties as teachers. Nor will faculty members fear reprisals for exercising their civic rights and academic freedom.
>
> Faculty members have a right to expect the Board and the College District's administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals.[31]

This approach is consistent with the widely accepted principles of academic freedom embraced by academic institutions across the country. A recent decision from the Wisconsin Supreme Court is illustrative.[32] After a private university punished a professor for his internet commentary criticizing a graduate student at the university, the court held that the imposition of discipline was improper, as the university's commitment to academic freedom rendered the blog post "a contractually-disqualified basis for discipline."[33] The court explained that "the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments."[34] The blog post, an "expression made in [the professor's] personal, not professorial, capacity," fell into the "extramural" category.[35] Such remarks are protected under a commitment to academic freedom unless the remark "clearly demonstrates the faculty member's unfitness for his or her position" in light of their "entire

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[30] *Id.*
[31] COLLIN COLL., EMPLOYEE RIGHTS AND PRIVILEGES: EMPLOYEE EXPRESSION AND USE OF COLLEGE FACILITIES (Aug. 12, 2020), https://pol.tasb.org/Policy/Download/304?filename=DGC(LOCAL).pdf.
[32] *McAdams v. Marquette University*, 914 N.W.2d 708, 731 (Wis. 2018).
[33] *Id.* at 737.
[34] *Id.* at 730.
[35] *Id.*

record as a teacher and scholar."[36] This "stringent standard" is "[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member's fitness for the position."[37]

Accordingly, academic freedom protects not only a faculty member's research or teaching but limits the ability of an institution to restrict faculty members' speech outside of the classroom. This provides an important safeguard against external pressures on an institution that would chill research or teaching: if speech outside of a classroom were the proper subject of regulation, then institutions—under the pressure of the public, legislators, or donors—could impose ideological litmus tests on who can conduct research or teaching based on their extramural speech. Indeed, we are not far removed from public university faculty being required to submit to state interrogation regarding their possible involvement with "subversive" organizations or being forced to sign loyalty oaths disavowing socialism or communism as a condition of employment.[38]

Because Collin College recognizes in policy that protecting faculty members' extramural speech against censorship is important to its core functions, the college's interests are insufficient to justify limits on a citizen's expressive rights involving political speech—where the First Amendment's protection is "at its zenith."[39] While the college's administration may fear that allowing its faculty to exercise their civic rights may reflect poorly on the institution's reputation, "[p]ublic perception alone cannot justify a restriction on free speech. . ." and "concern" about "brand or reputation is not sufficient to outweigh" First Amendment rights:

> Voters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either. The idea that the government should be permitted to censor speech in order to avoid public outcry was raised and dismissed in the Civil Rights era. . . . The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public. . . .[40]

C. Collin College's Condemnation and Written Warning Go Beyond Mere Criticism

The First Amendment provides no privilege to be free from criticism, however caustic, including from the leadership of universities and colleges. Indeed, criticism is a form of "more

---

[36] *Id.* at 731–32, citing AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).
[37] *Id.* at 732 (cleaned up).
[38] *See, e.g.*, *Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589, 594 (1967).
[39] *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).
[40] *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2, 29–31 (W.D. Tenn. June 14, 2019).

speech," the remedy to offensive expression that the First Amendment prefers to censorship.[41] However, courts across the country have held that "retaliatory speech" violates the First Amendment where it "intimat[es] that some form of punishment or adverse regulatory action"[42] may follow, and the "mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect."[43]

Here, Collin College's public-facing statement recognized that Burnett's tweets "may" be protected by the First Amendment. However, the email sent to those at the college intimated that adverse action might follow, sharing that the "execution of [the college's] personnel policies will not be played out in a public manner[.]" If Burnett's speech were more than *theoretically* protected speech, then there are no "personnel policies" to "execut[e]."

We do not need a crystal ball to determine whether or not it is reasonable to read this statement as intimating that adverse action would follow: Adverse action *did* follow, when Burnett was presented with a written warning concerning her "personal" use of college resources. That warning—utilized by the college in progressive employee discipline[44]—expressly invokes Burnett's posting of her "views" on her "personal social media," establishing a causal link between her speech and the issuance of the "feedback." The form does not identify what conduct, in particular, by Burnett violated any policy concerning personal use of institutional resources.

This lack of specificity is concerning. District policy governing use of college technological resources expressly *permits* "incidental personal use that does not otherwise violate" college policy "or have an adverse effect on [college] resources[.]"[45] It is difficult to imagine that responding to unsolicited emails—sent to that address because critical media outlets, through no effort of the faculty member, identified the professor's employer—is not an "incidental" use. If there is some other "use" that the college believes violates that policy, it should identify that impermissible use in order to give Burnett an opportunity to avoid violating policy.[46]

---

[41] *Whitney v. California*, 274 U.S. 357, 377 (1927).

[42] *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the "question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . . .").

[43] *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original). Notably, the United States Court of Appeals for the Fifth Circuit recently held that even a "formal reprimand" may be violate the First Amendment. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

[44] *Coaching and Discipline Instructions*, *supra* note 9.

[45] COLLIN CNTY. CMTY. COLL. DIST., TECHNOLOGY RESOURCES (Nov. 7, 2017), https://www.collin.edu/hr/boardpolicies/Nov2017/CRlocalApproved.pdf.

[46] The college's form also warns Burnett against "copying what appears to be private or personal communications to others via their Collin.edu email accounts." This is ambiguous. Is Burnett being warned against using the carbon copy function to send "private or personal" emails to others at the college? If so, the college should identify those emails. Alternatively, is she being directed not to *reproduce* emails sent to her

Moreover, invoking an inapplicable policy in a response flowing from Burnett's protected expression is designed to have a chilling effect. The college may be in search of some action it can take in order to sate Burnett's critics, but the law forbids it from doing so.

III. Conclusion

Collin College cannot punish a faculty member for commenting as a citizen on national political affairs, even if others—whether colleagues, the public, or their representatives in the halls of the legislature—find her comments offensive. District policy provides—rightly— that faculty members have "a right to expect the Board and the [college's] administrators to uphold vigorously the principles of academic freedom and to protect the faculty from harassment, censorship, or interference from outside groups and individuals."

Accordingly, we call on Collin College to:

(1) Confirm to Burnett, by 12:00 p.m. on Monday, October 19, that Collin College will cancel the Monday meeting concerning the written warning;
(2) Affirm, without reservation, that Burnett's comments are protected by the First Amendment; and
(3) Withdraw the written warning concerning "personal" use of college resources.

We respectfully request receipt of a response to this letter no later than the close of business on October 23, 2020.

Sincerely,

Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

college email address? If so, that restriction would violate Burnett's First Amendment right to share information lawfully obtained or received without solicitation. *See, Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876

Rebecca Bradley
rbradley@abernathy-law.com

1700 Redbud Boulevard, Suite 300 | McKinney, Texas 75070-1210
Main: 214.544.4000 | Fax: 214.544.4044

November 10, 2020

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

VIA CERTIFIED MAIL

Re: **Public Information Request from Amy Powell to the Collin College dated and received October 28, 2020.**
Our File No. AP-102820

To Whom It May Concern:

This letter is written on behalf of the Collin College ("College") in response to a request for public information dated and received October 28, 2020 from Amy Powell with FOIA Professional Services ("Powell").

The College is seeking an Attorney General's opinion regarding Powell's request for the following information (the "Request"):

"Under the Texas Public Information Act, §6252-17a et seq., I am requesting a copy of the current TimelyMD Contract with Collin College."

A copy of Powell's written request is attached as **Exhibit "A."** According to the interpretations by the Attorney General, the College has ten (10) business days to respond to Powell's request. Therefore, the College's request is timely filed.

Moreover, Section 52.301(e)(1)(A)-(D) of the Texas Government Code requires the College to submit to the attorney: (1) written comments stating the applicability of exceptions; (2) a copy of the written request for information; (3) a signed statement as to the date the written request for information was received; and (4) a copy of the specific information requested no later than the 15th business day after the date of receiving the written request. Thus, The College's required brief is timely filed.

The College contacted Mr. Griffin Sharp with TimelyMD, the third party referenced in this request ("TimelyMD") (herein also referred to as "Third Party") to seek clarification as to whether it objected to the release of the requested information. TimelyMD objected to the release of its information on November 5, 2020, stating that "disclosing such agreement will be harmful to TimelyMD and provide an advantage to TimelyMD's competitors." *See* **"Exhibit B."** The College also sent a third party letter to TimelyMD explaining its rights with regard to submitting information to the Attorney General related to this request from the College. *See* **Exhibit "C."**

The College asserts that documents responsive to Powell's request are excepted from disclosure, in party or in their entirety, under the following exceptions to the Public Information Act and objects to the disclosure of the requested information. The College relies on the comments and briefs, if any, submitted to the Attorney General by interested Third Parties, as discussed in the sections below.

1. Section 552.110: Confidentiality of Trade Secrets and Certain Commercial or Financial Information

Section 552.110 of the Texas Government Code protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

1) the extent to which the information is known outside of [the company's] business;
2) the extent to which it is known by employees and others involved in [the company's] business;
3) the extent of measures taken by [the company] to guard the secrecy of the information;
4) the value of the information to [the company] and to [its] competitors;
5) the amount of effort or money expended by [the company] in developing this information; and
6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). The Attorney General must accept a claim that information is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). The information at issue has not been publicly revealed and the confidentiality of the records has been maintained by the College.

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999). The College provided TimelyMD with a third party notification at the time of this letter. *See* **Exhibit "C."**

2. Section 552.1101: Confidentiality of Proprietary Information

Section 552.1101 provides:

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;
(B) organizational structure;
(C) staffing;
(D) internal operations;
(E) processes; or

> (F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and
>
> (2) give advantage to a competitor.
>
> ...
>
> (c) The exception to disclosure provided by Subsection (a) may be asserted only by a vendor, contractor, potential vendor, or potential contractor in the manner described by Section 552.305(b) for the purpose of protecting the interests of the vendor, contractor, potential vendor, or potential contractor. A governmental body shall decline to release information as provided by Section 552.305(a) to the extent necessary to allow a vendor, contractor, potential vendor, or potential contractor to assert the exception to disclosure provided by Subsection (a).

This request for an opinion is submitted to give the Third Parties an opportunity to make this required factual or evidentiary showing if they wish to do so in accordance with Section 552.305 of the Act and Subsection (c) above.

Accordingly, as previously stated, in conjunction with this request, the College notified the Third Party, identified above, of the request and of its rights to submit arguments to the Attorney General as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). Based on the foregoing, the College respectfully requests the Texas Attorney General consider any comments submitted by the interested Third Party before requiring the College to release the documents attached as **Exhibit "D."**

In summary, the information requested contained in **Exhibit "D"**, should be withheld in its entirety under Sections 552.110 and 552.1101 or, in the alternative, certain information containing the above referenced exceptions should be withheld.

The College requests consideration of this request. Thank you for your cooperation and assistance in this regard.

Yours truly,

Rebecca L. Bradley

Rebecca Bradley

RLB/slb

Enclosures

3234480

cc: Amy Powell (via *Certified Mail, no attachments*)
FOIA Professional Services
P.O. Box 852107
Mobile, AL 36685

EXHIBIT A

From: Amy Powell
Sent: Wednesday, October 28, 2020 8:34 AM
To: Public Info publicinfo@collin.edu >
Subject: Public Record Request

Dear Collin College (TX),
Under the Texas Public Information Act, §6252-17a et seq., I am requesting a copy of the current TimelyMD Contract with Collin College.
Here is a link to a Press release regarding the contract:
http://www.collincollegenews.com/2020/09/01/collin-college-offers-24-7-telehealth-access-for-students-adjunct-faculty-and-part-time-staff/
I ask that the information be provided electronically by email if possible. If there are any fees for searching or copying these records, please inform me before filing my request. Should you deny my request, or any part of the request, please state in writing the basis for the denial.
Please confirm receipt of this request.
Kind Regards,
Amy Powell
FOIA Professional Services
foiaprofessionalservices.com
Email:
Mailing address:
FOIA Professional Services
PO BOX 852107
Mobile, AL 36685
Phone: 877-264-8462

EXHIBIT B

From: Griffin Sharp
Sent: Thursday, November 5, 2020 11:41 AM
To: Rebecca Bradley
Subject: TimelyMD Public Information Request - Response

Hello Becca,

Below please find the statement from TimelyMD in response to the Public Information Request that we discussed yesterday via phone. Please let me know if there is anything else you need from us. Thank you.

"Pursuant to Texas Government Code Section 552.104, TimelyMD requests that its client agreement with Collin College not be made available and, instead, be withheld since disclosing such agreement will be harmful to TimelyMD and provide an advantage to TimelyMD's competitors."

Griffin Sharp
Client Success Manager, TimelyMD
860.977.1177 (m) | 817.835.7554 ext 912 (o) | timely.md

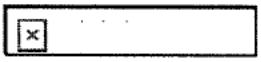

EXHIBIT C

A | R | B | H
ABERNATHY ROEDER
BOYD HULLETT
EST. 1876

COPY

Rebecca Bradley
rbradley@abernathy-law.com

1700 Redbud Boulevard, Suite 300 | McKinney, Texas 75070-1210
Main: 214.544.4000 | Fax: 214.544.4044

November 10, 2020

Griffin Sharp, Client Success Manager
TimelyMD
1315 S. Adams Street
Fort Worth, TX 76104

VIA EMAIL

Re: **Public Information Request from Amy Powell to the Collin College dated and received October 28, 2020.**
Our File No. AP-102820

To Whom It May Concern:

This letter is written on behalf of the Collin College ("College") in response to a request for public information dated and received October 28, 2020, from Amy Powell with FOIA Professional Services ("Powell" or "Requestor").

The College is seeking an Attorney General's opinion regarding Powell's request for the following information (the "Request"):

"Under the Texas Public Information Act, §6252-17a et seq., I am requesting a copy of the current TimelyMD Contract with Collin College."

Information identifying you and/or your interests is included in the requested documents.

The requested information may be excepted from disclosure by, among others, Section 552.101 of the Government Code. A copy of the request for information and a copy of our request to the Attorney General are enclosed for your reference. Pursuant to section 552.301 of the Government Code, the College will seek an Attorney General decision to determine whether the College must release the requested information. The College is providing the Attorney General with a copy of the request for information and a copy of the requested information, along with other material required by the Act.

Under the Act, all information held by governmental bodies is open to public disclosure unless it falls within one of the Act's specific exceptions to disclosure. The Act places on the custodian of records the burden of demonstrating that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, in cases such as this one, where a third party's privacy interest is implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. Gov't. Code § 552.305; Open Records Decision No. 542 (1990).

If you wish to claim that the requested information is protected proprietary information, you have the right to submit additional information or legal briefing to the Attorney General not later than ten (10) business days after your receipt of this notice. You are not required to submit briefing to the Attorney General, but if you decide not to submit briefing, the Office of the Attorney General will presume that you have no property interest in the requested information being released to the public.

If you submit briefing to the Attorney General, you must:

a) identify the legal exceptions that apply;

b) identify the specific parts of each document that are covered by each exception; and

c) explain why each exception applies. Gov't Code § 552.305(d).

A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436. If you do not have access to the information at issue, please contact me to review the same. The Act does not require the Attorney General to raise and consider exceptions that have not been raised. The Attorney General is generally required to issue a decision within forty-five (45) working days. You must send your written comments to the Office of the Attorney General at the following address:

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

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e).

Amy Powell
FOIA Professional Services
P.O. Box 852107
Mobile, AL 36685

If you have any questions about this notice or release of information under the Act, please contact the Attorney General's Office.

Yours truly,

S / Rebecca Bradley

RLB/slb
Enclosures *PIA Request Dated October 28, 2020*
Letter to the Attorney General dated November 10, 2020 (without exhibits)

3234794

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I ask that the information be provided electronically by email if possible. If there are any fees for searching or copying these records, please inform me before filing my request. Should you deny my request, or any part of the request, please state in writing the basis for the denial.
Please confirm receipt of this request.
Kind Regards,
Amy Powell
FOIA Professional Services
foiaprofessionalservices.com
Email:
Mailing address:
FOIA Professional Services
PO BOX 852107
Mobile, AL 36685
Phone: 877-264-8462

A | R | B | H

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Rebecca Bradley
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1700 Redbud Boulevard, Suite 300 | McKinney, Texas 75070-1210
Main: 214.544.4000 | Fax: 214.544.4044

November 10, 2020

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

VIA CERTIFIED MAIL

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This request for an opinion is submitted to give the Third Parties an opportunity to make this required factual or evidentiary showing if they wish to do so in accordance with Section 552.305 of the Act and Subsection (c) above.

Accordingly, as previously stated, in conjunction with this request, the College notified the Third Party, identified above, of the request and of its rights to submit arguments to the Attorney General as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). Based on the foregoing, the College respectfully requests the Texas Attorney General consider any comments submitted by the interested Third Party before requiring the College to release the documents attached as **Exhibit "D."**

In summary, the information requested contained in **Exhibit "D"**, should be withheld in its entirety under Sections 552.110 and 552.1101 or, in the alternative, certain information containing the above referenced exceptions should be withheld.

The College requests consideration of this request. Thank you for your cooperation and assistance in this regard.

Yours truly,

Rebecca L. Bradley

Rebecca Bradley

RLB/slb

Enclosures

3234480

cc: Amy Powell (via *Certified Mail, no attachments*)
FOIA Professional Services
P.O. Box 852107
Mobile, AL 36685