

CAUSE NO. 2018528740

cdm

DOLCEFINO COMMUNICATIONS, LLC DBA	§	IN THE DISTRICT COURT OF
DOLCEFINO CONSULTING,	§	
Plaintiff	§	
vs.	§	LUBBOCK COUNTY, TEXAS
	§	
TEXAS TECH UNIVERSITY,	§	
Defendant	§	99 <sup>th</sup> JUDICIAL DISTRICT

**DEFENDANT'S ORIGINAL ANSWER WITH AFFIRMATIVE DEFENSES,  
AND PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE WILLIAM C. SOWDER:

Defendant, Texas Tech University (hereafter "Defendant" or "TTU"), by and through its attorney of record, and the undersigned Assistant Attorney General, and files this Original Answer with Affirmative Defenses to Plaintiff's Original Petition. Defendant also files its Plea to the Jurisdiction.

**I. GENERAL DENIAL**

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendant TTU denies each and every, all and singular, the allegations of Plaintiff's Original Petition, and demands strict proof thereof. Defendant TTU denies that Plaintiff is entitled to any relief whatsoever.

**II. AFFIRMATIVE DEFENSES**

Pleading further, and in addition to its General Denial, TTU asserts the following affirmative defenses:

1. All actions taken by Defendant with respect to Plaintiff were justified, in good faith, and without malice;

2. Defendant asserts all applicable sovereign, official, and other immunities to Plaintiff's claims, including but not limited to any entitlement to caps and limits on damages or other demanded relief;
3. Defendant asserts the right to raise additional defenses that become apparent through the further factual or legal development of the case.

## **DEFENDANT'S PLEA TO THE JURISDICTION**

### **I. INTRODUCTION**

Dolcefino Communications, LLC d/b/a Dolcefino Consulting's ("Dolcefino") lawsuit has its roots in the termination of Coach Mike Leach from his position as head coach of the TTU's football program several years ago. TTU terminated his employment for cause and paid all money due under the contract. He sued. The courts held that sovereign immunity barred his claim. Not content, he later told the public he hired a private investigator to make public information requests of TTU to yield damaging information that would cause the University to pay Leach the sums he still believes he is owed. But the courts have already rejected his claims for additional money, and the statute of limitations bars any new claims. Any payment by TTU to Leach would violate the gift clause of the Texas Constitution by applying public funds to private use. In short, there is no lawful basis for TTU to pay Leach. Moreover, the doctrine of sovereign immunity that barred Leach's earlier lawsuit also bars this particular lawsuit.

## II. ARGUMENT AND AUTHORITIES

### A. Sovereign Immunity

Whether a trial court has subject matter jurisdiction is a question of law. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *see, e.g., Ex parte Springsteen*, 506 S.W.3d 789, 798 n.50 (Tex. App.—Austin 2016, pet. denied) (citing *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (per curiam)). Governmental immunity from suit implicates a court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Houston Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016); *Miranda*, 133 S.W.3d at 226.

When, as here, a plea to the jurisdiction challenges the pleadings, courts must look to the pleader's intent, construe the pleadings liberally in favor of jurisdiction, and accept the allegations in the pleadings as true to determine if the pleader has alleged sufficient facts to affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Heckman*, 369 S.W.3d at 150; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009); *Miranda*, 133 S.W.3d at 226. When the pleadings fail to allege sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate an incurable jurisdictional defect, the issue is one of pleading sufficiency, and the plaintiff should be given an opportunity to amend. *Miranda*, 133 S.W.3d at 226-27. If the pleadings affirmatively negate the existence

of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

**B. Dolcefino’s Requests Are Withdrawn by Operation of Law; Therefore, This Court Lacks Jurisdiction over Its Claims.**

Dolcefino asserts claims with respect to fourteen separate requests for information under the Public Information Act (“PIA”) (Chapter 552 of the Texas Government Code). Twelve of those requests are withdrawn by operation of law because, as explained below, Dolcefino failed to comply with Section 552.2615 of the PIA. (“the request is considered automatically withdrawn if the requestor does not respond. . . .”) Accordingly, these claims cannot be the basis for any claims—under the PIA or the Uniform Declaratory Judgments Act (“UDJA”) (Chapter 37 of the Texas Civil Practices and Remedies Code). As to the remaining two, TTU does not challenge the Court’s jurisdiction under the PIA.

**September 21, 2017, Request.**

This request (comprising several parts because Dolcefino sent TTU nine requests in one day, then withdrew three of them, and now, five of the remaining six form part of the basis for Dolcefino’s lawsuit) was withdrawn by operation of law and cannot serve as a basis for the Court’s jurisdiction in a PIA suit against TTU. TEX. GOV’T CODE §§ 552.261(e); .2615(b).

(b) A request described by Subsection (a) is considered to have been withdrawn by the requestor **if the requestor does not respond in writing to the itemized statement** by informing the governmental body **within 10 business days** after the date the statement is sent to the requestor that:

(1) the requestor will accept the estimated charges;

- (2) the requestor is modifying the request in response to the itemized statement; or
- (3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

TEX. GOV'T CODE § 552.2615(b) (emphasis added).

A “request described by Subsection (a)” means:

Sec. 552.2615. REQUIRED ITEMIZED ESTIMATE OF CHARGES.

- (a) If a request for a copy of public information will result in the imposition of a charge under this subchapter that exceeds \$40, or a request to inspect a paper record will result in the imposition of a charge under Section 552.271 that exceeds \$40, the governmental body shall provide the requestor with a written itemized statement that details all estimated charges that will be imposed, including any allowable charges for labor or personnel costs. If an alternative less costly method of viewing the records is available, the statement must include a notice that the requestor may contact the governmental body regarding the alternative method. The governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:
  - (1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;
  - (2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and
  - (3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents

transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

TEX. GOV'T CODE § 552.2615(a).

TTU sent Dolcefino a cost estimate for the September 21, 2017, request, as well as a revised estimate when the request was narrowed by Dolcefino. The first estimate, for \$18,422.50, was sent by U.S. Certified Mail on October 5, 2017; the revised estimate, for \$4,666.00, was sent by U.S. Certified Mail on October 23, 2017. TEX. GOV'T CODE § 552. 2615(e)(2). Dolcefino responded to the first notice of the estimated charges by narrowing his request, but did not respond to the revised estimate as set out in TEX. GOV'T CODE § 552. 2615(b). Dolcefino could have accepted the proposed charges or filed a complaint with the attorney general alleging that he was being overcharged. TEX. GOV'T CODE § 552. 2615(b). The deadline for Dolcefino to do either was **ten business days** after October 23, 2017, when the cost statement was sent to him, though TTU allowed thirty business days due to vague statutes and an abundance of caution. Dolcefino did not accept or pay the charges, or file a complaint with the attorney general within even the more generous thirty business days TTU gave him. Accordingly, the request is considered withdrawn. TEX. GOV'T CODE § 552.2615(b).

The Court's jurisdiction over TTU in a PIA case requires that TTU refuse to supply public information in response to a request. At the very least there must be a "request" at the heart of a plaintiff's PIA lawsuit. Dolcefino's September 21, 2017, request is withdrawn as a matter of law and therefore cannot serve as grounds for the Court's jurisdiction. Furthermore, since the September 21, 2017 request is

withdrawn, Dolcefino is not a “requestor” with respect to it, thus, he lacks standing under TEX. GOV’T CODE § 552.321(a).

Sec. 552.321. SUIT FOR WRIT OF MANDAMUS.

- (a) A **requestor** or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection **if the governmental body** refuses to request an attorney general's decision as provided by Subchapter G or **refuses to supply public information** or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.

TEX. GOV’T CODE § 552. 321(a). (Emphases added).

Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). (“*Bland*”) Therefore, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the September 21, 2017, requests.

**October 9, 2017, Request.**

On October 9, 2017, Dolcefino sent a PIA request to TTU seeking “any completed investigation into the alleged mistreatment of Adam Jones by Mike Leach” (Emphasis added). On October 23, 2017 TTU responded to Dolcefino via email that “Texas Tech University does not have any documents regarding any alleged mistreatment of anyone by the name of ‘Adam Jones.’ If you are referring to the incident that eventually led to Coach Leach’s termination, then I assume you are referring to the mistreatment of ‘Adam James.’ However, TTU does not have a completed investigation report regarding Leach’s

mistreatment of Adam James as the completion of the report was interrupted by the litigation ensuing upon Coach Leach’s termination.”

Section 552 of the PIA defines “public information” as “information that is collected, assembled, or maintained” by a governmental body. The Supreme Court of Texas in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995), has interpreted this to mean that the Act compels disclosure of public information that is in existence but that the Act does not require a governmental entity to prepare or assemble new information in response to a request.

Thus, TTU is not refusing to produce public information to Dolcefino with respect to the October 9, 2017, request—the information simply does not exist as he has requested it. In fact, even if you read this request as broader than it actually is, Dolcefino’s October 27, 2017 request covers all of the documents responsive to this request, and TTU did not refuse to produce the information requested by Dolcefino’s October 27, 2017 request (see below). Refusal by TTU to produce public information is a prerequisite to the Court’s jurisdiction over TTU in this PIA case. TEX. GOV’T CODE § 552.321(a). (“Where, as here, the plea to the jurisdiction challenges the existence of jurisdictional facts—i.e., whether the City ‘refuses to supply public information or information that the attorney general has determined is public information,’ TEX. GOV’T CODE § 552.321—we consider evidence that the parties have submitted when necessary to resolve the jurisdictional issues raised.”) *City of El Paso v. Abbott*, 444 S.W.3d 315, 320 (Tex.App.–Austin 2014, pet. denied), citing *Bland*, 34

S.W.3d at 555. Therefore, this Court lacks the jurisdiction necessary to consider Dolcefino's claims against TTU with respect to the October 9, 2017 request.

**October 10, 2017, Request.**

On October 10, 2017, Dolcefino sent a PIA request to TTU seeking emails sent by Texas Tech University Board of Regents member L. Frederick Francis "which relate to University business." On October 24, 2017, TTU sent Dolcefino a cost estimate stating that the cost to retrieve and produce the requested information would be \$2,127.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 10, 2017, request is withdrawn, TEX. GOV'T CODE § 552.2615(b). Consequently, as explained above regarding Dolcefino's September 21, 2017 requests, Dolcefino is not a "requestor" with respect to this request, and he lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a). As a direct result, this Court lacks jurisdiction necessary to consider Dolcefino's claims against TTU with respect to the October 10, 2017, request.

**October 11, 2017, Request.**

On October 11, 2017, Dolcefino sent a PIA request to TTU seeking "documents detailing the General Ledger Funds and Expenses of the Texas Tech Football Team between January 1, 2015, and October 1, 2017." On October 25, 2017, TTU responded to Dolcefino that it did not have the information requested or the ability to create it. ("Texas Tech University does not have the ability to create a 'General Ledger Funds

and Expenses’ report specific to the Texas Tech Football Team as you have requested . . . nor do we have any such document.”)

Section 552 of the PIA defines “public information” as “information that is collected, assembled, or maintained” by a governmental body. The Supreme Court of Texas in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995), has interpreted this to mean that the Act compels disclosure of public information that is in existence but that the Act does not require a governmental entity to prepare or assemble new information in response to a request.

Thus, TTU is not refusing to produce public information to Dolcefino with respect to the October 11, 2017, request—the information simply does not exist in the requested format. Refusal by TTU to produce public information is a prerequisite to the Court’s jurisdiction over TTU in this PIA case. TEX. GOV’T CODE § 552.321(a). (“Where, as here, the plea to the jurisdiction challenges the existence of jurisdictional facts—i.e., whether the City ‘refuses to supply public information or information that the attorney general has determined is public information,’ TEX. GOV’T CODE § 552.321—we consider evidence that the parties have submitted when necessary to resolve the jurisdictional issues raised.”) *City of El Paso v. Abbott*, 444 S.W.3d 315, 320 (Tex.App.–Austin 2014, pet. denied), citing *Bland*, 34 S.W.3d at 555. Therefore, this Court lacks the jurisdiction necessary to consider Dolcefino’s claims against TTU with respect to the October 11, 2017 request.

**October 12, 2017, Request.**

On October 12, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 13, 2017, (1) from Texas Tech University Board of Regents member Tim Lancaster “which relate to University business,” and (2) between Chancellor Robert Duncan and Tim Lancaster. On October 26, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$1,307.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 12, 2017, request is also withdrawn by statute as stated above with regard to the September 21, 2017 requests, TEX. GOV’T CODE § 552.2615(b). Consequently, Dolcefino is not a “requestor” with respect to this request. Therefore, he lacks standing to assert any claims with respect to it under TEX. GOV’T CODE § 552.321(a), and this Court also lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 12, 2017, request.

**October 13, 2017, Request.**

On October 13, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 13, 2017, (1) from Texas Tech University Board of Regents member John Esparza “which relate to University business,” and (2) between Chancellor Robert Duncan and John Esparza. On October 27, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$1,115.00, and that unless Dolcefino responded

within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 13, 2017, request is withdrawn, TEX. GOV'T CODE § 552.2615(b). Accordingly, Dolcefino is not a “requestor” with respect to this request, lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a), and this Court, consequently, lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 13, 2017, request.

**October 16, 2017, Request.**

On October 16, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 16, 2017, (1) from Texas Tech University Board of Regents member Mickey L. Long “which relate to University business,” and (2) between Chancellor Robert Duncan and Mickey L. Long. On October 30, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$307.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 16, 2017, request is also withdrawn, TEX. GOV'T CODE § 552.2615(b). As a result, Dolcefino is not a “requestor” with respect to this request, lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a), and this Court, again, lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 16, 2017, request.

**October 17, 2017, Request.**

On October 17, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 17, 2017, (1) from Texas Tech University Board of Regents member Ronnie Hammonds “which relate to University business,” and (2) between Chancellor Robert Duncan and Ronnie Hammonds. On October 31, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$217.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 17, 2017, request is also statutorily withdrawn, TEX. GOV’T CODE § 552.2615(b). Dolcefino is, therefore, not a “requestor” with respect to this request, and he lacks standing to assert any claims with respect to it under TEX. GOV’T CODE § 552.321(a). Thus, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 17, 2017 request.

**October 18, 2017, Request.**

On October 18, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 18, 2017, (1) from Texas Tech University Board of Regents member Christopher M. Huckabee “which relate to University business,” and (2) between Chancellor Robert Duncan and Christopher M. Huckabee. On November 1, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$3,080.00, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or

filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 18, 2017, request is also withdrawn, TEX. GOV'T CODE § 552.2615(b). Since Dolcefino is not a “requestor” with respect to this request, he lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a). Consequently, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 18, 2017 request.

**October 19, 2017, Request.**

On October 19, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 19, 2017, (1) from Texas Tech University Board of Regents member J. Michael Lewis “which relate to University business,” and (2) between Chancellor Robert Duncan and J. Michael Lewis. On November 2, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$172.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 19, 2017, request is statutorily withdrawn, TEX. GOV'T CODE § 552.2615(b). Thus, Dolcefino is not a “requestor” with respect to this request, and he lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a). Therefore, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 19, 2017 request.

**October 20, 2017, Request.**

On October 20, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 20, 2017, (1) from Texas Tech University Board of Regents member John Steinmetz “which relate to University business,” and (2) between Chancellor Robert Duncan and John Steinmetz. On November 3, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$2,970.00, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 20, 2017, request is, again, withdrawn, TEX. GOV’T CODE § 552.2615(b). As a result, Dolcefino is not a “requestor” with respect to this request, and he lacks standing to assert any claims with respect to it under TEX. GOV’T CODE § 552.321(a). Hence, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 20, 2017 request.

**October 23 2017, Request.**

On October 23, 2017, Dolcefino sent a PIA request to TTU seeking all emails between January 1, 2016, and October 23, 2017, (1) from Texas Tech University Board of Regents member John Walker “which relate to University business,” and (2) between Chancellor Robert Duncan and John Walker. (Dolcefino’s petition mistakenly alleges that this request was dated October 22, 2017). On November 6, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$1,164.00, and that unless Dolcefino

responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 23, 2017, request is withdrawn by statute, TEX. GOV'T CODE § 552.2615(b). Therefore, Dolcefino is not a “requestor” with respect to this request, and he lacks standing to assert any claims with respect to it under TEX. GOV'T CODE § 552.321(a). Accordingly, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 23, 2017 request.

**October 25, 2017, Request.**

On October 25, 2017, Dolcefino sent a PIA request to TTU seeking all emails amid January 1, 2016, and October 25, 2017, between Chancellor Robert Duncan and L. Frederick Francis. On November 8, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$127.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino did neither, so the October 25, 2017, request is also withdrawn, TEX. GOV'T CODE § 552.2615(b). Consequently, Dolcefino is not a “requestor” with respect to this request, and he lacks standing to assert any claims with respect to this request under TEX. GOV'T CODE § 552.321(a). As a direct result, this Court lacks jurisdiction to consider Dolcefino’s claims against TTU with respect to the October 25, 2017 request.

**October 27, 2017, Request.**

On October 27, 2017, Dolcefino sent a PIA request to TTU seeking information related to an investigation of allegations against Mike Leach, and emails sent or received by Chancellor Kent Hance relating to Mike Leach from September 1, 2009 to February 28, 2010. On November 10, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$494.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino paid the estimated charges, and TTU sent over 300 responsive pages. TTU also timely asked for a ruling from the attorney general with respect to other responsive information pursuant to TEX. GOV'T CODE § 552.301, and that ruling remains pending with the Attorney General's office. TTU does not contest the Court's jurisdiction under the PIA over Dolcefino's PIA claims with respect to the October 27, 2017, request; however, TTU hereby requests that the court abate these proceedings until the Attorney General has ruled on this matter in accordance with the court's discretion as stated in *Kallinen v. City of Houston*, 462 S.W.3d 25, 28-29 (Tex. 2015) as any delay will not impinge on Dolcefino's right to information since the documents requested are over eight years old.

**November 6, 2017, Request.**

On November 6, 2017, Dolcefino sent a PIA request to TTU seeking:

1. A copy of Kelly Overly's resume.

2. Copies of all publicly releasable documents from Kelly Overly's personnel file.
3. Copies of any email correspondence between Kelly Overly and Kent Hance for all time.

On November 20, 2017, TTU sent Dolcefino a cost estimate, stating that the cost to retrieve and produce the requested information would be \$169.50, and that unless Dolcefino responded within thirty business days by sending a deposit or bond (or filing a complaint with the Attorney General about being overcharged) his request would be considered withdrawn. Dolcefino paid the estimated charges, and TTU sent over 250 responsive pages. TTU also timely asked for a ruling from the attorney general with respect to other responsive information pursuant to TEX. GOV'T CODE § 552.301, and that ruling remains pending with the Attorney General's office. TTU does not contest the Court's jurisdiction under the PIA over Dolcefino's PIA claims with respect to the November 6, 2017, request; however, TTU hereby requests that the court abate these proceedings until the Attorney General has ruled on this matter in accordance with the court's discretion as stated in *Kallinen v. City of Houston*, 462 S.W.3d 25, 28-29 (Tex. 2015) as any delay will not impinge on Dolcefino's right to information since the documents requested are over eight years old.

**November 30, 2017, Request.**

On November 30, 2017, Dolcefino sent a PIA request to TTU seeking "all publicly releasable documents including but not limited to any disciplinary action, internal investigation and or complaints filed against **Kent Hance** since January 1, 2014." On December 14, 2017, after a thorough search, TTU

responded to Dolcefino via email that “Texas Tech University does not have any documents responsive to this request.”

Section 552 of the PIA defines “public information” as “information that is collected, assembled, or maintained” by a governmental body. The Supreme Court of Texas in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995), has interpreted this to mean that the Act compels disclosure of public information that is in existence but that the Act does not require a governmental entity to prepare or assemble new information in response to a request.

Thus, TTU is not refusing to produce public information to Dolcefino with respect to the November 30, 2017, request—the information simply does not exist. In fact, TTU found no evidence that any disciplinary action, internal investigation and or complaints had ever been filed or even alleged against Mr. Hance. Refusal by TTU to produce public information is a prerequisite to the Court’s jurisdiction over TTU in this PIA case. TEX. GOV’T CODE § 552.321(a). (“Where, as here, the plea to the jurisdiction challenges the existence of jurisdictional facts—i.e., whether the City ‘refuses to supply public information or information that the attorney general has determined is public information,’ TEX. GOV’T CODE § 552.321—we consider evidence that the parties have submitted when necessary to resolve the jurisdictional issues raised.”) *City of El Paso v. Abbott*, 444 S.W.3d 315, 320 (Tex.App.–Austin 2014, pet. denied), citing *Bland*, 34 S.W.3d at 555. Therefore, this Court lacks the jurisdiction necessary to consider Dolcefino’s claims against TTU with respect to the November 30, 2017 request.

**C. This Court Lacks Jurisdiction over TTU under The Uniform Declaratory Judgment Act as a Matter of Law.**

Sovereign and governmental immunities encompass two distinct principles, immunity from suit and immunity from liability. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) (“*Miranda*”). Immunity from liability is an affirmative defense subject to waiver, but immunity from suit deprives a court of subject-matter jurisdiction. *Miranda*, 133 S.W.3d at 224. Immunity from suit is thus properly asserted in a plea to the jurisdiction. *Reyes v. City of Laredo*, 335 S.W.3d 605, 606 (Tex. 2010) (per curiam) (quoting *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999)).

The Uniform Declaratory Judgments Act (“UDJA”), TEX. CIV. PRAC. & REM. CODE §§37.001-.011, “does not enlarge the trial court's jurisdiction but is ‘merely a procedural device for deciding cases already within a court's jurisdiction.’” *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (per curiam) (“*Sefzik*”) (quoting *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (“*Sawyer Trust*”). Accordingly, the UDJA “is not a general waiver of sovereign immunity.” *Sawyer Trust*, 354 S.W.3d at 388. Instead, the UDJA only “waives sovereign immunity in particular cases.” *Sefzik*, 355 S.W.3d at 622.

Immunity does not bar an *ultra vires* claim for prospective injunctive and declaratory relief against individual governmental officials acting in their official capacities even if a declaration mandates payment of money, *City of El Paso v. Heinrich*, 284 S.W.3d 284, 372–73 (Tex. 2009), but a governmental entity cloaked with sovereign immunity remains immune from suit. *Texas Dept. of Ins. v.*

*Reconveyance Services, Inc.*, 306 S.W.3d 256, 258 (Tex. 2010). Texas law provides that “sovereign immunity bars UDJA actions against the state and its political subdivisions absent a legislative waiver.” *Sefzik*, 355 S.W.3d at 620. Dolcefino has not brought an *ultra vires* suit against an official; he has sued only TTU, a state governmental entity. TEX. GOV'T CODE § 554.001(5)(A); TEX. EDUC. CODE §61.003,); TEX. EDUC. CODE Chapter 109.

The legislature created an explicit waiver of sovereign immunity in the PIA. TTU does not challenge Dolcefino’s general right to sue TTU under the PIA and to seek mandamus relief. *See* TEX. GOV'T CODE §552.321(a) (providing that requestor “may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection”). TTU does, however, challenge Dolcefino’s right to sue TTU under the UDJA, for two reasons. First, any relief available under the UDJA would be redundant of the relief available under the PIA.

“Under the redundant remedies doctrine, courts will not entertain an action brought under the UDJA when the same claim could be pursued through different channels.” *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 79 (Tex. 2015). “The focus of the doctrine is on the initiation of the case, that is, whether the legislature created a statutory waiver of sovereign immunity that permits the parties to raise their claims through some avenue other than the UDJA.” *Id.*

*McLane Co., Inc. v. Texas Alcoholic Beverage Comm'n*, 514 S.W.3d 871, 877 (Tex.App.–Austin 2017, pet. denied) (“*McLane*”)

Second, Dolcefino does not challenge the validity of a statute, the only basis for a waiver of sovereign immunity under the UDJA. (“[T]he UDJA only “waives sovereign immunity in particular cases.” *Sefzik*, 355 S.W.3d at 622. “For example, the

state may be a proper party to a declaratory judgment action that challenges the validity of a statute.” *Id.* However, “the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law.” *Id.* at 621.”) *McLane*, 514 S.W.3d at 877. Dolcefino seeks three declarations (Plaintiff’s Original Petition, ¶41, p. 15), two of which are redundant of remedies available under the PIA:

- (1) The information sought by Dolcefino is public information not excepted from disclosure;
- (2) TTU has a duty to promptly release the requested information to Dolcefino; and
- (3) Certain charges from TTU for the information are unauthorized.

These requests do not seek a declaration concerning the validity of the PIA or any other statute. Instead, they seek a declaration of Dolcefino’s rights under the statute. That is, Dolcefino asks the court to declare that the PIA requires TTU to produce the information that Dolcefino has requested. Therefore, in light of *Sefzik*, the UDJA does not waive TTU's sovereign immunity with respect to these claims. *See McLane*, 514 S.W.3d at 875.

Dolcefino cites no waiver of sovereign immunity for his complaint about unauthorized charges; more to the point, Dolcefino had, but waived, a remedy under the PIA to complain about TTU’s estimated charges. As stated to Dolcefino in every cost estimate letter, he had thirty business days (Section 552.2615 provides for ten business days, but Dolcefino was given 30 business days under 552.231 in an abundance of caution as the requests required manipulation of data) to either pay the costs or complain to the attorney general. He did neither. Section 552.269 of the PIA

(when copies are requested) and Section 552.272 (when copies are not requested) provide that a requestor can either timely pay or *timely* complain, and “a governmental body may impose charges *in accordance with this subchapter.*” Dolcefino asks the Court for relief even though he waived his right to that relief by failing to comply with the process the legislature set out for a requestor to complain about costs.

Therefore, the Court has no jurisdiction over any of Dolcefino’s UDJA claims against TTU because there is no waiver of sovereign immunity for these claims, nor has Dolcefino suggested any. The fact that a plaintiff might have standing to sue a private party under the UDJA has no bearing on whether sovereign immunity is waived for a UDJA suit against the state. The UDJA does not enlarge the trial court’s jurisdiction but is merely a procedural device for deciding cases already within a court’s jurisdiction. *Sefzik*, 355 S.W.3d at 621–22.

### **III. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Texas Tech University prays that the Court grant its plea to the jurisdiction and dismiss all of Plaintiff’s claims with prejudice for lack of subject matter jurisdiction, and for such other and further relief to which Defendants may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via E-service by File & Serve Texas on this the 9th day of February, 2018, to:

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