

BAYLOR UNIVERSITY,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
vs.	§	
	§	MCLENNAN COUNTY, TEXAS
THE BAYLOR UNIVERSITY ALUMNI ASSOCIATION,	§	
	§	
Defendant.	§	74 <sup>TH</sup> JUDICIAL DISTRICT

**Defendant’s Response to Plaintiff’s Motion for Entry of Protective Order**

The Baylor University Alumni Association (“BAA”) submits this response to Motion for Entry of Protective Order filed by Plaintiff Baylor University (“the University”).

**I. Introduction**

For more than a decade, Baylor has pursued a plan to destroy the BAA and to gain control of its functions. The facts revealed through discovery in this case will show that the University devised and executed a calculated attack intended to put the BAA out of business. For example, the BAA anticipates that discovery will yield evidence showing that President Robert Sloan obtained advice from his cabinet about how to eliminate the BAA, and that the BAA’s destruction was among the formal performance goals of Baylor’s high-level administrators. The University seeks to keep evidence like this from the public by obtaining an order from this Court allowing it to designate such materials “confidential.” The BAA contends that this is an inappropriate use of a confidentiality order.

“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” *Acker v. Texas Water Com'n*, 790 S.W.2d 299, 300 (Tex. 1990) (quoting from L. Brandeis, *Other People’s Money* 92 (1914 ed.)). Nonetheless, Baylor University has a long-standing culture of conducting its business in secret and strictly controlling the flow of

information. But when it initiated this lawsuit, the University gave up the right to continue to do so. A party that invokes the power of the public court system should expect that evidence relating to its complaints will become public. The Texas courts are open to the public and do not operate in secrecy; accordingly, “courts should be guided by a principle encouraging the free exchange of information and ideas.” *Garcia v. Peebles*, 734 S.W.2d 343, 349 (Tex. 1987). The BAA strongly supports these principles, and it contends that the evidence surrounding the University’s allegations deserve no special degree of secrecy.

The BAA agrees that a confidentiality order should be entered in this case, but it should allow protection only of information that has a legitimate basis for confidentiality under Texas law. The University’s motion goes far beyond that simple proposition, seeking to cloak with secrecy relevant documents that it finds embarrassing or controversial, perhaps because they reveal inconvenient facts about the University’s governance processes. The University contends that a mere “understanding or reasonable expectation that the information would not become generally available to the public” is enough to secure confidentiality status. This reflexive instinct toward secrecy is emblematic of a broad effort by the University to keep its wrongful conduct hidden from public scrutiny. However, the fact that a document is part of a “private” conversation or was created pursuant to a closed-door process does not make it confidential under Texas law. Baylor *chose* to institute this litigation against its alumni association, and it cannot now take the position that the documents underlying this dispute should continue to be withheld from the BAA’s members, or from the Baylor community as a whole.

The BAA has a right to communicate with its Board of Directors, its membership, and the larger Baylor community about this case. Both the University and the BAA are nonprofit institutions—presumably serving public purposes—and the constituents of these institutions

have a right to know the about the conduct that underlies the allegations. The BAA respectfully submits that its proposed order is appropriate and should be entered.

## **II. Requirements for Entry of a Confidentiality Order.**

1. The University Has the Burden. Like all motions, the party seeking the entry of a confidentiality order has the burden of proving its entitlement to the requested relief. *Garcia v. Peebles*, 734 S.W.2d 343, 345-46 (Tex. 1987).

2. The University Must Prove a Specific Injury. Even in the context of a general confidentiality order, the movant must show “a particular, articulated and demonstrable injury, as opposed to conclusory allegations” in order to justify entry of the order. *Id.* at 345.

3. The Order Must be “Carefully” Tailored. According to the Texas Supreme Court, the public policies favoring shared information demand that any protective order be “carefully tailored” to protect a party’s proprietary interests. *Garcia*, 734 S.W.2d at 348. A court abuses its discretion by entering an overbroad order that unnecessarily restricts the dissemination of information. *Id.*

4. The Order Must Comply with Rule 76a. Court records are presumed to be open to the general public. Tex. R. Civ. P. 76a. To the extent the order purports to seal or otherwise prevent disclosure of “court records” defined by Rule 76a—including certain unfiled discovery—the protective order must comply with Rule 76a’s notice and hearing requirements. Tex. R. Civ. P. 192.6(a) (allowing for sealing or protection of discovery “subject to the provisions of Rule 76a”); *Clear Channel Communications, Inc. v. United Servs. Auto. Ass’n*, 195 S.W.3d 129, 136 (Tex. App.—San Antonio 2006, no pet.) (confidentiality orders must comply with Rule 76a to the extent they concern court records, and it is “irrelevant” whether the sealing request involves a trade secret).

### **III. Merely “Private” Communications Do Not Qualify for Confidentiality Protection.**

The University advances the notion that it should be allowed to shield from disclosure all communications and other documents “made with the understanding or reasonable expectation that the information would not become generally available to the public.” *See* University’s Motion for Protective Order, at ¶ 4 and Ex. 1 at ¶ 3(b) (defining designation criteria for “Classified Information”). However, any protective order in this case should protect confidential information *only if* there is an independent basis for confidentiality under Texas or federal law. In those instances, the document or information should qualify as “Classified Information” under Paragraph 3 of the confidentiality order. Communications or other relevant documents should not be labeled “Classified” Information simply because Baylor claims they were created with a subjective “expectation” of privacy, or made under the cloak of secrecy.

There is no legal basis for an order withholding information on such a broad scale. *See White Rosebay Shipping, S.A. v. HNA Group Co., Ltd*, No. C-12-096, 2013 WL 686409, at \*2 (S.D. Tex. Feb. 25, 2013) (denying request for “impermissibly broad” blanket confidentiality order, where proposed order sought protection of information “which the Producing Party would not normally reveal to third parties except in confidence, or has undertaken to maintain in confidence”). Simply alleging that a communication was made with the intention that it remain private does not lead to the conclusion that the communication is protected from public disclosure, especially when it constitutes relevant evidence in a lawsuit. *See Humphreys v. Caldwell*, 881 S.W.2d 940, 946 (Tex. App.—Corpus Christi 1994, no pet.) (the party seeking protection “must show the particulars of the expectation of privacy beyond merely conclusory allegations that the [party] considers such information to be private and keeps it confidential”); *In re K.L. & J. Limited Partnership*, 336 S.W.3d 286, 293 (Tex. App.—San Antonio 2010, no

pet.) (allegation that information was “personal and confidential” failed to establish particular, specific, and demonstrable injury).

The University has withheld the vast majority of its relevant, discoverable documents from discovery in this matter; and as of this filing the BAA has received no document production from Baylor. There are at least sixty-three (63) separate discovery requests as to which the University has withheld relevant documents but has *not* lodged a trade secret or other confidentiality objection. *See* Chart, Ex. 1 (summarizing University confidentiality objections). Simply alleging that a party considers certain information to be private and keeps it confidential does not require the trial court to recognize a confidentiality interest in those documents, and this Court should not do so in this instance.

#### **IV. Conclusion and Prayer**

For the reasons described above, the BAA respectfully requests the following relief:

- a) an order denying the University’s request for a protective order;
- b) an order overruling the University’s objections and privileges and compelling the University to fully respond to interrogatories and produce documents in response to requests for production as set forth above; and
- c) such further relief as it may be entitled.

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANT,  
THE BAYLOR UNIVERSITY ALUMNI  
ASSOCIATION**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded to counsel of record on the 19<sup>th</sup> day of February 2015, via electronic mail as follows:

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Ryan A. Botkin

**“EXHIBIT 1”**

**Baylor University – Information Alleged to be Under Protective Order**

<b>RFP No.</b>	<b>Description</b>	<b>Trade secret or confidentiality objection?</b>	<b>Disclosure conditioned on PO?</b>
<b>BAA’s 1<sup>st</sup> Request for Production</b>			
1	Documents identified in response to interrogatories.	No	Yes
2	Documents concerning BAA’s alleged breach of the License Agreement.	No	Yes
3	Documents concerning BAA’s alleged breach of the Official Recognition Agreement.	No	Yes
4	Documents concerning any communications b/w Baylor and any current or former member of the Board of Directors of the BAA regarding this Action.	No	Yes
5	Documents concerning any communications b/w Baylor and any current or former member of the Board of Directors of the BAA regarding breach of License Agreement or Official Recognition Agreement.	No	Yes
6	Documents concerning Agreement to Vacate.	No	Yes
7	Documents concerning whether Baylor intended the BAA to continue to occupy Robinson Tower if Transition Agreement was not approved.	No	Yes
8	Documents concerning termination of BAA’s occupancy of offices in Robinson Tower.	No	Yes
9	Documents concerning value of Hughes Dillard Alumni Center.	No	Yes
10	Documents concerning cost of constructing a building of size, condition, quality, and location approximately the same as that of the HDAC.	No	Yes
11	Documents concerning Breach of Agreement to Vacate by the BAA.	No	Yes
12	Documents concerning BAA’s pledge of \$1M, as described in paragraph 9 of Baylor’s Original Petition.	No	Yes
13	Documents concerning the express charitable trust referred to in paragraph 7 of Baylor’s Original Petition.	No	Yes
14	“Instruments creating the charitable trust” referred to in paragraph 9 of Baylor’s Original Petition.	No	Yes
15	Each license to “others” referred to in first sentence of paragraph 16 of Baylor’s Original Petition.	Yes	No
16	Each agreement pursuant to which Baylor granted a perpetual trademark/patent license to any person or entity.	Yes	No



<b>RFP No.</b>	<b>Description</b>	<b>Trade secret or confidentiality objection?</b>	<b>Disclosure conditioned on PO?</b>
17	Each agreement pursuant to which Baylor granted a trademark or patent license to any person/entity that includes the word "perpetual."	Yes	No
18	Each agreement pursuant to which Baylor granted a trademark/patent license to any person/entity that includes the phrase "fully paid" or "fully paid up."	Yes	No
19	Each agreement pursuant to which the following entities are licensed or otherwise permitted to use the name "Baylor": <ul style="list-style-type: none"> <li>• Baylor Health Care System Foundation</li> <li>• Baylor College of Medicine</li> <li>• Baylor Scott &amp; White Health</li> <li>• Baylor Health Care System</li> <li>• Baylor College of Dentistry</li> <li>• Texas A&amp;M University Baylor College of Dentistry</li> <li>• Baylor University Medical Center at Dallas</li> </ul>	Yes	No
20	Each Agreement pursuant to which Baylor granted a trademark/patent license to any person or entity under which licensee could terminate the agreement at any time.	Yes	No
21	Each trademark or patent license or other agreement b/w Baylor and any person/entity that is indefinite in duration.	Yes	No
22	Documents concerning the "confusion in the marketplace" regarding BAA's gifts/solicitations referred to in paragraph 62 of Baylor's Original Petition.	No	Yes
23	All minutes and other records of meetings of Baylor's BOR at which the License Agreement was addressed.	Yes	Yes
24	All minutes and other records of meetings of Baylor's BOR at which the Official Recognition Agreement was addressed.	Yes	Yes
25	All minutes and other recordings of meetings of Baylor's BOR at which the Transition Agreement was Addressed.	Yes	Yes
26	All minutes and other records of meetings of Baylor's BOR at which the Agreement to Vacate was addressed.	Yes	Yes
27	All documents concerning authority or lack thereof of Herbert Reynolds to execute License Agreement on behalf of Baylor.	No	Yes

<b>RFP No.</b>	<b>Description</b>	<b>Trade secret or confidentiality objection?</b>	<b>Disclosure conditioned on PO?</b>
28	Documents concerning any resolution of Baylor's BOR regarding: <ul style="list-style-type: none"> <li>• License Agreement</li> <li>• Official Recognition Agreement</li> <li>• Agreement to Vacate</li> <li>• Transition Agreement.</li> </ul>	Yes	Yes
29	All documents concerning authority or lack thereof of Herbert Reynolds to execute Official Recognition Agreement on behalf of Baylor.	No	Yes
30	Documents discussing the formation of the Baylor Network, Baylor Alumni Network, or Baylor Office of Alumni Services.	No	Yes
31	Documents sufficient to establish personnel organization (organization chart) of the Baylor Alumni Network from its inception to the present.	No	Yes
32	Documents sufficient to establish Baylor Alumni Network's budgets and operating expenditures from its inception to the present.	No	Yes
33	Documents concerning/for the BAA that Baylor received from Randy Lofgren.	No	No
34	Documents concerning alumni association administration/operating, or best practices that Baylor received from Randy Lofgren.	No	No
35	Documents concerning Baylor's decision to employ Randy Lofgren, including communications with Lofgren regarding his potential employment.	Yes	Yes
36	Documents concerning effort by Baylor or Lofgren to avoid disclosure of BAA's confidential or proprietary information to Baylor in connection with Baylor's employment of Lofgren.	No	Yes
37	Documents concerning Baylor's assumption of the operation of the Baylor class ring program.	No	Yes
38	Documents concerning Baylor's decisions/actions from 2005 to the present with respect to BAA's participation in Baylor's homecoming activities.	No	Yes
39	Document concerning Baylor's decisions/actions from 2005 to the present with respect to BAA's participation in Baylor graduation events and activities.	No	Yes
40	Documents concerning Baylor's decisions or actions from 2005 to the present with respect to BAA's participation in or operation of travel programs for Baylor Alumni.	No	Yes

RFP No.	Description	Trade secret or confidentiality objection?	Disclosure conditioned on PO?
41	Documents concerning Baylor's decisions or actions from 2005 to the present with respect to BAA's participation in or operation of education programs for alumni.	No	Yes
42	All agreements pursuant to which any insurer is or may be liable to defend or indemnify Baylor with respect to this Action or the BAA's claims against Baylor.	No	No
43	Fee Agreement b/w Baylor and each attorney and law firm whose fees Baylor seeks to recover.	No	No
44	<p>All e-mail and other communications concerning any breach of the License Agreement that Baylor sent to or received from:</p> <ul style="list-style-type: none"> <li>• Jeff Kilgore</li> <li>• Chad Wooten</li> <li>• Todd Copeland</li> <li>• Collin Cox</li> <li>• Elizabeth Coker</li> <li>• George Cowden</li> <li>• Roland Johnson</li> <li>• Emily Tinsley</li> <li>• David Lacy</li> </ul>	No	Yes
45	<p>All e-mail and other communications concerning any breach of the Official Recognition Agreement that Baylor sent to or received from:</p> <ul style="list-style-type: none"> <li>• Jeff Kilgore</li> <li>• Chad Wooten</li> <li>• Todd Copeland</li> <li>• Collin Cox</li> <li>• Elizabeth Coker</li> <li>• George Cowden</li> <li>• Roland Johnson</li> <li>• Emily Tinsley</li> <li>• David Lacy</li> </ul>	No	Yes
46	<p>All e-mail and other communications concerning the Agreement to Vacate (including but not limited to its negotiation, formation, performance, and breach) that Baylor sent to or received from:</p> <ul style="list-style-type: none"> <li>• Chad Wooten</li> <li>• Todd Copeland</li> <li>• Collin Cox</li> <li>• Elizabeth Coker</li> </ul>	No	Yes
47	<p>All e-mail and other communications the Transition Agreement (including but not limited to its negotiation, formation, performance, and breach) that Baylor sent to or received from:</p> <ul style="list-style-type: none"> <li>• Chad Wooten</li> <li>• Todd Copeland</li> <li>• Collin Cox</li> <li>• Elizabeth Coker</li> </ul>	No	Yes

<b>RFP No.</b>	<b>Description</b>	<b>Trade secret or confidentiality objection?</b>	<b>Disclosure conditioned on PO?</b>
48	All e-mail messages and other communications concerning this Action that Baylor sent to or received from: <ul style="list-style-type: none"> <li>• John Lilly</li> <li>• Karla Leeper</li> <li>• Jeff Kilgore</li> <li>• Basil Thomson</li> <li>• Randy Lofgren</li> <li>• Todd Copeland</li> </ul>	No	Yes
49	Documents concerning/constituting/setting forth any communication between Baylor and Jack Dillard regarding the License Agreement.	No	Yes
50	Documents concerning/constituting/setting forth any communication between Basil Thomason and Jack Dillard regarding the License Agreement.	No	Yes
<b>BAA's First Interrogatories</b>			
1	Identify each trademark or service mark, including date of registration of each mark.	No	No
2	Identify all entities with which you have entered into a license agreement pertaining to use of the word(s) "Baylor" or "Baylor University."	Yes	No
3	Identify each licensing relationship identified in Interrogatory No. 2 that you consider "at will."	Yes	No
4	Identify written agreements b/w Baylor and any third party that include the word(s) "perpetual," "irrevocable," or "fully paid up."	Yes	No
5	Documents and data brought to Baylor by Randy Lofgren when he left BAA to become employed by Baylor.	No	No
6	Legal/factual basis for contention that BAA is an "express charitable trust that names Baylor University as the only specific beneficiary." Identify the elements of the trust relationship.	No	No
7	If you contend that BAA violated or failed to satisfy a contractual requirement, identify the provision that you contend was violated and the manner in which you contend it was violated.	No	No
8	Identify all communication which you contend represent written notice to the BAA of the alleged violations listed in response to Interrogatory 7.	No	No
9	Identify acts/omissions you contend violated an alleged fiduciary duty owed to Baylor and the manner in which they violated the alleged duty.	No	No
10	Identify all instances of actual confusion among consumers caused by BAA's use of the Marks.	No	No

<b>RFP No.</b>	<b>Description</b>	<b>Trade secret or confidentiality objection?</b>	<b>Disclosure conditioned on PO?</b>
11	Paragraph 67 of Baylor's Original Petition states that "Baylor's signatory to the agreements was not authorized to bind Baylor beyond a reasonable time." State the reasonable time and identify documents that define/limit the authority of Baylor's signatory.	No	No
12	Explain how Baylor will be harmed if the BAA is allowed to continue using the Marks pursuant to the terms of the License Agreement.	Yes	No
13	State the date you anticipated litigation in this matter.	No	No
14	Describe steps taken to collect electronic data in response to Defendant's RFPs. Identify specific search terms used in any word searches that were conducted.	No	No
<b>BAA's 2<sup>nd</sup> Request for Production</b>			
1	Documents concerning the "complaints and/or comments" that have been "made to Baylor and its administrators over the years as a result of BAA activities, mailouts, Baylor Line articles, etc."	No	Yes
2	Any report prepared in whole/in part by Karla Leeper regarding best practices in collegiate Alumni Relations and/or Plaintiff's relationship with Defendant.	No	Yes
3	Documents prepared in whole or in part by Karla Leeper regarding best practices in collegiate Alumni Relations and/or Plaintiff's relationship with Defendant.	No	Yes
4	Copy of survey Baylor conducted using an independent research center at the University of New Hampshire (see paragraph 12 of Original Petition).	No	Yes
5	Documents related to the survey referred to in Plaintiff's Original Petition.	No	Yes
6	Copy of the document quoted from in paragraph 14 of Plaintiff's Original Petition.	No	No
7	Documents showing Plaintiff's payments to any builder, contractor, or subcontractor regarding renovation of the HDAC that occurred in the 1990s.	No	Yes
8	Copy of Reagan Ramsower's task list referring to an intent to destroy or negatively affect Defendant.	No	No

RFP No.	Description	Trade secret or confidentiality objection?	Disclosure conditioned on PO?
9	<p>All documents -including documents containing official/unofficial performance goals, metrics, or evaluations for:</p> <ul style="list-style-type: none"> <li>• Reagan Ramsower</li> <li>• John Barry</li> <li>• Pattie Orr</li> <li>• Tommye Lou Davis</li> <li>• Ian McCaw</li> <li>• Juan Alejandro</li> <li>• Ken Hall</li> <li>• Jerry Haag</li> <li>• Dennis Prescott</li> </ul> <p>-regarding intent to destroy or negatively affect Defendant.</p>	No	No
10	Documents from November 2009 to the present regarding an intent to make it more difficult or challenging for Defendant to receive approval to hold events on Baylor campus.	No	Yes
11	Copy of Plaintiff's strategic vision called <i>Pro Futuris</i> .	No	Yes
12	Documents regarding Plaintiff's proposals to Defendant "to have BAA terminate its independent governance and become part of Baylor University."	No	Yes
13	Documents regarding Plaintiff's decision to "end[] an agreement to pay BAA for any services."	No	Yes
14	Documents regarding a \$1M gift to Baylor for student scholarships.	No	Yes
15	Documents from 2007 to present that show what percentage of alumni giving comes from or on behalf of Defendant or its members.	Yes	Yes
16	Copy of Randy Lofgren's 2002 report to Defendant's directors.	No	No
17	Documents regarding Randy Lofgren's September 2002 report to BAA's directors.	No	No
18	Documents that show accounting of funds contributed to Plaintiff or to any entity associated with Plaintiff from 1978 to present by 1) Defendant; 2) any of Defendant's members; 3) anyone on b/h of or in honor of Defendant or any of its members.	No	Yes
19	Documents that show accounting of funds donated by 1) Defendant; 2) any of Defendant's members; 3) any one on b/h of or in honor of Defendant or any of its members for renovation of HDAC in the late 1990s.	Yes	Yes
20	Documents regarding any gift agreement b/w Plaintiff and any individual or entity that donated funds for the renovation of the HDAC in the late 1990s	Yes	Yes