

Affirmed and Opinion filed June 17, 2021.



In The

Fourteenth Court of Appeals

NO. 14-19-00521-CV

DOUGLAS LAMB, Appellant

V.

TEXAS SECRETARY OF STATE, Appellee

**On Appeal from the 250th District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-18-000382**

OPINION

This appeal concerns a request under the Public Information Act and raises the question whether appellant Douglas Lamb is entitled, upon proper request, to obtain the email addresses of Texas’s presidential electors. Although their names and phone numbers were provided to Lamb, we agree that the presidential electors’ personal email addresses were properly withheld. Resolution of the issue turns upon the appropriate statutory construction of the meaning of “member of the public”, and whether that term as we construe it includes presidential electors.

Because we find that it does, we affirm the trial court's summary judgment dismissal of Lamb's mandamus action that seeks to compel appellee Secretary of State to produce those email addresses.

I. FACTUAL AND PROCEDURAL BACKGROUND

Days after the 2016 presidential election, appellant Douglas Lamb requested from appellee Texas Secretary of State ("the Secretary of State") the names, telephone numbers, and email addresses of Texas's presential electors. The Secretary of State released the electors' names but withheld the phone numbers and email addresses. In turn, Lamb filed a complaint to the Office of the Attorney General to review the Secretary of State's decision to withhold the electors' telephone numbers and email addresses. The Secretary of State requested a formal ruling from the Attorney General for a determination on the issue whether the electors' telephone numbers and email addresses were subject to required public disclosure. In the letter the Secretary of State explained that it was withholding the electors' email addresses on the basis that they were excepted from disclosure under certain provisions of Public Information Act ("the Act"), including section 552.137 of the Texas Government Code, protecting disclosure of email addresses of a member of the public that is provided for the purpose of communicating electronically with a governmental body.

By March 2017, the Office of the Attorney General issued a ruling, concluding that the electors' email addresses must be withheld under the Act's "member of the public" exception found in subsection (a) of 552.137. The Attorney General concluded the Secretary of State must release the "remaining information". Following the direction of the Attorney General, the Secretary of State released the electors' telephone numbers to Lamb, but continued to withhold their email addresses.

Lamb then filed the suit from which this appeal arose.¹ The lawsuit sought relief via three causes of action: declaratory and injunctive actions,² and a mandamus compelling the Secretary of State’s “release of all email addresses the electors used in their official capacities.”

Lamb filed a motion for summary judgment asking the court to affirmatively grant the mandamus relief requested. Lamb argued Texas’s presidential electors do not qualify as “members of the public” because the electors are created by the United States Constitution and are reimbursed for travel under the Texas Election Code. The Secretary of State timely responded to the motion, and in the same filing brought its own summary-judgment motion³ seeking to dismiss Lamb’s mandamus action on the ground that the presidential electors were not public officials (but were party officials belonging to the Texas Republican Party), consequently not members of the Texas government, and instead were “members of the public,” rendering their email addresses exempt from disclosure.

The trial court denied Lamb’s summary-judgment motion and granted the Secretary of State’s motion. This appeal followed.

II. ISSUES AND ANALYSIS

A. Waiver and Scope of Review

Has appellant waived his complaint on appeal in failing to identify in his

¹ Lamb’s lawsuit was filed in the 250th District Court in Travis County. His appeal from this lawsuit was originally filed in the Third Court of Appeals in Austin and was later transferred to this court pursuant to Supreme Court’s order.

² Lamb originally appealed that court’s denial of his requests for declaratory and injunctive relief, but voluntarily dismissed that appeal.

³ The record includes a Rule 11 agreement executed between the parties, which memorializes Lamb’s waiver of his right under Rule 166a to 21-days notice of the hearing on the Secretary of State’s summary-judgment motion.

argument section the manner in which his case was dismissed? In the argument section to his Brief, Lamb does not mention either summary-judgment motion or the trial court’s summary judgment order dismissing his mandamus to compel production of the electors’ email addresses, but discusses what he presumably believes to be the implicit conclusion reached by the court that led to the dismissal of his mandamus action. The rules of appellate procedure instruct that a brief “contain a clear and concise argument for the contentions made, with appropriate citations to authorities.” Tex. R. App. P. 38.1(i). Though appellant’s argument section is not a model of clarity, it does not misguide us, and we find it helpful that in the prayer to his brief, Lamb asks that we render an order *granting his motion for summary judgment and denying the Secretary of State’s summary judgment*. We conclude that Lamb has not waived his challenge to the Court’s summary judgment order by not specifically referring to challenged order as a “summary judgment order”. See *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 732–33 (Tex. 2020) (Briefs must be liberally, but reasonably, construed so that the right to appeal is not lost by waiver).

What is the scope of our review? In two related arguments, Lamb complains of (1) the trial court’s implicit finding that each of Texas’s presidential electors fall within the definition of a “member of the public” under Tex. Gov’t Code § 552.137, and (2) that the trial court misapplied binding Third Court of Appeals precedent. The Secretary of State contends that Lamb has not carried with his appeal his summary-judgment-stage arguments that presidential electors are not members of the public because they are created by federal law and are reimbursed for their travel. We liberally construe Lamb’s brief as setting forth a single cognizable issue: whether the Act’s “member of the public” email-address exception applies to the personal email addresses of the presidential electors on the

record before us. The two points Lamb asserts in his Brief and the two points the Secretary of State contends were not carried forth by Lamb in his Brief are all subsumed under that issue, and are subjects addressed in the context of our discussion below.

B. Standard of Review

We review a trial court's order granting a traditional motion for summary judgment de novo. *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). In reviewing a grant of summary judgment, we consider all of the evidence in the light most favorable to the nonmovant. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007). To prevail on a traditional motion for summary judgment, a movant must prove entitlement to judgment as a matter of law on the issues pled and set out in the motion for summary judgment. Tex. R. Civ. P. 166a(c); *Masterson v. Diocese of Nw. Texas*, 422 S.W.3d 594, 607 (Tex. 2013). If the trial court grants summary judgment without specifying the grounds, we affirm the judgment if any of the grounds presented are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). If an appellant does not challenge every possible ground for summary judgment, we will uphold the summary judgment on any of the unchallenged grounds. *Durham v. Accardi*, 587 S.W.3d 179, 183 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

C. Applicable Law

In transferred cases such as this, when we sit as the transferee court, we are required to decide the case “in accordance with the precedent of the transferor court [Third Court of Appeals] under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court”. Tex. R. App. P. 41.3. The transferee court may state whether the outcome would have been different had the transferee court not been required

to decide the case in accordance with the transferor court’s precedent. *Id.*

The decision in this case will be guided by our construction of a term found within the Act, specifically the term “member of the public” found in section 552.137. How to construe this statutory term is an issue of first impression in this court; yet, as it happens, it is an issue the Third Court of Appeals has addressed in thorough detail. As further discussed below, we choose to adopt the Third Court of Appeals’ construction of the statutory term in question, in the same manner as construed in *Austin Bulldog v. Leffingwell*. 490 S.W.3d 240, 245-49 (Tex. App.—Austin 2016, no pet.).

D. Did the trial court err in granting summary judgment dismissing Lamb’s action to compel the Secretary of State to release email addresses for the presidential electors?

We consider whether the Act’s “member of the public” email address exception applies to the personal email addresses of the presidential electors on the facts before us. The exception is stated as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.⁴

Recognizing that “member of the public” is not a phrase defined in the statute, the Third Court of Appeals considered the issue and set out to construe the term from its plain and common meaning, abstractly and in its statutory context. *Austin Bulldog*, 490 S.W.3d at 245–46. The court first considered in the abstract, the meaning conveyed by the dictionary definition of the component words of the phrase to mean “a person who belongs to the community or people as a whole.” *Id.*

⁴ Tex. Gov’t Code § 552.137(a). Neither party makes any argument on the subject of the consent described in subsection (b), or contends that subsections (c) or (d) are relevant to the analysis.

citing *The American Heritage Dictionary of the English Language* 1097 (defining “member” as “one that belongs to a group or organization”), 1424 (defining “public” as “the community or people as a whole”) (5th ed. 2011); *see also Beeman v. Livingston*, 468 S.W.3d 534, 542 (Tex. 2015) (defining “public” as “the community as a whole”). Then the court considered the phrase’s plain and common meaning in the context of the email address exception, concluding:

When “member of the public” is used in conjunction with an identified or identifiable group (or groups)—as it is here with “governmental body”—its meaning is contextually modified to mean a person who does not belong to the identified group. Stated another way, when used in context with another category or group of people, whether specifically identified or simply understood, “member of the public” is a shorthand way to identify someone who does not belong to the other group.⁵

Like the Austin court we find the contextual, plain meaning of “member of the public” more appropriate than the broad and abstract meaning considered by the court, and we join its conclusion that “member of the public” means someone who does not belong to the “governmental body”.⁶ The *Austin Bulldog* court cemented its confidence to this meaning by demonstrating comparable usage in various legal and non-legal contexts, summarizing instances where the phrase “member of the public” had been used in a similar manner. The court provided legislative examples from the Texas Open Meetings Act, Texas Government Code, and Texas Geosciences Practice Act to show where the phrase “a member of the public” was

⁵ *Austin Bulldog*, 490 S.W.3d at 246.

⁶ The statute defines governmental body to mean “a board, commission, department, committee, institution, agency, or office *that is within or is created by the executive or legislative branch of state government . . .*” Tex. Gov’t Code § 552.003(1)(A)(i)(emphasis added). The additional definitions within that subdivision make clear that the governmental body must be an entity of the state. *See generally* Tex. Gov’t Code § 552.003(1). Thus, “member of the public” means those persons who do not make up or belong to a state governmental body. *See* Tex. Gov’t Code § 552.137; *Austin Bulldog*, 490 S.W.3d at 246–47.

used to identify persons not belonging to particular government agencies. *Austin Bulldog*, 490 S.W.3d at 247. The court ultimately concluded that its construction satisfies the Act’s mandate that the public have “complete information about the affairs of government and the official acts of public officials and employees,” even where those officials choose to conduct official government business using private email addresses.

After resolving the meaning of the term “member of public” and concluding its mutually exclusive relationship with the provision’s companion term “governmental body”, the Third Court of Appeals was not forced to make a lengthy assessment about its application. The facts simply did not demand it. The plaintiff’s request for personal email addresses of Austin’s elected city council members used in their official capacities resulted in a clear-cut conclusion the city council members were members of a governmental body, the City of Austin. *Id.* at 250.

This case involves a request for the email addresses of Texas’s 38 presidential electors in 2016.

Presidential electors are created by the United States constitution and their roles are defined by a combination of federal and state laws, and generally only operate once every four years. U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XII; 3 U.S.C. § 1, et seq.; Tex. Elec. Code Ann. § 192.001, et seq.; *See, e.g.*, Tex. Elec. Code Ann. § 192.006(a) (“The electors shall convene at the State Capitol at 2 p.m. on the first Monday after the second Wednesday in December following their election and shall perform their duties as prescribed by federal law.”). To be eligible to serve as a presidential elector, a person must: (1) be a qualified voter of this state; and (2) not hold the office of United States senator, United States representative, or any other federal office of profit or trust. Additionally, to be

eligible to serve as a presidential elector for a political party, as is in the typical election, a person must be affiliated with the party. Tex. Elec. Code Ann. § 192.002. Thus, in the usual course, the political party, rather than the state, governs who shall serve as presidential electors. *See Seay v. Latham*, 182 S.W.2d 251, 253 (Tex. 1944)(“A political party is a voluntary association, instituted for political purposes. It is organized for the purpose of effectuating the will of those who constitute its members, and it has the inherent power of determining its own policies. . . including the power to determine who shall represent it in the selection of the President and Vice-President of the United States”); *see also* Tex. Elec. Code Ann. § 192.005.

We conclude that unlike the elected city council members in *Austin Bulldog*, Texas presidential electors are not a part of any state governmental body; they are members of their respective political parties—in 2016, they were members of the Texas Republican Party. The Texas Republican Party does not fall under any of the definitions of “governmental body” found in Section 552.003(1), and therefore, the presidential electors are “members of the public” for purposes of Section 552.137. That the electors may go to the state capitol to perform their singular function and that they might get travel expenses in the manner that a state employee gets paid such expenses does not bring their role within a state governmental body.

Importantly, presidential electors are officers created by the federal constitution, not the state government. In this way, Lamb’s public policy argument—“that the [the Act’s] purpose in assisting the people of Texas to retain control over the instruments they have created”—fails because presidential electors are not instruments created by Texas law. *See Austin Bulldog*, 490 S.W.3d at 244 (“that the government is the servant and not the master of the people,” and reflects the public policy that the people of Texas “remain[] informed so that they may

retain control over the instruments they have created.”) *citing* Tex. Gov’t Code § 552.001(a) and *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 293 (Tex. 2011).

To the extent the Supreme Court’s recent decision is applicable to our discussion, we recognize the high court’s regard for the state’s ability to impose restrictions and penalties on presidential electors for the manner in which they discharge their duty. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2328, 207 L. Ed. 2d 761 (2020) (recognizing that the constitution “gives States broad power over electors, and gives electors themselves no rights.”). To be sure, the State’s power does not render presidential electors state officials or members of a state governmental body. Legal accountability is a basic tradeoff of public membership. The Texas Legislature regularly imposes restrictions and penalties on members of the public simply based on their participation in (non-governmental) various activities and professions.⁷ Presidential electors like other members of the public may participate in the government’s process without also being a member of a state governmental body. The *Austin Bulldog* court’s legislative examples illustrate the participatory role “members of the public” have with the respective governmental entities. *See id.* at 247 (noting that the Texas Open Meetings Act provides members of the public opportunity to participate actively in meetings; the Ethics Commission rules found in the Government Code permit members of the public to take on oversight roles providing the availability of financial statements; and the Texas Board of Professional Geoscientists allows members of the public the same ability as internal functionaries to generate complaints).

The undisputed summary-judgment evidence before the district court

⁷ For example, the State of Texas regulates who can work in a child-care facility (Tex. Hum. Res. Code § 42.001, et seq.) or be a barber (Tex. Occ. Code § 1601.001, et seq.) but such regulations do not mean that child-care workers or barbers are not members of the public.

established that the email addresses of Texas’s presidential electors are included in Section 552.137’s members of the public exception. The plain meaning of the phrase “member of the public,” as read within the context of Section 552.137, includes presidential electors because they do not belong to a state governmental body. The trial court properly found that these email addresses were exempt.

III. CONCLUSION

We conclude that presidential electors are members of neither a federal nor state governmental body, and thus, for purposes of section 552.137, are members of the public. Accordingly, their email addresses are exempt from disclosure. The trial court thus properly disposed of Lamb’s mandamus action seeking to compel the Secretary of State to disclose the email addresses. We therefore affirm the decision below.

/s/ Randy Wilson
Justice

Panel consists of Justices Zimmerer, Hassan, and Wilson.