

CAUSE NO. 09-1051

IN THE
SUPREME COURT OF TEXAS

FRIENDSWOOD INDEPENDENT SCHOOL DISTRICT and PATRICIA HANKS
Petitioners

v.

NANCY KESSLING
Respondent

On Petition for Review from the
14th Court of Appeals in Houston, Texas

REPLY TO RESPONSE TO PETITION FOR REVIEW

JEFFREY L. ROGERS
State Bar No. 17174500
CLAY T. GROVER
State Bar No. 08550280
PAUL A. LAMP
State Bar No. 24002443
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
Telephone: 713-960-6000
Facsimile: 713-960-6025

ATTORNEYS FOR PETITIONERS

IDENTITY OF PARTIES AND COUNSEL

Parties

Petitioners: Friendswood Independent School District and Patricia Hanks

Respondent: Nancy Kessling

Attorneys of Record

Counsel for Petitioners: Jeffrey L. Rogers
Clay T. Grover
Paul A. Lamp
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
Telephone: 713/960-6000
Facsimile: 713/960-6025
Web: www.feldmanrogers.com

Counsel for Respondent: Jason Ray
Jennifer S. Riggs
Riggs & Aleshire, P.C.
700 Lavaca, Suite 920
Austin, Texas 78701
Telephone: 512/457-9806
Facsimile: 512/457-9066

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STATEMENT OF THE CASE

Nature of the Case: Nancy Kessler claims that the Friendswood Independent School District (“FISD”) and its Superintendent, Patricia Hanks (“Hanks”), violated the Texas Open Meetings Act, the Texas Public Information Act and the Texas Education Code.

Trial Court: The Honorable Lonnie Cox, 56th Judicial District Court, Galveston County, Texas.

Trial Court Disposition: The trial court granted FISD and Hanks’ Motion for Summary Judgment and Plea to the Jurisdiction, which dismissed all claims against FISD and Hanks.

Parties in Court of Appeals: Nancy Kessler, Appellant
Friendswood Independent School District, Appellee
Patricia Hanks, Appellee

Court of Appeals: 14th Court of Appeals, Houston. Majority opinion by Chief Justice Hedges, joined by Justice Yates. Dissenting opinion by Justice Frost.

Court of Appeals Disposition: *Kessler v. Friendswood Indep. Sch. Dist.*, No. 14-07-01063-CV, 2009 Tex. App. LEXIS 8412 (Tex. App.—Houston [14th Dist.] Nov. 3, 2009, pet. filed). The Court of Appeals affirmed in part, and reversed and remanded in part, the trial court’s Order granting FISD and Hanks’ Motion for Summary Judgment and Plea to the Jurisdiction.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal for the following reasons:

- The Court of Appeals' decision conflicts with prior decisions of this Court and of another court of appeals on important questions of law material to a decision of the case. Tex. Gov't Code § 22.001(a)(2) (Vernon 2004).
- The Court of Appeals' decision involves the construction of a statute necessary to a determination of the case. Tex. Gov't Code § 22.001(a)(3) (Vernon 2004).
- The Court of Appeals committed errors of law that have such importance to the jurisprudence of the state that it requires correction by this Court. Tex. Gov't Code § 22.001(a)(6) (Vernon 2004).
- This matter involves important constitutional issues. Tex. R. App. P. 56.1(a)(4).

ISSUES PRESENTED

1. Whether a request for injunctive and mandamus relief to require a governmental entity to comply with the Texas Open Meetings Act (“TOMA” or “the Act”) in the future, based solely on an alleged pattern of past violations, presents a justiciable controversy.
2. Whether a suit seeking declaratory relief regarding past violations of the TOMA is barred by the mootness doctrine where the remedy sought is an injunction to prohibit unspecified future violations.
3. Whether a trial court has subject matter jurisdiction over a claim under the Texas Public Information Act (“TPIA”) where the plaintiff does not allege an essential element of the claim in the plaintiff’s petition. (Not briefed per Tex. R. App. P. 53.2(i)).
4. Whether a request for declaratory relief based on past violations of the TPIA will support injunctive and mandamus relief requiring the governmental entity to comply with the TPIA in the future. (Not briefed per Tex. R. App. P. 53.2(i)).

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION

Kessling’s Response Brief fails to offer any authority or argument addressing the specific issues raised in the Petition for Review. Fisd and Hanks filed their Petition for Review for this Court to resolve two primary issues: (1) whether a plaintiff presents a justiciable controversy by seeking injunctive relief requiring a governmental entity to comply with the Texas Open Meetings Act (“TOMA”) in the future based solely on an alleged pattern of past TOMA violations; and (2) whether a suit seeking declaratory relief regarding past TOMA violations is moot where the remedy sought is an injunction to prohibit unspecified future violations. As shown below, the cases Kessling cites do not address these issues, much less support her claim that these issues are well-settled under the law. They are not, which underscores the need for this Court to grant Fisd and Hanks’ Petition for Review.

ARGUMENT

A. Contrary to Kessling Argument, There Is A Split of Authority in the Courts of Appeals That This Court Should Resolve.

Kessling essentially argues in her Response that there is no conflict in the Courts of Appeals involving *Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex. App.—Austin 1999, no pet.), and that Fisd “ignores” voluminous authority showing that she plead a justiciable claim under the TOMA. Response at pp. 1-5. Ironically, it is Kessling who ignores the Court of Appeals’ admission in this case that it “arrived at [a] different

conclusion” than *City of Garland* in rejecting both of its principal holdings. *Kessling v. Friendswood Indep. Sch. Dist.*, 302 S.W. 3d 373, 380 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). The Courts of Appeals expressly conflict in their interpretation of the TOMA as shown in FISH and Hanks’ Petition for Review, and Kessling’s suggestion to the contrary is simply incorrect.

Additionally, Kessling cites various cases that purportedly reflect “fifteen years” of “consistent” authority supporting her justiciability argument. Response at pp. 1-3. None of these cases support Kessling’s position as shown below.¹

- *Finlan v. City of Dallas*, 888 F.Supp. 779 (N.D. Tex. 1995) – The City’s Mayor created an *ad hoc* committee of five (5) of the City’s fourteen (14) councilmen, which met with third parties to negotiate the City’s construction of a new sports arena. None of the committee meetings were posted or open to the public, and two (2) City residents sued the City for TOMA violations in connection with these meetings. The court conducted an injunction hearing and found that the committee’s meetings were subject to the TOMA. The court also found that “[t]he [Committee] members are all actively participating in cutting a deal behind closed doors. *Since time is of the essence, whatever this Committee negotiates will have the benefit of at least five votes being already in place from the beginning.*” *Id.* at

¹ Kessling cites all of her authority for the following proposition: “The Courts have consistently held that just because an open government violation has already occurred in the past does not render the question moot or advisory, nor does it necessarily implicate jurisdiction.” Response at p. 2. Notably, Kessling does not identify “the question” that she alludes to in this sentence, and as shown herein, there is no “consistent” holding relevant to this case that can be drawn from the cases she cites.

786 (emphasis added). The court entered a preliminary injunction prohibiting the Committee from meeting with third parties in closed session and ordering the City to comply with the TOMA “consistent with this opinion.” *Id.* at 792.

Finlan is distinguishable from this case in two critical respects. First, the Committee in *Finlan* was created for a specific purpose, and it was not complying with the TOMA *in any respect*. Second, no deal had been struck as of the time the injunction hearing was held. Future meetings of the Committee were imminent and would have unavoidably violated the TOMA because the City was taking the position that the Committee was not even subject to the TOMA. In this case, Kessler seeks a very general, broad form permanent injunction requiring a public school district’s board of trustees and its superintendent to “comply with the Act” in the future without regard to how or when they might commit future violations of the TOMA. The school district does not contend that it was not subject to the TOMA, and Kessler does not claim any specific imminent violation of the Act.

- *City of Richardson v. Gordon*, 2010 Tex. App. LEXIS 1888 (Tex. App.—Dallas, March 18, 2010, no pet.) – The holding in *Gordon* adopts the reasoning in a case the Court of Appeals relied on below—*City of Farmers Branch v. Ramos*, 235 S.W.3d 462 (Tex. App.—Dallas 2007, no pet.). Citing *Ramos*, the court in *Gordon* held that the plaintiff’s request for declaratory relief under the TOMA, “coupled with the potential remedy involving records from . . . closed meetings, establish that the [TOMA] claim is not moot.” *Gordon*, 2010 Tex. App. LEXIS 1888 at *8. Fisd

and Hanks distinguished *Ramos* in their Petition for Review on the grounds that, unlike the plaintiff in *Ramos*, Kessler does not seek the production of information from FISH as a remedy for past TOMA violations. The plaintiffs' requests for information in *Gordon* and *Ramos* were critical to the holdings in those cases, but they do not apply to this case because Kessler does *not* seek information in connection with her request for declaratory relief as to past TOMA violations.

- *City of Austin v. Savetownlake.Org*, 2008 Tex. App. LEXIS 6471 (Tex. App.—Austin, 2008, no pet.) (Purveyar, J., dissenting) – The “Savetownlake” organization sought a declaration that the City’s vote to amend its Land Development Code was void because the City failed to properly post the meeting at which the vote took place in violation of the TOMA. *Id.* at *1-2. The City filed a plea to the jurisdiction on the grounds that, among other things, the organization’s claims were moot because the City amended the Code yet again in a manner that addressed the organization’s concerns. *Id.* at *15-16. The court found that the second amendment did not moot the organization’s claim because it was not retroactive.

Savetownlake is distinguishable from this case for two important reasons. First, unlike Kessler, the Savetownlake organization did not merely ask the court to order the City to generally comply with the TOMA in the future. Second, the court found that the organization’s TOMA claims were not moot because the organization alleged a specific past violation of the TOMA, and requested that the court void the City’s vote that was the product of the TOMA violation. In this case, Kessler

alleges past violations of the TOMA, but she does not seek to reverse or void any FISD actions resulting from these alleged violations.

- *City of Laredo v. Escamilla*, 219 S.W.3d 14 (Tex. App.—San Antonio 2006, pet. denied) – In this case, two (2) Laredo citizens and Webb County sued the City of Laredo on the grounds that the City violated the TOMA when its City Council voted to purchase a parcel of land from a local school district. *Id.* at pp. 16-18. The plaintiffs sought a declaration that the City violated the TOMA and that its purchase of the land was void. *Id.* The trial court granted the plaintiffs’ motion for summary judgment and declared the City’s action void. The Court of Appeals affirmed. *Id.* at pp. 18, 23. *Escamilla* has no bearing on this case whatsoever because the justiciability of the plaintiffs’ TOMA claims was not challenged in that case. Unlike Kessler, the plaintiffs sought to void prior governmental action, and also unlike Kessler, the plaintiffs did not seek permanent injunctive relief requesting the court to order the City to generally “comply with the Act” in the future.
- *Odessa, Tex. Sheriff’s Posse, Inc. v. Ector County*, 215 S.W.3d 458 (Tex. App.—Eastland 2006, pet. denied) – In *Ector County*, a private organization requested that the court void the County’s votes at various meetings on the grounds that the County failed to properly post the meetings at which the votes took place. The trial court granted the County’s motion for summary judgment. The Court of Appeals reversed in part because it found that one of the County’s meetings was not properly posted. *Id.* at 473. *Ector County* also has no bearing on this case because the

plaintiff sought to void the County’s prior votes whereas Kessler does not; and unlike Kessler, the plaintiff did not seek permanent injunctive relief requesting the court to order the County to “comply with the Act” in the future.

- *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396 (Tex. App.—Houston [1st Dist.] 2006, no pet.) – Kessler claims that *Thomas* describes “the type of pleadings necessary to avoid advisory opinions” in a Public Information Act case. Kessler refers the Court to the following language in the *Thomas* opinion: “When a question presented is one of public interest and of recurrent character, jurisdiction is not lost because a threatened act has become an accomplished fact.” Response at p. 3. Importantly, the *Thomas* court was quoting this language from *Texas Department of Human Services v. Benson*, 893 S.W.2d 236, 240 n.4 (Tex. App.—Austin 1995, writ denied), which it was *distinguishing* from its own case, and which did not involve the TOMA. More importantly, *Thomas* ultimately held that the plaintiff’s complaints were not “of recurrent character” and thus its request for declaratory relief was moot. *Thomas*, 196 S.W.3d at 403. Kessler’s allegations are also not of recurring character, as more fully set forth below, and thus *Thomas* fully supports FISH and Hanks’ position.
- *Cox Enterprises, Inc. v. Bd. of Trustees of the Austin Indep. Sch. Dist.*, 706 S.W.2d 956 (Tex. 1986) – Kessler cites this Texas Supreme Court case, and the underlying Court of Appeals opinion, for the proposition that “many TOMA cases indicate that evidence of past violations is traditionally the method of securing injunctive relief to

prevent such violations in the future.” Response at p. 3. Conspicuously, neither of the *Cox* opinions contains any analysis whatsoever regarding future injunctive relief based on past TOMA violations. Instead, the school district in that case *agreed* not to violate the TOMA as that court interpreted the statute, which permitted the trial court to deny the plaintiff’s request for injunctive relief. *Cox* is inapposite for this additional reason.

B. Kessling’s Claim of “Pattern and Practice” TOMA Violations.

Kessling fails to cite a single authority supporting her claim that her request for future injunctive relief is justiciable (ripe) singly because she has alleged a “pattern and practice” of TOMA violations. Response at pp. 5-7. Kessling also fails to identify a single sentence in her pleading alleging that FISD and/or Hanks were poised to commit imminent TOMA violations. Instead, Kessling simply argues that she alleged numerous TOMA violations in her lawsuit, that she amended her pleading to add more alleged violations, and that her allegations “show that Kessling believes that further violations of the TOMA are imminent.” *Id* at p. 7. None of these arguments support Kessling’s claim for the broad form injunctive relief she seeks.

A review of Kessling’s pleadings is important to understanding the lack of merit in her argument:

- Original Petition – filed August 8, 2006 – does not allege any specific TOMA violations. CR Vol. 1 at pp. 2-120.

- First Amended Petition – filed November 25, 2006 – does not allege any specific TOMA violations. CR Vol. IV at pp. 707-719.
- Second Amended Petition – filed February 2, 2007 – alleges various TOMA violations, with the only post-litigation allegations referencing actions allegedly taken on December 12, 2006 and January 9, 2007. CR Vol. IV at pp. 726-752.
- Third Amended Petition – filed April 24, 2007 – does not allege any additional TOMA violation dates. CR 2nd Supp. at pp. 2-30.

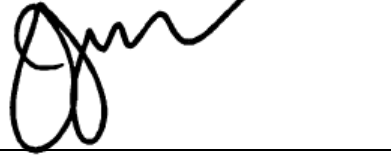
Even assuming that a plaintiff can obtain injunctive relief under the TOMA by establishing a “pattern and practice” of past TOMA violations, Kessling’s allegations fall well short of showing that FISD and Hanks engaged in a pattern and practice of TOMA violations. Kessling’s Third (and final) Amended Petition was filed in April 2007, and yet that *Petition only alleges that FISD and Hanks violated the TOMA on two dates during the entire year of 2006—March 21, 2006 and December 12, 2006.* 2nd SCR at pp. 731, 739. Even a cursory review of Kessling’s pleadings show that she has failed to identify any pattern and practice of TOMA violations, much less that any future violations are imminent.

PRAYER

FISD and Hanks request that the Court grant their Petition for Review, reverse that portion of the Court of Appeals’ decision reversing and remanding the trial court’s Order granting FISD and Hanks’ Motion for Summary Judgment and Plea to the Jurisdiction, and render judgment dismissing Kessling’s suit for lack of subject matter jurisdiction.

Respectfully submitted,

FELDMAN, ROGERS, MORRIS & GROVER, L.L.P.



JEFFREY L. ROGERS
State Bar No. 17174500
CLAY T. GROVER
State Bar No. 08550280
PAUL A. LAMP
State Bar No. 24002443
5718 Westheimer, Suite 1200
Houston, Texas 77057
Telephone: (713) 960-6000
Facsimile: (713) 960-6025

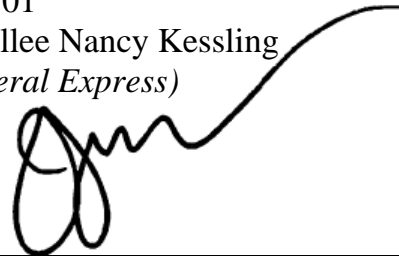
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2010, a true and correct copy of the foregoing document was served on all counsel of record in the above-referenced matter *via* overnight mail by Federal Express, and addressed as follows:

Jason Ray
Jennifer S. Riggs
Riggs & Aleshire, P.C.
700 Lavaca, Suite 920
Austin, Texas 78701

Attorney for Appellant/Cross-Appellee Nancy Kessler
(Via Overnight Mail by Federal Express)



Attorney for Petitioners