



2. The Final Order directs the Defendants to make available any and all public records, as defined by Wyo. Stat. § 16-4-201(a)(v), which contain: the names of the finalists forwarded from the secondary screening committee to the Board of Trustees or other finalists that the Board may decide to interview; the finalists' current employers; and, the dates when the finalists will visit the University.

3. For three reasons, the Court should alter or amend the Order Granting Plaintiffs' Petition for Declaratory Action entered on February 4, 2013: 1) there has been an intervening change in the controlling law; 2) there is insufficient evidence to support the Court's conclusion that the loss of two or three candidates out of a pool of 15 is not a "substantial" injury to the public interest; and 3) there is new evidence regarding the loss of candidates which could not be produced at the trial of this matter.

A. Intervening Change in Controlling Law.

4. On January 23, 2013, this Court issued its Decision Letter in this matter. The Court found, *inter alia*, "The testimony of Trustees John MacPherson and David Bostrom demonstrates beyond question their desire to do the best job possible to ensure UW's strength and vitality for years to come. However, ***absent a specific statutory exemption***, that desire and mere possibility of a better result, and their opinions as to how to best accomplish that result, must be weighed against the WPRAs policy of ready disclosure and transparent government." (emphasis added) Decision Letter, p. 10.

5. In closing argument, undersigned counsel discussed an often-cited law review article, Estes, "State University Presidential Searches: Law and Practice," 26 J.C.&U.L 485 (Winter 2000), which analyzes those cases in which the courts of other jurisdictions have confronted the problem which the University and Board presented here.

For example, in *Board of Regents of the University System of Georgia v. The Atlanta Journal*, 378 S.E.2d 305 (Ga. 1989), the Board of Regents "insist[ed] that its ability to attract qualified applicants will be diminished by the disclosure of their identities, in disservice of the cause of higher education[.]" and the Court "acknowledge[d] that this preference may be justifiable as a matter of good practice." 378 S.E.2d, 307, fn.3. The Presiding Justice concurred in the majority opinion, with the caveat, "I take this position in spite of my concern that the disclosure of search committee activities, including the names of applicants, may result in diminishing the quality of the applicant pool. \* \* \* The public policy issue of what information

or actions involved in a search for an official may be withheld from disclosure rests with the legislative branch. I believe the legislative branch has the power to exclude from disclosure names of persons considered. But in view of the requirement of narrow interpretation, I do not believe it has done so yet.” *Id.*, at 308.

The Estes article concluded:

This article has identified a repeated pattern. Every so often, a state university presidential search becomes the object of well-publicized litigation, in which the media sue to force greater disclosure of candidate identities than the customary practice allows. The media usually win these lawsuits, but the victory is pyrrhic. The university appeals to the legislature, points out that it cannot attract good presidential candidates under the rules demanded by the press and the courts, and convinces the legislature to change the statute.

\* \* \* Perhaps state legislatures are in the best position to judge the value of attracting top leadership to their higher education systems, and can balance the desire for total openness with the practical reality that such openness will diminish their state’s chances of attracting top candidates to lead their institutions. \* \* \* Perhaps the wisest decisions in this area are similar to the Georgia Board of Regents opinion, in which the court acknowledged the university’s good policy argument, but asked that it be redirected to the legislature which wrote the public records law.

26 J.U.&C.L., 508–09.

6. In their Pre-Trial Summary, the Plaintiffs also asserted that the issue presented a matter of public policy which should be addressed by the Wyoming Legislature.

Plaintiffs cited *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. Civ. App. 1983), for their contention that the claim “that some qualified candidates for university administrative positions would be discouraged from applying for a position if they thought their names might be disclosed” was insufficient. And they cited the Texas court’s conclusion: “While this factor might persuade the legislature to create an Open Records Act exception for such applicants, it is not evidence of a ‘clearly unwarranted invasion of personal privacy’ under current Texas tort law or the Open Records Act.” See Plaintiffs’ Pre-trial Summary, p. 8, citing *Hubert*, 652 S.W.2d, 551.

The Plaintiffs stated, “Defendants in their counterclaim want this Court to make public policy by seeking to withhold documents otherwise public pursuant to the express provisions of the Wyoming Public Records Act. Courts have recognized that the ‘catch-all’ exemption could be used to subvert the legislature’s prerogative to make policy.” *Id.*, p. 12.

Plaintiffs also argued, “This Court, as a matter of law, should reject the invitation to make policy better left to the legislature on the basis that this is not one of the ‘extraordinary situations the legislature could not have identified in advance.’” *Id.*, p. 14.

The University and Board agree that public policy is established by the Legislature. *Union Pacific Resources Co. v. Dolenc*, 2004 WY 36, ¶ 21, 86 P.3d 1287, 1295 (Wyo. 2004)(legislature sets public policy, the wisdom of which the courts will not second guess); *Galesburg Construction Co., Inc. v. Board of Trustees of Memorial Hosp. of Converse County*, 641 P.2d 745, 750 (Wyo. 1982)(“The legislature announces public policy by its enactments.”); *Kinney v. Hynds*, 7 Wyo. 22, 49 P. 403, 405 (1897)(legislature had the power to declare the public policy of the state, and what should be legal in the premises).

7. Following this Court’s Decision Letter, the Wyoming Legislature reacted with the introduction of House Bill 223. The bill passed both houses of the Legislature, and became House Enrolled Act 001. Pursuant to Wyo. Const., Art. 4, § 8, the bill became law without the Governor’s signature on February 8, 2013. A certified copy of HEA 001, and the Governor’s accompanying message, is attached hereto.

8. The bill amends Wyo. Stat. § 16-4-203(b) by creating a new paragraph (vii). The amendment adds the following described records to those which the custodian may withhold from public inspection:

(vii) An application for the position of president of an institution of higher education, letters of recommendation or references concerning the applicant and records or information relating to the process of searching for and selecting the president of institution of higher education, if the records or information could be used to identify a candidate for the position. As used in this paragraph “institution of higher education” means the University of Wyoming and any community college in this state.

9. Section 2 of the Enrolled Act provides:

This act shall apply to all records or information as stated in this act related to the search and selection process for which a board of trustees of an institution of higher education or its agent is considering applications on or after the effective date of this act, and shall include all such records or information whether developed or submitted prior to or after the effective date of this act.

That is, the amendment applies prospectively to searches not yet complete, but exempts from disclosure any records which fall within the scope of the amendment, whether developed or submitted before or after the effective date of the amendment. The amendment expressly applies to a search for which a board of trustees “is considering applications on or after the effective date of this act.” By its terms, the amendment applies to the current, ongoing search for the next president of the University which was the subject of this action.

10. As Plaintiffs have stipulated,<sup>1</sup> the records at issue in this case did not exist at the time of the original public records request, and did not exist at the time of trial. Further, they did not exist on the day the Court entered its final order [February 4, 2012], did not exist at the time the amendment was enacted into law, and do not exist as of the filing of this Motion. *See* Affidavit of Asher, ¶¶ 6, 7.

11. This amendment creates the “specific statutory exemption” to which this Court referred in its Decision Letter, and changes the controlling public records law to protect the records which the Plaintiffs seek in this action.

12. As a result, the controlling law has changed since the Court issued its Decision Letter.

13. In its Final Order, this Court enjoined the Defendants from withholding the records at issue in this case under the provisions of the Wyoming Public Records Act as it existed prior to the amendment. While the general rule is that statutory amendments do not apply to pending litigation, “[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.” *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1993); *see also* Gilmore, Application of Statutory Changes to Cases in Progress, 34 Idaho L. Rev. 517, 577 (1998)(“If the regulated activity takes place after the statute is effective, the statute's application would be prospective, not retroactive, and the statute should be applied in the course of the litigation, even if other acts underlying the litigation arose before the new statute was enacted.”)

B. There is Insufficient Evidence to Support the Court’s “Substantial Injury” Conclusion.<sup>2</sup>

14. As the Court noted in its Decision Letter, Dr. Betty Asher “testified regarding the likely effect that publishing the identities of the finalists would have on UW’s ongoing search.” Of 15 candidates identified by the Initial Screening Committee as warranting further consideration, eight, including two sitting presidents and five sitting provosts, were selected for background and reference checks. “Dr. Asher asserted that both sitting presidents and one sitting

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<sup>1</sup> *See* Plaintiffs’ Pre-trial Summary, Admissions of Facts and of Documents, p. 3, ¶ 12.

<sup>2</sup> The intervening change in the controlling law is sufficient, in itself, to grant this Motion. If the Court acts on the change in the law, the sufficiency of the evidence and availability of new evidence which may alter the judgment need not be considered.

provost had indicated that there were likely to withdraw their applications if their confidentiality was not guaranteed.” Decision Letter, p. 8.

15. At the time of the bench trial held in this matter, Dr. Asher was not able to say with certainty what would happen in the event that confidentiality of the candidates’ identities could not be maintained. Now that the Court has ruled, the candidates identified by Dr. Asher have confirmed their intentions. One sitting president and one sitting provost have withdrawn, and the other sitting president and another sitting provost have advised that they will not participate in the search unless confidentiality is maintained. As a result, there are only four candidates in the current pool who will allow their identities to be disclosed. *See* Affidavit of Betty Asher, attached hereto.

16. In its Decision Letter, the Court found and concluded:

The loss of any qualified candidate due to disclosure is certainly “damage or harm,” and thus an injury, at least in the sense that it reduces somewhat the odds of finding a successful new president. However, stated simply, the loss of two to three qualified candidates out of 15 recommended by the initial screening committee is not an injury that is “considerable in importance, value, degree, amount or extent.” It is not a “substantial injury” to the Board’s ability to find a qualified president.

Decision Letter, p. 9.

17. This finding cannot be sustained by the evidence. Of the 15 candidates identified by the Initial Screening Committee, eight were selected by the Secondary Screening Committee to be “referenced.” While these candidates may or may not have been the selected “finalists,” depending on the results of the background and reference checks, they constitute the set of candidates from which the finalists would have been chosen. *See* Resolution of the Board of Trustees of the University of Wyoming, Exhibit C, ¶ 3.B. Thus, in determining whether the loss of some number of candidates constitutes a “significant injury” to the public interest, the pool is eight candidates, not 15. The evidence available at the time of trial was that the two sitting presidents would withdraw, and one sitting provost might withdraw. That is, Dr. Asher predicted that two or three of eight would be lost, including both sitting presidents, not “two to three...out of 15.” Decision Letter, p. 9.

C. Evidence Which Could not be Produced at Trial.

18. Because, at the time of trial, the only evidence which could be offered was Dr. Asher’s prediction of what was likely to occur if the identities of the finalists were not confidential, the actual withdrawal of candidates following the Court’s decision is new evidence



which the University and Board could not have produced at trial. Following the Court's Decision Letter, four of the eight candidates selected for reference checking either have withdrawn or will withdraw if their identities must be disclosed.<sup>3</sup> Whether the withdrawal of one half of the candidate pool, including the two sitting presidents, constitutes a "substantial injury" to the public interest is a question committed to the Court under Wyo. Stat. § 16-4-203(g), but it is not answered in the Court's Decision Letter.

WHEREFORE, Defendants/Counterclaim Plaintiffs pray that the Court alter or amend the Decision Letter, and the final Order entered thereon, to reflect that there has been an intervening change in the controlling law which requires that the judgment be altered or amended to authorize the University and Board of Trustees to complete the search without disclosing the records which may be created regarding the finalists. Alternatively, Defendants/Counterclaim Plaintiffs pray that the Court alter or amend the Decision Letter and Final Order to reflect whether the loss of four of eight candidates constitutes a "substantial injury" to the public interest pursuant to Wyo. Stat. § 16-4-203(g).

Dated this 11th day of February, 2013.

THE UNIVERSITY OF WYOMING and its  
BOARD OF TRUSTEES, Defendants/  
Counterclaim Plaintiffs,

By: Bruce A. Salzburg  
Bruce A. Salzburg  
Crowell & Moring, LLP  
205 Storey Blvd., Suite 120  
Cheyenne, WY 82009  
Tel.: (307) 996-1400  
Fax (307) 996-1419

#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Alter/Amend was served via United States mail this 11th day of February, 2013, addressed as follows:

Bruce T. Moats, Esq.  
Law Office of Bruce T. Moats  
2515 Pioneer Avenue  
Cheyenne, WY 82001

Anna Rose Mumford

<sup>3</sup> These were the three to whom Dr. Asher referred in her trial testimony, plus another sitting provost. See Asher Affidavit, ¶ 6.

MATTHEW H. MEAD  
GOVERNOR



STATE CAPITOL  
CHEYENNE, WY 82002

## Office of the Governor

February 8, 2013

The Honorable Tony Ross  
Senate President  
Wyoming Senate  
State Capitol Building  
Cheyenne, WY 82002

The Honorable Tom Lubnau  
Speaker of the House  
Wyoming House of Representatives  
State Capitol Building  
Cheyenne, WY 82002

Re: House Bill No. 223


Dear President Ross and Speaker Lubnau,

Today I did not sign House Bill No. 223; however, I sent the bill to the Secretary of State, meaning it becomes law without my signature.

This bill creates another exemption from disclosure under the Wyoming Public Records Act. In addition, the Press Association has raised important points about the need for transparency at UW and our community colleges. By not signing the bill, I wish to signal that I would not favor any further expansion of this exemption.

That being said, I had asked the UW Board of Trustees to find the very best person possible to be the next President of the University of Wyoming. After careful consideration, the Board identified a process to meet that request and did so with good intentions and believing they were within the bounds of the Wyoming Public Records Act. The search process should play out under the conditions established for the applicants who put their names forward. It should not change midstream. Consequently, I allowed the bill to proceed absent my signature.

Sincerely,

  
Matthew H. Mead  
Governor

MHM:mdm

cc: ✓ The Honorable Max Maxfield, Secretary of State  
Chief Clerk, Wyoming House of Representatives





Chapter 2

ORIGINAL HOUSE  
BILL NO. 0223

ENROLLED ACT NO. 1, HOUSE OF REPRESENTATIVES

SIXTY-SECOND LEGISLATURE OF THE STATE OF WYOMING  
2013 GENERAL SESSION

AN ACT relating to public records; authorizing denial of inspection of records of applications for president of institutions of higher education and associated records as specified; specifying applicability; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

Section 1. W.S. 16-4-203(b) by creating a new paragraph (vii) is amended to read:

16-4-203. Right of inspection; grounds for denial; access of news media; order permitting or restricting disclosure; exceptions.

(b) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

(vii) An application for the position of president of an institution of higher education, letters of recommendation or references concerning the applicant and records or information relating to the process of searching for and selecting the president of an institution of higher education, if the records or information could be used to identify a candidate for the position. As used in this paragraph "institution of higher education" means the University of Wyoming and any community college in this state.

Section 2. This act shall apply to all records or information as stated in this act relating to the search and selection process for which a board of trustees of an institution of higher education or its agent is considering

ORIGINAL HOUSE  
BILL NO. 0223


ENROLLED ACT NO. 1, HOUSE OF REPRESENTATIVES

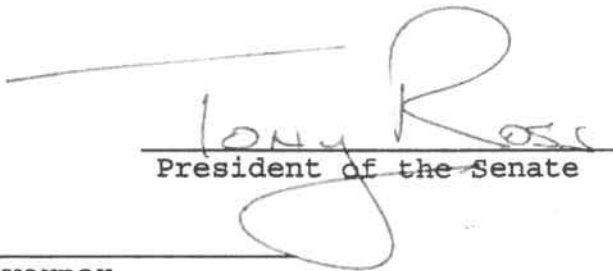
SIXTY-SECOND LEGISLATURE OF THE STATE OF WYOMING  
2013 GENERAL SESSION

applications on or after the effective date of this act, and shall include all such records or information whether developed or submitted prior to or after the effective date of this act.

Section 3. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(END)

  
\_\_\_\_\_  
Speaker of the House


  
\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Governor


TIME APPROVED: \_\_\_\_\_

DATE APPROVED: \_\_\_\_\_

I hereby certify that this act originated in the House.

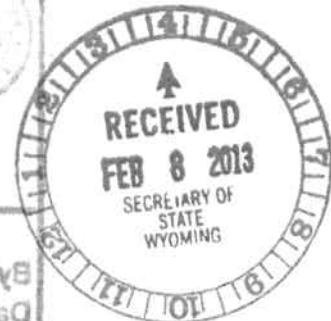
  
\_\_\_\_\_  
Chief Clerk

STATE OF WYOMING  
Secretary of State  
I hereby certify that this is a true and correct copy of the document as filed in this office.

  
\_\_\_\_\_  
Secretary of State

By: \_\_\_\_\_  
Date: \_\_\_\_\_

2





STATE OF WYOMING  
Secretary of State

I hereby certify that this is a true  
and complete copy of the document  
as filed in this office.

*Max Mayfield*

Secretary of State

By:

*Karla Stackis*

Date:

*February 8, 2013*

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Fax: (307) 996-1416

STATE OF WYOMING     )  
  ) ss.  
COUNTY OF ALBANY     )

IN THE DISTRICT COURT FOR THE  
SECOND JUDICIAL DISTRICT

CHEYENNE NEWSPAPERS, INC.,     )  
a Wyoming corporation,     )  
dba *The Wyoming Tribune-Eagle*;     )  
LEE NEWSPAPERS, a Foreign corporation,)  
dba *The Casper Star-Tribune*, and     )  
THE ASSOCIATED PRESS, a     )  
not-for-profit news cooperative,     )  
  )  
  ) Plaintiffs,     )

Docket No. 2012-32631

vs.     )  
          )  
          )

THE UNIVERSITY OF WYOMING     )  
and its BOARD OF TRUSTEES,     )  
in their capacity as custodians of records,     )  
  )  
  ) Defendants.     )

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**AFFIDAVIT OF BETTY TURNER ASHER**

---

COMES NOW Betty Turner Asher, who being first being duly sworn, deposes and says:

1. My name is Betty Turner Asher. I am over the age of twenty one years and otherwise qualified and competent to make this affidavit.

2. I am a partner in Greenwood/Asher & Associates, a search firm which specializes in searches for officers and employees in the higher education field. I am the lead consultant assisting the University of Wyoming in its current search for a president to succeed Dr. Thomas Buchanan when he retires later in 2013. I testified on behalf of the University of Wyoming and its Board of Trustees at the trial in this matter held on January 16, 2013.

3. At trial, I was asked to describe the current status of the search, and to testify regarding my expectation of what would happen if the identities of the candidates for the position were required to be publicly disclosed. I explained that the Initial Screening Committee had identified 15 candidates who warranted further consideration. The Secondary Screening Committee had identified eight of those 15 who were selected to be “referenced.” That is, eight of the 15 were selected for background and reference checking. The other seven candidates were advised that they would not proceed to the next stage of the search. Pursuant to the process set out in the Board of Trustees’ October 12, 2012, resolution, after this background and reference checking was completed, the Secondary Screening Committee was charged with the obligation to “recommend no fewer than five best qualified applicants for consideration by the full Board.” Exhibit C, ¶ 3.B.

4. The eight candidates selected for background and reference checking included two sitting presidents, five sitting provosts, and one non-traditional candidate.

5. At trial, I testified that my expectation was, if the identities of the candidates were required to be disclosed, that the two sitting presidents would withdraw from the search pool, and one sitting provost might withdraw.

6. Following the Court’s Decision Letter, dated January 23, 2012, two of the eight candidates, including one sitting president and one sitting provost, formally withdrew. In addition, two other candidates, including the remaining sitting president and another sitting provost, have announced that they will not continue if their identities are required to be disclosed. As a result, as of this date, only four of the eight candidates have agreed to remain in the pool if public disclosure of their identities is required.

7. For this reason, the Secondary Screening Committee is currently unable to comply with the direction "to recommend no fewer than five best qualified applicants for consideration by the full Board."

FURTHER AFFIANT SAYETH NOT.

Dated this 4<sup>th</sup> day of February, 2013.

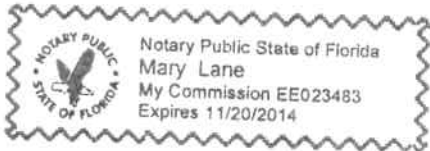
Betty Turner Asher  
Betty Turner Asher

State of Florida )  
County of Walton ) ss.

Subscribed and sworn to or affirmed before me this 4<sup>th</sup> day of February, 2013.

SEAL

Mary Lane  
Notary Public



Mary Lane