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FIFTH COURT OF APPEALS
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No. 05-24-00813-CV

IN THE FIFTH COURT OF APPEALS
DALLAS DIVISION

TEXAS PUBLIC POLICY FOUNDATION,
Plaintiff-Appellant,

v.

HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the 14th Judicial District Court
of Dallas County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

RECORD REFERENCES

"[Volume Number].RR.[Page Number]" refers to the three-volume reporter's record of August 1, 2024. "CR.[Page Number]" refers to the clerk's record of July 18, 2024.

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STATEMENT OF THE CASE

Nature of the Case: This suit involves Plaintiff's attempt to obtain the disclosure of a single document—a final report, created by an accounting firm. Plaintiffs seek disclosure of this document under the Texas Public Information Act.

Course of Proceedings: Plaintiff, Texas Public Policy Foundation filed an Original Petition for Writ of Mandamus on January 23, 2023, against Highland Park Independent School District (HPISD)

On March 1, 2023, HPISD answered the petition.

On March 16, 2023, HPISD filed a motion to stay in light of a pending Texas Supreme Court case which Plaintiff responded to on April 27, 2023.

On April 21, 2023, Plaintiff filed a motion for *in camera* review which HPISD responded to on April 25, 2023.

On April 27, 2023, the Court granted HPISD's motion to stay.

On July 18, 2023, Plaintiff filed an unopposed motion to reopen proceedings.

On July 25, 2023, the Court issued a scheduling order setting a trial date for April 30, 2024.
On February 8, 2024, HPISD file a motion for summary judgment.

On March 19, 2024, Plaintiff and HPISD filed a joint motion for continuance in order for both

parties to present cross-motions for summary judgment to either resolve the case or clarify the issues present for trial.

On April 3, 2024, the Court denied the joint motion for continuance.

On April 5, 2024, Plaintiff filed a motion for summary judgment and response to HPISD's motion for summary judgment.

On April 8, 2024, Plaintiff and HPISD filed a joint motion for leave to set hearings on their motions for summary judgment.

On April 11, 2024, the Court granted Plaintiff's motion for *in camera* review.

On April 15, 2024, the Court informed the parties it would not hear or consider their motions for summary judgment.

On April 30, 2024, this matter went for trial and the Court issued a final judgment denying Plaintiff's Application for Writ of Mandamus.

Trial Court: 14th District Court, Dallas County (Hon. Eric V. Moyé)

Trial Court Disposition: On April 30, 2024, after a trial, the trial court entered a final written order denying Plaintiff's application for Writ of Mandamus.

On May 1, 2024, Appellant timely requested Findings of Facts and Conclusions of Law which the Court issued on May 20, 2023.

On May 30, 2024, Appellant requested Additional Conclusions of Law which the District Court did not provide.

On July 3, 2024, Appellant timely filed a notice of appeal of the order of denial of Plaintiff's Application for Writ of Mandamus.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument because this appeal involves important questions regarding the interplay between the Texas Open Records Act, attorney-client privilege, and the duty of courts to ensure that government bodies may not circumvent the core design of the Open Records Act with shell-games under the guise of privilege. The outcome of this case will impact both government bodies throughout the state and every member of the public. Oral argument is therefore likely to assist the Court.

ISSUES PRESENTED

After a scandal involving an alleged misallocation of public funds, Highland Park Independent School District (HPISD) commissioned a third-party report from Whitley Penn, an accounting firm. HPISD has informed the public, through an email from Michael White, that this Report found no malfeasance and no misconduct on the part of HPISD.

In response, Appellant filed a Texas Public Information Act (TPIA) request for the contents of the Report. HPISD refused to comply, arguing that the entirety of the Report was privileged because it was sent to its lawyers prior to being presented to HPISD.

Appellant filed suit arguing that privilege was waived when HPISD officials disclosed the alleged contents of the Report to the public. And regardless, disclosure of any non-privileged portions of the Report is still required under the TPIA.

The District Court rejected Appellant's arguments and did not require that HPISD turn over any part of the Report.

Appellant presents the following questions on appeal:

1. Did HPISD waive its attorney-client privilege regarding the Report by making claims to the public about the contents of the Report?

2. Did the District Court abuse its discretion in preventing Appellant from introducing any evidence regarding the context, content, or understood meaning of Mr. White's email when considering the waiver issue?

3. Assuming that privilege was not waived, must HPISD disclose any nonprivileged portions of the Report?

INTRODUCTION

This case presents a question at the core of the Texas Public Information Act (TPIA): Is a final, factual report, prepared by a governmental entity with taxpayer funds, whose conclusion has been disclosed to the public, subject to the disclosure under the TPIA? The plain answer is yes.

The District Court nevertheless refused to require disclosure, because the Report was allegedly shared with the government's attorneys before being passed on to top officials. According to the court below, this shell-game rendered the Report covered by the attorney-client privilege.

But even if privilege could be achieved by such cynical means, that privilege was waived when government officials, for political purposes, disclosed the alleged conclusions of that Report to the public. The government, like anyone else, may not use privilege as both a sword and a shield.

Moreover, even where privilege applies, the TPIA requires that the government disclose those portions of the Report that are purely factual.

By refusing to require any disclosure in this case, the District Court has permitted an end-run around the plain text and purpose of the TPIA. If not corrected by this Court, this approach will provide a model for any government entity seeking to avoid the sunshine required by the law.

The lower court's opinion should be reversed and vacated.

STATEMENT OF FACTS

Background

The Seay Tennis Center is a facility owned by HPISD that serves the schools and surrounding community. *Seay Tennis Center*, Highland Park Indep. School District, https://tinyurl.com/3c4k32p6. It was built at its current location and funded by millions of dollars allocated from a Highland Park bond package passed by the voters. Elvia Limón, *Highland Park ISD Plans for New Indoor Tennis Facility Draws Concerns About Extra Traffic*, The Dallas Morning News (Feb. 13, 2017), https://tinyurl.com/bd5992z2. The revenues from this facility are important to Highland Park, because the profits are not subject to the same "Robin Hood" provisions that redirect money from local property taxes away from Highland Park. Tex. Educ. Code. § 36.001 *et. seq*.

In 2020, Jason Holland, a former tennis professional at the Center, alleged that Center employees had been running a kick-back scheme by pocketing cash payments for tennis services rather than providing those funds to HPISD. CR.786–87. This allegation was corroborated when the Center switched to a credit/debit card payment system and gross receipts increased by 1.1 million dollars. 2020 HPISD Comprehensive Annual Financial Report, at 18 available at https://tinyurl.com/38wkv9fs; 2021 HPISD Comprehensive Annual Financial Report, at 18 available at https://tinyurl.com/2jvk822w.

In response to public pressure, HPISD hired accounting firm Whitley Penn to investigate and complete a report (hereafter, the "Whitley Penn Report" or "the Report"). CR.796. The Report was not published.

By 2021, concerned citizens were still asking questions about the tennis center and wanted to know what was in the Whitley Penn Report. CR.805. In response to several emails, Michael White, HPISD's Assistant Superintendent for Business Service stated that there had been "a thorough investigation . . . with expert assistance" and that there was "no malfeasance occurring" and that "no funds are being misdirected or mismanaged." CR.805. Mr. White later testified that the investigation he was referring to was the Whitley Penn Report. 2.RR.27. HPISD has never retracted or contradicted these statements.

Appellant's TPIA Request

On August 22, 2022, Appellant requested a copy of the Report from HPISD under the Texas Public Information Act. CR.841. In response, HPISD requested a ruling from the Open Records Division of the Attorney General as to whether the Report was excepted from disclosure by the attorney-client privilege. CR.841. HPISD argued that the Report was privileged in its entirety because Whitley Penn had provided a copy of the Report to HPISD attorneys, and no copy of the Report had been disclosed to non-parties.

On November 30, 2022, the Open Records Division of the Attorney General issued its ruling. The Attorney General concluded that the Report was discoverable as "a completed report subject to section 552.022(a)(1)" but ultimately held that the Report was privileged and did not compel production of the Report. CR.841; Tex. Att'y Gen. Op. OR2022-36895.

This Lawsuit

Because HPISD refused to disclose the Report, Appellant filed suit under the TPIA seeking disclosure. Tex. Gov't Code § 552.321(a) (providing that a requestor "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 supply public information . . ."). Appellant argued that: (1) the Report was not subject to attorney client privilege, (2) to the extent the Report was subject to privilege, Mr. White's email discussing the Report's contents had waived any privilege associated with the Report, and (3) at a minimum, the factual/non-privileged portions of the Report had to be disclosed under the Texas Public Information Act. CR.12–28.

On April 21, 2023, Plaintiff requested the Court conduct an *in camera* review of the Whitley Penn Report. After a series of events including (1) a stay to await a Texas Supreme Court case, (2) a denied joint motion for continuance which would have extended discovery, and (3) a denied joint motion to set a hearing on cross motions for summary

judgment, the District Court conducted the *in camera* review, and, without briefing, held that the Whitley Penn Report was privileged.

The District Court then ordered the parties to appear at trial.

The District Court Prevents the Parties from Putting on Evidence at Trial.

When the Parties arrived for trial, the court made clear that it was limiting the discussion to the issue of waiver. 2.RR.7 at 24–25

When the parties attempted to submit agreed exhibits, the court refused to enter any of them. 2.RR.7. When the Parties attempted to enter stipulated facts, the court refused. When Appellants offered to put on witnesses, the court refused those as well. 2.RR.7.

Rather, the court limited the proceedings to a single witness and a single document—Michael White, and the last email in a chain of emails between Mr. White and a member of the public where Mr. White discussed the contents of the Whitley Penn report. 2.RR.7, 17.

But even there, the court intervened with a heavy hand. Appellant was not allowed to ask Mr. White any questions about the prior emails in the chain, the context of the discussion, or even what certain words in Mr. White's email meant. 2.RR.22–27. Once the court repeatedly made clear that it would not allow Appellant to ask any questions—repeatedly telling the witness not to answer—Appellant dismissed the witness. 2.RR.28. HPISD did not put on any evidence.

The court then ruled from the bench that Mr. White's email did not waive privilege attached to the Whitley Penn Report and entered final judgment dismissing the case. 2.RR.28, CR.845.

The District Court's Findings of Fact and Conclusions of Law

On May 1, 2024, Appellant requested findings of fact and conclusions of law. CR.847. The Judge filed its findings of fact and conclusions of law on May 20.

In those findings, the District Court held that the Whitley Penn Report was subject to attorney client privilege because it was prepared for HPISD's lawyers. CR.851. It found that the entirety of the Whitley Penn Report was excepted out of TPIA's disclosure because of the attorney client privilege. CR.851. It held that only the Board of Trustees, acting by a majority vote, could waive the attorney client privilege attached to the Report. CR.854. And it held that Michael White did not waive the privilege in the Report. CR.852.

Appellant requested additional conclusions of law to clarify the Courts holdings. CR.855–56. The Court refused.

Appellant now appeals. CR.859.

SUMMARY OF ARGUMENT

The TPIA requires completed final reports be turned over to the public. Here, a completed final Report was created by accountants at Whitley Penn for HPISD. That final Report is subject to disclosure.

HPISD has refused to turn over the Report, claiming attorney-client privilege because the Report was also shared with its attorneys. But that's not how privilege works. Even if it was, HPISD waived any attorney client privilege in the Report when it publicly disclosed the Report's alleged findings via an email from Michael White. This is textbook waiver.

The District Court nevertheless accepted HPISD's arguments. In doing so it made several fundamental errors, each of which warrants reversal.

First, the District Court held that HPISD could only waive a privilege by a majority vote of its Board. But HPISD never raised this argument, and the District Court did not cite any authority for its approach. In the context of government bodies like HPISD, privilege is waived when a top official discloses a significant part of the information to the public. Here, Mr. White—the official charged with overseeing the Tennis Center—revealed the conclusions of the Report to the public in an email, with the full knowledge of the Superintendent, Board of Trustees, and HPISD's counsel. HPISD has not retracted those statements. That is sufficient for waiver. The District Court's plain departure from the established jurisprudence on waiver warrants reversal.

Second, the District Court held that complete disclosure of the Report was necessary to waive privilege. But, under the Texas Rules of Evidence, privilege is waived when a significant part of the material is

disclosed. Here, HPISD revealed the conclusions of the Report. Under the statute and case law, this is sufficient for waiver. The District Court's holding to the contrary warrants reversal.

Third, to the extent there was any ambiguity in Mr. White's email disclosing the contents of the Report, the District Court erred by refusing to allow any evidence as to the context or meaning of those public statements. Mr. White's email was a response to prior emails about the Whitley Penn Report. This context clarifies any potential ambiguity in his statements. Yet, when Appellant attempted to put on evidence to this effect, the Court flatly refused to allow any evidence, witnesses, exhibits, or questions on the topic. This abuse of discretion requires this Court's intervention.

Fourth, even if the District Court were correct on waiver, the District Court's analysis of privilege on the front end ignored the text of the TPIA and failed to distinguish between legal advice provided by an attorney, and purely factual, nonlegal reports prepared by accountants. Under the case law, even when licensed attorneys prepare reports in a non-legal capacity, that material is not subject to attorney client privilege. Here, the Whitley Penn Report was prepared by accountants to make personnel decisions which is the exact type of non-legal work product excluded from attorney-client privilege.

Thus, even if there was some legal advice within the Whitley Penn Report, the District Court still erred in preventing any disclosure of the

Report. The TPIA requires partial disclosure even when a document contains privileged information. Here, the Court did not distinguish between any privileged or non-privileged information within the Whitley Penn Report. This requires reversal.

This Court should therefore reverse the trial court's judgment denying Plaintiff's Petition for Writ of Mandamus and finally grant the public the opportunity to see how its tax dollars were spent at the Seay Tennis Center.

STANDARD OF REVIEW

A final, completed report is subject to disclosure and may be withheld from release only if it falls within one of the exceptions to the Act. Tex. Gov't Code §552.221. It is the governmental body's burden to prove the applicability of any exception it asserts to withhold information requested pursuant to the Act. *Thomas v. Cornyn*, 71 S.W.3d 473, 490 (Tex. App.—Austin 2002, no pet.). Accordingly, HPISD bears the burden of establishing that attorney-client privilege exists and that the information has not been waived. *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1985). This Court reviews the District Court's fact finding for abuse of discretion, but this Court must "review de novo questions of law and other applications of law to fact." *Mangiafico v. State*, No. 05-21-00601-CR, 2023 Tex. App. LEXIS 5633 at *21 (Tex. App.—Dallas, July 31, 2023).

ARGUMENT

I. The District Court Erred in Evaluating Mr. White's Waiver Of Privilege

Under Tex. R. Evid. 511, the holder of a privilege waives the privilege if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged." If there is a dispute as to waiver, "the party asserting the privilege has the burden of proving that no waiver has occurred." *Jordan* 701 S.W.2d at 649.

Generally, the waiver of privilege for part of a document constitutes waiver for the whole. A "privilege may not be waived selectively to disclose only such evidence as may be beneficial to the party holding the privilege." *Bailey v. State*, 469 S.W.3d 762, 774 (Tex. App.—Houston, 2015) (affirmed *Bailey v. State*, 507 S.W.3d 740 (Tex. Crim. App. 2016)). Or as it is often put colloquially, privilege cannot be used as a both "sword and a shield."

That is precisely what happened here. Mr. White both knew about the Whitley Penn Report and was entrusted to speak on behalf of HPISD as the person who oversaw the Seay Tennis Center. CR.805. When the public expressed concerns about malfeasance at the Center and asked questions about the Report, HPISD sent Mr. White out to use the Report as a sword—claiming that the Report showed "no mismanagement" and there was "no malfeasance occurring" and that "no funds are being

misdirected or mismanaged." CR.805. These statements, made on behalf of HPISD, waived any privilege for the Whitley Penn Report. CR.805.

HPISD now tries to use privilege as a shield to prevent the public from determining the veracity of Mr. White's statements about the Report. But that is not how privilege works. Once HPISD chose to use the alleged conclusions of the Report publicly to its benefit, it waived any privilege to the Report itself. *Bailey*, 469 S.W.3d at 774.

This makes sense. If, for example, a defendant sought to use an email with her attorney as evidence in her defense, no one would dispute that she could not merely disclose those sentences from the email that were beneficial to her case. *Jones v. State*, 181 S.W.3d 875, 877–88 (Tex. App.—Dallas, 2006). Privilege for the entire email would be waived. *Id.* Similarly, HPISD may not disclose the parts of the Report it likes and then hide behind privilege when the public asks questions.

Neither HPISD nor the District Court below ever provided any case to the contrary. Instead, the District Court held that waiver was not applicable for three reasons, each of which is contrary to law.

A. As the Official Tasked with Operating the Tennis Center and Speaking on Behalf of HPISD, Mr. White Had Authority to Waive any Privilege Attached to the Whitley Penn Report.

First, the District Court held that there was no waiver, because the Highland Park ISD Board of Trustees had not officially waived the privilege by majority vote. CR.854

But HPISD never raised this "majority vote" argument, and the District Court cites no authority for it. For institutions like HPISD, attorney client privilege "rests with the corporation's management" and therefore may be waived by "officers and directors." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985); *Tex. Tech Univ. Health Sciences Ctr.—El Paso v. Niehay*, 641 S.W.3d 761, 790 (Tex. App.—El Paso 2022), *rev'd on other grounds*, 671 S.W.3d 929 (Tex. 2023).

Here, Mr. White was "the Administration official charged by the Superintendent with direct oversight of the Seay Tennis Center." 3.RR.3. His communications about the report were made on behalf of HPISD with the full knowledge of Dr. Tom Trigg, HPISD's Superintendent, as well as HPISD's attorney. *Id.* To this day, HPISD has never sought to distance itself from his statements. That is sufficient for waiver.

HPISD may not give Mr. White authority to make statements about the contents of the Report to assuage public opinion, and then claim that he had no authority to talk about that Report for the purposes of privilege. Were it otherwise, government bodies could simply allow officials to make positive statements about privileged material and then continue to hide behind privilege when the public seeks to verify those comments. That is precisely the sword and shield approach that courts

have routinely disfavored in the attorney-client privilege context. *Bailey*, 469 S.W.3d at 774.[1]

The district court's holding to the contrary should be reversed.

B. Mr. White Did Not Have to Reveal the Entirety of the Contents of the Report to Waive Privilege.

Second, the District Court held that Mr. White did not waive the privilege because he did not disclose the full contents of the Whitley Penn Report, he merely shared its alleged conclusions. CR.852.

But, as noted above, the holder of a privilege waives the privilege if he discloses "*any* significant part of the privileged matter . . . ." Tex. R. Evid. 511 (emphasis added). As the Texas Supreme Court recently held in *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, even when the holder of privilege does not directly quote from a document, "there may still be disclosure sufficient to trigger a waiver if the [disclosure] unambiguously refers to and describes any of the documents in dispute." 675 S.W.3d 273, 288 (2023).

In that case, the University of Texas published a final report detailing a review done of the University's admissions practices. *Id*. at 283. Since the University had released the final report, Franklin Center was seeking the documents underlying the report to ensure that they

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[1] To the extent any question remains about Mr. White's roles, responsibilities, or ability to waive the privilege, that is due to the District Court's abuse of discretion in refusing to allow Plaintiff's counsel to ask questions about Mr. White's background and establish Mr. White's authority to waive the privilege. 2.RR.20 at 4–7.

agreed with the final report. *Id*. The Texas Supreme Court held that if the University had voluntarily disclosed the content of those underlying documents in the report—even if it did not quote or disclose the entirety of the underlying document—then that was sufficient for waiver. *Id*. at 288.

Here, in response to an email from the public about the results of the Whitley Penn Report, Mr. White claimed that Whitley Penn's investigation showed that there was "no mismanagement" and "no malfeasance occurring" at the Center, and that "no funds are being misdirected or mismanaged." 3.RR.3. These conclusions are certainly a "significant part" of a final report describing whether there had been mismanagement or malfeasance occurring at the Tennis Center. Tex. R. Evid. 511. That is sufficient for waiver. A government official may not make claims about the alleged contents of a report when it is politically advantageous, but then claim privilege when a citizen seeks to check the veracity of those statements by utilizing their rights under the Open Records Act.

The district court therefore committed legal error by holding that a complete disclosure of the contents of the Report was necessary to waive privilege.

C. There is No Reasonable Dispute that Mr. White's Email Publicly Discussed the Alleged Contents and Conclusions of the Report.

HPISD's sole response at trial was that some of the language in Mr. White's email was in the present tense and therefore could not be read as referring to the Whitley Penn Report. 2.RR.17. But Mr. White did not testify to that effect, and nothing in the record supports that conclusion.

To rebut a claim of claim of waiver, the party invoking the privilege bears the burden of establishing that the disclosure was not a "significant part of the privileged matter." Tex. R. Evid. 511(a)(1); *Jordan*, 701 S.W.2d at 649. To meet that burden here, HPISD was required to provide some evidence that Mr. White was not discussing the contents of the Report when he claimed that the investigation showed "no mismanagement" and "no malfeasance occurring" at the Center, and that "no funds are being misdirected or mismanaged." 3.RR.3.

Here, the City relies solely on the text of Mr. White's email, arguing that the use of present tense language precludes the inference that he was speaking about the Report. But such a reading of Mr. White's email is contrary to common sense and Mr. White's testimony.

Mr. White's email was in response to an inquiry from a concerned citizen about the contents of the Report. 3.RR.3. The email states in response that there had been "an investigation…with expert assistance" and that there was "no mismanagement" and "no malfeasance occurring" at the Center, and that "no funds are being misdirected or mismanaged."

CR.805. Mr. White testified that the "investigation" he was referring to was the Whitley Penn investigation. 2.RR.27. The fact that he said "occurring" rather than "occurred" does not change the fact that he was discussing the content of the Whitley Penn Report. To the extent that HPISD seeks to prove otherwise, it was *its* burden—not Appellant's—to prove that privilege was not waived. *See Jordan*, 701 S.W.2d at 649.

But HPISD presented no evidence on this issue at all. And when Appellant's counsel attempted to present evidence or ask questions regarding the context of Mr. White's statements, the District Court flatly refused to allow such evidence into the record. 2.RR.26 at 11–14. Indeed, Appellant's counsel was not permitted to present any evidence, or ask any questions on this topic at all. See infra § I. D.

Regardless, this Court can determine that the plain meaning of Mr. White's email was not a discussion of the current state of affairs at the Seay Tennis Center. Rather it was an attempt to allay the worries of the public by disclosing the conclusions of the Report. That disclosure is sufficient to establish waiver.

D. To the Extent There is Remaining Ambiguity; the District Court Abused its Discretion by Refusing to Allow Any Evidence or Testimony on the Topic.

As discussed above, the plain text of the email and the testimony of Mr. White should have been sufficient to establish waiver. However, to the extent that this Court finds that the language is ambiguous, the District Court abused its discretion by not allowing *any* testimony or

evidence on this topic to be presented at trial, and this Court should remand for the entry of such evidence.

As relevant here, an abuse of discretion occurs when a Court's evidentiary ruling prevents a party from "present[ing] a viable claim or defense," or "develop[ing] the merits of its case." *In re Cook*, No. 05-19-01283-CV, 2020 Tex. App. LEXIS 3999 at *5 (Tex. App.—Dallas, 2020) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992)).

That is what happened here. From the beginning of the trial, the Judge refused to allow basic, uncontested, evidence from being admitted into the record. The Judge refused to enter *any* stipulated facts including facts on the topic of waiver. 2.RR.7. He refused to enter stipulated exhibits. 2.RR.7. He refused to allow Mr. White to testify about the context of his email, despite no objections from opposing counsel.[2] 2.RR.22. He refused to allow evidence or testimony regarding the communications that Mr. White's email was responding to. See, e.g. 2.RR.24 at 12–19. He refused to allow Mr. White to testify about whether the information in his email was drawn from the Whitley Penn Report—the core issue of waiver in this case. 2.RR.27 at 17–23. In short, after

[2] At one point, Plaintiff's counsel asked Mr. White whether he remembered the contents of those emails. When Mr. White began testifying about those emails the Judge interrupted the witness, without an objection from opposing counsel, and instructed him to only answer the question asked by Plaintiff's counsel. 2.RR.23–24. This intrusion into Plaintiff's examination of the witness goes well beyond the traditional role of a judge overseeing a trial.

holding that a trial was necessary and requiring the parties to appear, the Judge steadfastly refused to allow the parties to put on their case.

Instead, the Court insisted that the only thing that mattered was Mr. White's email—standing alone and divorced from any context. As the Judge held "the document that you say establishes waiver is [the Michael White Email] which is in evidence. I have instructed you that you will restrict your examination to this. I do not need context, I do not need background." 2.RR.26 at 11–14.

But that's not how the English language works. Language requires context. Standing alone, an email asking, "have you done it yet", would be ambiguous. But that ambiguity would disappear if the reader was aware that the email was following up on a previous email about taking a suit to the dry cleaners. The clarity comes from context. By refusing to allow any evidence as to context, the District Court abused its discretion.

As such, if this Court finds that Mr. White's statements are not clear enough, standing alone, to constitute waiver, Appellants should be permitted to return to the district court to submit necessary evidence regarding the context of Mr. White's email.

II. Even If There Was No Waiver, Some Portion of The Whitley Penn Report is Subject to Disclosure Under the Public Information Act.

Mike White's disclosure of the conclusion of the Whitley Penn Report should be the beginning and end of the Court's analysis. Regardless of the contents of the Report, HPISD opened itself up to disclosure when it decided to share the conclusions of the Report with the public. But if this Court disagrees, then the Court should require HPISD to disclose at least a part of the Whitley Penn Report under the Texas Public Information Act.

A. The Whitley Penn Report is not Subject to Attorney-Client Privilege.

As the Attorney General acknowledged, the Whitley Penn Report is a "completed report" that must be disclosed under Tex. Gov't Code §552.022(a)(1) unless it is excepted from disclosure. CR.761 (Tex. Att'y Gen. Op. OR2022-36895). That exception includes attorney-client privilege under Tex. R. Evid. 503. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Like waiver, the burden of proof for establishing privilege lies with HPISD. *Jordan*, 701 S.W.2d at 649.

HPISD's main argument below was that Whitley Penn was acting as a lawyer's representative and therefore, all of the work done by Whitley Penn was protected by attorney client privilege. But whether Whitley Penn is a lawyer's representative is a red-herring that misses Appellant's point.

Courts have been clear; attorney-client privilege "does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public." *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin July 27, 2000, pet. denied) *Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 602 (4th Cir. 1997) ("no privilege attaches when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer"); *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana Feb. 18, 1999, rehearing overruled) ("However, the privilege does not apply if the attorney is acting in a capacity other than that of an attorney."); *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474-75 (N.D. Tex. 2004) ("Where an attorney is functioning in some other capacity—such as an accountant, investigator, or business advisor—there is no privilege."); *Adelman v. Peter*, No. L-08-6, 2009 U.S. Dist. LEXIS 110652 at *11 (S.D. Tex. Nov. 30, 2009) ("Even in the shadow of impending litigation, purely factual investigations or judgments on business matters are not privileged, even in cases where lawyers are hired to make them.").

For example, in *In re Texas Farmers Ins. Exch.*, the court found that the documents gathered, including investigation reports, were not privileged because they were created by an attorney who was acting as an insurance investigator rather than as an attorney. 990 S.W.2d at 339,

341. The court explained that if such bare facts as investigative reports were covered by the attorney-client privilege, "insurance companies could simply hire attorneys as investigators at the beginning of the claim investigation and claim privilege as to all the information gathered. This is not the intent of the privilege." *Id*. at 341.

If the attorney-client privilege does not attach to investigative reports created by *lawyers* acting in a non-legal capacity, then it certainly cannot apply if the investigation is conducted by the forensic accountants at Whitley Penn. This is true regardless of whether Whitley Penn was a lawyer's representative. HPISD has no authority for its request to vastly expand the scope of attorney-client privilege as it relates to the core public information of investigative reports. Tex. Gov't Code § 552.022(a)(1).

This is what the Court concluded in *Seibu Corp. v. KPMG LLP*, No. 3-00-CV-1639-X, 2002 U.S. Dist. LEXIS 906 (N.D. Tex. Jan. 18, 2002). In that case, KPMG misrepresented the true financial condition of a company based on faulty audits, and the plaintiff relied on those misrepresentations in making what turned out to be bad investments. *Id*. at *2. Following the bad audit, in-house counsel at KPMG ordered in-house accountants to conduct a financial investigation about what went wrong, and to make personnel decisions about the partners involved in the audit. *Id*. at *2–*4. The court found that "the critical inquiry is not whether the investigation was conducted at the behest of a lawyer, but

whether any particular communication in connection with that investigation facilitated the rendition of legal advice to the client." *Id.* at *9. Despite the fact that one of the documents at issue was an investigative report directed to in-house counsel and labeled "Confidential, For the Briefing of Legal Counsel," the court found that this document was not subject to the attorney-client privilege or the work product doctrine because it was not "made for the purpose of facilitating the rendition of the legal services," but rather "the primary purpose of the internal investigation was to make personnel decisions regarding the termination of partners responsible for the Q-ZAR audit." *Id.* at *11–*14.

Similarly, here, lawyers ordered non-lawyers to conduct a factual investigation into the financial aspects of what was going wrong at the Seay Center. CR.797. Based on that investigation, HPISD used those facts gathered to make certain (insufficient) personnel decisions. CR.796. Just as in *Seibu*, the legal advice HPISD was seeking was merely related to personnel decisions. CR.805.

At the District Court, HPISD relied on two cases, neither of which help its argument. First, HPISD relied on *Harlandale*, and cases in the same line, for the proposition that the entirety of the Report must be withheld, including the factual statements that were the result of the financial investigation by non-lawyers. CR.762.

But such a broad view of attorney-client privilege misreads *Harlandale*. In *Harlandale*, the court found that the entire report

created by the attorney doing the investigation was privileged, including the factual portions of that report, because "the investigative fact-finding was not the ultimate purpose for which she was hired." *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 334 (Tex. App.—Austin July 27, 2000, pet. denied). The attorney in that case "was not hired by Harlandale strictly as an investigator; rather, she was employed to investigate Villareal's allegations and to use her legal training to provide Harlandale with a recommended course of action." *Id*. at 335, n.13.

But, as discussed above, even if Whitley Penn had been lawyers and not accountants, the attorney-client privilege would still look to whether they prepared the Report in a legal or a non-legal capacity. As the District Court found, Whitley Penn was brought in to create a report analyzing "internal controls and other accounting procedures and issues . . . ." CR.851.

Applying *Harlandale* to the facts of this case would result in a vast expansion of attorney-client privilege and give future governmental bodies a blueprint for avoiding scrutiny. Any local, political subdivision could be captured and entrenched by an administration that only learns embarrassing facts under the guise of attorney-client privilege. The public record of the administration and its oversight would appear unblemished, and citizens would not even realize anything is being hidden from them. This is a systemic threat to government by the people. Because in addition to allowing an administration to hide its flaws by

specious claims of privilege, it would also allow the administration to waive the "privilege" if doing so would hurt its political adversaries.

The other case cited by HPISD in support of its provision is the recent Texas Supreme Court case *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023). CR.738 But while that case has interesting things to say about privilege related to documents used in the preparation of a final report, the final report in that case, containing the investigations factual findings, *was disclosed*. *Id.* at 288 ("The Kroll Report . . . was published on UT Austin's website . . . Unsatisfied with the Kroll Report, Franklin Center of Government . . . sought complete access to the documents underlying the report."). The University of Texas admitted that the "investigators' factual findings . . . would not have been privileged to begin with." *Id.*

Franklin Center does not bear on whether the core public information of the factual portions of a "completed report"—indisputably discoverable and compiled by non-lawyers in a non-legal capacity—can nonetheless be hidden from the public. Accordingly, any reliance on Franklin Center to prevent the disclosure of the Whitley Penn report is misplaced.

This makes sense. A finding that the Report is privileged would provide a blueprint for any future governmental body to conceal material facts of wrongdoing from voters. The entirety of the Texas Public Information Act would be felled by the simpleton notion of "get the

lawyers involved" to shield bad facts from ever being disclosed to the public. How can the taxpayers/voters of HPISD fairly evaluate the administration if the administration is shielding bad facts by learning bad facts through its lawyers? "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." 2022 Public Information Handbook at 2 (citations omitted).

B. At Minimum, the Texas Public Information Act Requires Purely Factual Parts of the Whitley Penn Report to be disclosed.

But even if this Court finds that there could potentially be some privileged information within the Whitley Penn Report, it would still have to reverse the District Court's decision because at least some of the content within the report is purely factual information that must be disclosed.

It is true that the general rule is that "[i]f the governmental body demonstrates that rule 503 applies to part of a communication, generally the entire communication will be protected." 2022 Public Information Handbook at 65 (emphasis added, citing cases that set forth the ordinary rule, not as applied to core public information under the Texas Public Information Act). However, this ordinary rule does not apply to "core" public information under TPIA § 552.022(a).

The text of the Texas Public Information Act contemplates that existence of attorney-client privilege to some portion of a document does not justify withholding of the entire document when the information rises to the level of core public information. Tex. Gov't Code § 552.022(a)(16) (defining information in an attorney's fees bill as core public information even if the bill also contains non-discoverable information covered by the attorney-client privilege).

A finding that the presence of any information in a document covered by the attorney-client privilege is sufficient to exempt the entire document from disclosure would improperly render "and that is not privileged under the attorney-client privilege" from § 552.022(a)(16) mere surplusage. *Id.*; *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) ("We will give effect to all the words of a statute and not treat any statutory language as surplusage if possible.").

This makes sense. If government bodies could circumvent public disclosure under the Texas Public Information Act with a single line of privileged information, then the entire purpose of the TPIA would be undermined. And HPISD can't argue that it would be harmed by such disclosure. Of course, governments need to be able to have open and frank conversations with their attorneys, which is why attorney-client privilege is not waived by the TPIA. But government entities don't have any interest in hiding facts from the public. In fact, the TPIA was created to ensure that those facts—such as where millions of dollars of taxpayer

money has gone—can be discovered by the public. To prevent all of that information from being released to the public simply because the District does not want to redact actual legal advice from the completed report undermines the very core of government transparency and the rules for government bodies created by the legislature.

PRAYER

Based on the foregoing, this Court should reverse the District Court's judgment and grant Appellant's Writ of Mandamus, mandating that Defendant timely turn over the Whitley Penn Report to Appellant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this brief contains 6,193 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/Christian Townsend
CHRISTIAN TOWNSEND

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, a true and correct copy of the foregoing document was filed electronically and all counsel of record indicated below have been served via electronic service.

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No. 05-24-00813-CV

IN THE FIFTH COURT OF APPEALS
DALLAS DIVISION

TEXAS PUBLIC POLICY FOUNDATION,
Plaintiff-Appellant,

v.

HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the 14th Judicial District Court
of Dallas County, Texas

APPENDIX TO APPELLANT'S BRIEF

TAB A

DC-23-01161

TEXAS PUBLIC POLICY FOUNDATION	§	**IN THE DISTRICT COURT**
Plaintiff	§	
VS.	§	**14th JUDICIAL DISTRICT**
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT	§	
Defendants	§	**DALLAS COUNTY, TEXAS**

FINAL JUDGMENT

On the 30th day of April, 2024 came on for trial before the Court the above styled and referenced matter. After considering the Court's ruling establishing the proper interposition of the objection by the Defendants to the production of particular privileged information, this Court is of the opinion that Plaintiff's Application for Writ of Mandamus is not well taken, and should be denied.

All relief sought be Plaintiff is denied. All costs of Court shall be borne by Plaintiff.

It is so Ordered.

Signed 30 April, 2024.

Eric V. Moyé, Presiding Judge

TAB B

CAUSE NO. DC-23-01161

TEXAS PUBLIC POLICY FOUNDATION	§	**IN THE DISTRICT COURT**
Plaintiff	§	
VS.	§	**14th JUDICIAL DISTRICT**
	§	
HIGHLAND PARK INDEPEN-DENT SCHOOL DISTRICT	§	
Defendants	§	**DALLAS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled Cause came on for trial before the Court without a jury on April 30, 2024. Present were the Plaintiff, Texas Public Policy Foundation (hereinafter sometimes referred to as the "Foundation") and Defendant Highland Park Independent School District (hereinafter sometimes referred to as the "Highland Park ISD" or the "District"), together with their respective attorneys of record.

After considering the pleadings, the evidence, the arguments and briefs from counsel, the Court, in response to a request from Plaintiff, makes its Findings of Fact and Conclusions of Law as follows. To the extent that any testimony or documentary evidence exists in the record which is inconsistent with the Findings contained herein, the Court finds said testimony or evidence to be not persuasive.

FINDINGS OF FACT

1. The Highland Park ISD retained the law firm of Thompson & Knight LLP (the "Law Firm") for the rendition of legal services regarding an attorney investigation of certain allegations involving the Tennis Center. Thompson & Knight LLP subsequently merged with the

law firm of Holland & Knight as of August 1, 2021.

2. The Law Firm was retained to opine on legal issues involved in the District's Seay Tennis Center operations, including the employee handling of the financial operations of the Tennis Center.

3. Because the lawyers providing the advice are not accountants and do not have a financial background, and because providing legal advice to the Highland Park ISD required knowledge of a number of financial and accounting issues, the Law Firm engaged Whitley Penn—an accounting and consulting firm—to assist the attorneys in their investigation.

4. The Law Firm considered Whitley Penn's assistance with analyzing the Seay Tennis Center's internal controls and other accounting procedures and issues to be necessary for it to be able to provide legal advice to the Highland Park ISD.

5. The Law Firm's engagement letter outlined that it was retaining accounting firm Whitley Penn "to assist [the Law Firm] with an attorney investigation of certain allegations," which is in furtherance of the Law Firm's rendition of legal services to the Highland Park ISD.

6. Upon the completion of its work, Whitley Penn produced its findings in a report (the "Report"), which Whitley Penn provided to the Law Firm's attorney Bryan Neal. Attorney Neal used the Report to complete his investigation into the allegations regarding the Tennis Center and to provide legal advice the Highland Park ISD.

7. Neither the Report, nor the contents of the Report have been shared with any non-party, with the exception of certain other attorneys (and certain support staff) at the Law Firm, as well as the Attorney General in connection with responding to the Public Information Act request at issue in this lawsuit. At the time the Law Firm provided the legal advice to Highland Park ISD, it did not provide a copy of the Report to anyone at Highland Park ISD.

8. On March 29, 2021, Mike White, the District's then Assistant Superintendent for Business Services sent an email regarding the Tennis Center. The email stated that "there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged. The email did not disclose the contents of the Report, or the legal advice provided by Attorney Neal.

9. On August 22, 2022, the Foundation filed a request under the Texas Public Information Act with the Highland Park ISD seeking a copy of the Whitley Penn Report. In response, on September 21, 2022, the District sought an opinion from the Attorney General that the Report was not subject to disclosure under the Public Information Act because it was protected by the attorney-client privilege.

10. On November 30, 2022, the Open Records Division of the Attorney General determined the Report was not subject to disclosure un the Texas Public Information Act as the Report was protected by the attorney-client privilege.

11. The Whitley Penn Report has not been produced for public viewing. At all times, the Whitley Penn Report has been maintained private and confidential. There has been no voluntary disclosure or consent to disclosure of any significant part of the Whitley Penn Report.

12. On April 12, 2024, Highland Park ISD submitted the Whitley Penn Report, which is the subject of this lawsuit, to the Court for an *in camera* inspection. On April 15, 2024, counsel for the District and TPPF received email correspondence from the Court, which stated "[t]he Court has completed its *in camera* review of the Whitley-Penn Report and affirms the retention of same by the Defendant based upon the privilege as invoked."

13. Any Conclusion of Law more properly deemed a Finding of Fact.

CONCLUSIONS OF LAW

1. Texas law allows public information that is subject to Section 552.022(a) of the Government Code to be withheld from disclosure if the information is held to be confidential under attorney-client privilege.

2. Information is excepted from the requirements of Section 552.021 of the Government Code if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

3. A "compelling reason" to withhold confidential attorney-client communications exists and, absent waiver, rebuts the presumption that the information protected by the privilege is "subject to required public disclosure."

4. Texas Rule of Evidence 503 provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: . . . between the client's lawyer and the lawyer's representative."

5. Tex.R.Evid. 503 defines a "lawyer's representative" to include "one employed by the lawyer to assist in the rendition of professional legal services; or an accountant who is reasonably necessary for the lawyer's rendition of professional legal services."

6. Tex.R.Evid. 511(a)(1) provides that a person waives the privilege if the "holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged."

7. Tex.R.Evid. 511 provides that "[a] person upon whom these rules confer a privilege against disclosure waives the privilege if . . . the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged."

8. Whitley Penn is a "lawyer's representative" and the Report, which is a confidential communication between the Law Firm and Whitley Penn made to facilitate the Law Firm's rendition of legal services is therefore privileged.

9. The Highland Park ISD Board of Trustees acts as a body corporate and oversees the management of the District. As a body corporate, the Board of Trustees may act only by majority vote at a meeting duly called and held under the Texas Government Code. As a body corporate, the attorney-client privilege belongs to the Board of Trustees and, as such, the Board of Trustees must take action, by majority vote, to waive the privilege.

10. The Whitley Penn Report is subject to the attorney client privilege and, as such, not subject to disclosure and the privilege has not been waived.

11. And Finding of Fact more properly deemed a Conclusion of Law.

Signed this 20 day of May, 2024.

Eric V. Moyé, Presiding Judge

TAB C

Tex. R. Evid. 511

casetext.com/rule/texas-court-rules/texas-rules-of-evidence/article-v-privileges/rule-511-waiver-by-voluntary-disclosure

As amended through August 6, 2024

Rule 511 - Waiver by Voluntary Disclosure

(a) General Rule.

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

TAB D

Sec. 552.022. CATEGORIES OF PUBLIC INFORMATION; EXAMPLES. (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(4) the name of each official and the final record of voting on all proceedings in a governmental body;

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

(6) the name, place of business, and the name of the municipality to which local sales and use taxes are credited, if any, for the named person, of a person reporting or paying sales and use taxes under Chapter 151, Tax Code;

(7) a description of an agency's central and field organizations, including:

(A) the established places at which the public may obtain information, submit information or requests, or obtain decisions;

(B) the employees from whom the public may obtain information, submit information or requests, or obtain decisions;

(C) in the case of a uniformed service, the members from whom the public may obtain information, submit information or requests, or obtain decisions; and

(D) the methods by which the public may obtain information, submit information or requests, or obtain decisions;

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

(9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

(11) each amendment, revision, or repeal of information described by Subdivisions (7)-(10);

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

(13) a policy statement or interpretation that has been adopted or issued by an agency;

(14) administrative staff manuals and instructions to staff that affect a member of the public;

(15) information regarded as open to the public under an agency's policies;

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described

by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is confidential under this chapter or other law.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, Sec. 3, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 1319, Sec. 5, eff. Sept. 1, 1999.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1229 (S.B. 602), Sec. 2, eff. September 1, 2011.

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