

NO. DC-23-01161

TEXAS PUBLIC POLICY
FOUNDATION,

Plaintiff,

v.

HIGHLAND PARK INDEPENDENT
SCHOOL DISTRICT,

Defendant.

IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

14th JUDICIAL DISTRICT

**DEFENDANT HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT'S
MOTION FOR SUMMARY JUDGMENT**

Defendant Highland Park Independent School District (Highland Park ISD or the District) files this Motion for Summary Judgment, and, in support thereof, would respectfully show the Court as follows:

INTRODUCTION

1. On January 23, 2023, Petitioner Texas Public Policy Foundation filed its Original Petition for Writ of Mandamus against Highland Park ISD.

2. According to the Petition, Petitioner seeks an order from the Court compelling the production of a confidential investigative report prepared at the direction of the District's lawyers by accounting firm Whitley Penn (the Report) regarding the Highland Park ISD Seay Tennis Center (the Tennis Center).

3. On March 1, 2023, Highland Park ISD filed an Answer, asserting that the Report is protected by the attorney-client privilege. Soon thereafter, on March 16, 2023, Highland Park ISD filed a Motion to Stay the judicial proceedings, pending the outcome of *University Texas System v. Franklin Center for Government* before the Texas Supreme Court.

4. The Texas Supreme Court issued a ruling in *University Texas System v. Franklin*

Center for Government on June 30, 2023.¹ In its opinion, the Texas Supreme Court concluded that a third party engaged by the University of Texas System to assist the General Counsel in investigating certain allegations relating to allegedly unlawful considerations in college admissions was a “lawyer’s representative” under Texas Rule of Evidence 503, such that confidential communications with that third party for the purpose of rendering legal advice were privileged.²

5. Highland Park ISD files a motion for summary judgment, in accordance with Texas Rules of Evidence and the Texas Supreme Court’s recent ruling in *University Texas System v. Franklin Center for Government*, which supports the District’s contention that the Report is protected from production under the attorney-client privilege.

SUMMARY JUDGMENT EVIDENCE

6. In support of its Motion for Summary Judgment based on the attorney-client privilege, Highland Park ISD relies on the following evidence:

- (a) **Exhibit A**: the Affidavit of Bryan Neal (pp. 9-11);
- (b) **Exhibit 1** to the Affidavit, the engagement letter with Whitley Penn (pp 12-17);
- (c) **Exhibit 2** to the Affidavit, the District’s letter to the Texas Attorney General regarding the Report (pp. 18-25); and
- (d) **Exhibit 3** to the Affidavit, the response from the Texas Attorney General regarding the Report (pp. 26-30).

SUMMARY JUDGMENT FACTS

7. Highland Park ISD retained the law firm of Thompson & Knight LLP (the Law

¹ See *Univ. of Tex. Sys. v. Franklin Ctr. for Gov’t & Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023).

² *Id.*

Firm)³ for the rendition of legal services regarding an attorney investigation of certain allegations involving the Tennis Center. (pp. 9-10 ¶4). Specifically, the Law Firm was retained to opine on legal issues involved in the Tennis Center’s operations, including the employee handling of the financial operations of the Tennis Center. (pp. 9-10 ¶4).

8. Because the lawyer providing the advice is not an accountant and does not have a financial background, and because providing legal advice to the District required knowledge of a number of financial and accounting issues, the Law Firm engaged Whitley Penn—an accounting and consulting firm—to assist the attorney in the investigation. (p. 10 ¶5). The attorney considered Whitley Penn’s assistance with analyzing the Seay Tennis Center’s internal controls and other accounting procedures and issues to be necessary for him to be able to provide legal advice to the District. (p. 10 ¶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 District. (p. 13).

9. Upon the completion of the Report, Whitley Penn provided the Report to the Law Firm. The Report was a communication from Whitley Penn to attorney Bryan Neal only. (p.10 ¶6). Attorney Neal used the Report to complete his investigation into the allegations regarding the Seay Tennis Center and to provide legal advice to Highland Park ISD. (p. 10 ¶6).

10. 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. (p. 10 ¶7). At the time the Law Firm provided the legal advice to Highland

³ The law firm of Thompson & Knight LLP subsequently merged with the law firm of Holland & Knight as of August 1, 2021. (p. 9 ¶2).

Park ISD, it did not provide a copy of the Report to anyone at Highland Park ISD. (p. 10 ¶7).

11. Petitioner submitted a request for a copy of the Report pursuant to the Public Information Act. (Plaintiff's Original Petition ¶10.) In response, 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. (pp. 19-25).

12. The Texas Attorney General subsequently determined the Report was not subject to disclosure un the Texas Public Information Act as the Report was protected by the attorney-client privilege. (pp. 27-30).

SUMMARY JUDGMENT STANDARD

13. To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c).

ARGUMENT AND AUTHORITIES

14. The Whitley Penn Report is protected from disclosure to the public under the attorney-client privilege. Highland Park ISD thus moves for summary judgment on the basis of the attorney-client privilege.⁴

15. 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 Rule 503 defines a “lawyer’s representative” to include “an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services.”⁶

⁴ See TEX. R. EVID. 503.

⁵ *Id.* at R. 503(b)(1)(A).

⁶ *Id.* at R. 503(a)(4)(B).

16. Here, the Law Firm, through Attorney Neal, retained Whitley Penn, an accounting firm, to assist Attorney Neal with rendering legal services to Highland Park ISD. (pp. 9-10 ¶4). In other words, under a plain reading of the Rule, Whitley Penn is a “lawyer’s representative” as a matter of law, 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 privileged.

17. But even if the Court analyzes the relationship between the Law Firm and Whitley Penn under the other definition of a “lawyer’s representative” (*i.e.*, “one employed by the lawyer to assist in the rendition of professional legal services”), the result is the same.⁷ To that end, as noted by the Texas Supreme Court in the *Franklin Center* opinion, “incidentally providing” assistance does not suffice to render someone a “lawyer’s representative” under Rule 503. But if the assistance was “a significant purpose for which the representative was hired in the first instance,” as it was here, the communication will be privileged.⁸

18. Indeed, a review of the engagement letter between the Law Firm and Whitley Penn supports that Whitley Penn is a “lawyer’s representative” under Rule 503(a)(4)(A):

- (a) The Law Firm engaged Whitley Penn to “assist . . . with an attorney investigation of certain allegations;
- (b) Whitley Penn acted as the Law Firm’s “representative . . . in [Attorney Neal’s] role of providing legal advice to [Highland Park ISD];
- (c) Whitley Penn understood its role was “subject to the attorney/client and work product privileges;”
- (d) Whitley Penn’s role in working with Attorney Neal included “review[ing] documentation concerning the conduct of certain employees with respect to financial matters related to the [Tennis Center]; (2) work[ing] with [Attorney Neal] to interview, or consult as to the topics of interviews to be conducted by [Attorney Neal] or others of, certain [District] employees or former employees associated

⁷ Under Rule 503(a)(4)(A), a “lawyer’s representative” is “one employed by the lawyer to assist in the rendition of professional legal services.” *See id.* at R. 503(a)(4)(A).

⁸ *Franklin Ctr.*, 675 S.W.3d at 281.

with [the Tennis Center]; and (3) develop[ing] the [R]eport. (p. 13).

19. Moreover, as testified to by Attorney Neal, Highland Park ISD engaged him to provide legal advice regarding the Tennis Center. (pp. 9-10 ¶4). There is no reasonable argument to be made that Attorney Neal and the District did not have an attorney-client relationship giving rise to the application of the attorney-client privilege and the work-product privilege.

20. Because Attorney Neal is not an accountant and lacks a financial background, he retained Whitley Penn to investigate potential legal concerns related to the financial and accounting aspects of the Tennis Center's operations. (p. 10 ¶5). Indeed, Whitley Penn's assistance with analyzing the Tennis Center's internal controls and other accounting procedures and issues was necessary for Attorney Neal to provide legal advice to Highland Park ISD. (p. 10 ¶5).

21. After completing its work, Whitley Penn issued the Report regarding its findings and making recommendations regarding financial operations for the Tennis Center moving forward. (p. 10 ¶6). Attorney Neal then used the Report to complete his investigation and render legal advice to the District. p. 10 ¶6). The Report was maintained confidentially. (p. 10 ¶7).

22. In short, Whitley Penn "was (1) 'employed by' [the Law Firm] (2) 'to assist in the rendition of professional legal services.'"⁹ It follows that the attorney-client privilege applies to the Report as a matter of law and, as such, the Report is protected from disclosure to Petitioner and the public.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Highland Park ISD requests that the Court grant the District's Motion for Summary Judgment and deny all Petitioner's requested relief. The

⁹ *Id.* at 284.

District seeks any additional relief the Court deems appropriate, including attorneys' fees and costs.

Respectfully submitted,

By: /s/Meredith Prykryl Walker
Meredith Prykryl Walker
State Bar No. 24056487
Crystal Hernandez
State Bar No. 24132604

WALSH GALLEGOS KYLE
ROBINSON & ROALSON P.C.
105 Decker Court, Suite 700
Irving, Texas 75062
214.574.8800
214.574.8801 (facsimile)
mwalker@wabsa.com
chernandez@wabsa.com

ATTORNEYS FOR DEFENDANT
HIGHLAND PARK INDEPENDENT
SCHOOL DISTRICT

CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of February 2024, a true and correct copy of the above and foregoing document was served upon all counsel of record in accordance with the Texas Rules of Civil Procedure:

Robert Henneke
Chance Weldon
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701

/s/Meredith Prykryl Walker
Meredith Prykryl Walker

EXHIBIT A

NO. DC-23-01161

TEXAS PUBLIC POLICY
FOUNDATION,

Plaintiff,

V.

HIGHLAND PARK INDEPENDENT
SCHOOL DISTRICT,

Defendant.

STATE OF TEXAS)
COUNTY OF DALLAS)

IN THE DISTRICT COURT

DALLAS COUNTY, TEXAS

116TH JUDICIAL DISTRICT

AFFIDAVIT OF BRYAN P. NEAL

Before me, the undersigned authority, on this day personally appeared Bryan P. Neal, who being by me first duly sworn, did on oath depose and say as follows:

1. My name is Bryan P. Neal. I am over the age of eighteen and am competent to make the statements in this Affidavit. I have personal knowledge of the matters covered by this Affidavit.

2. I am a partner in the Dallas office of the law firm of Holland & Knight LLP (“HK”) and have been with HK since August 1, 2021. Before that date, I was a partner in the Dallas office of the law firm of Thompson & Knight LLP (“TK”), where I worked since 1993. HK merged with TK effective August 1, 2021.

3. I am Board Certified in Labor and Employment Law and Civil Appellate Law by the Texas Board of Legal Specialization. I have represented Highland Park Independent School District (“HPISD”) in employment and school law-related matters for approximately twenty years.

4. In 2019, I began providing legal advice to HPISD regarding legal issues involved in certain aspects of the operations of the Seay Tennis Center, including the employee handling of

the financial operations of the Seay Tennis Center. The Seay Tennis Center is a tennis facility owned and operated by HPISD. I believe that I also have provided some legal advice to HPISD on matters arising out of the Seay Tennis Center before 2019, but the matters discussed below relate to the work I did beginning in 2019.

5. Because I am not an accountant and do not have a financial background, and because providing legal advice to HPISD required knowledge of a number of financial and accounting issues, TK engaged Whitley Penn, LLP (“Whitley Penn”—an accounting and consulting firm—to assist me in investigating potential legal concerns related to the financial and accounting aspects of the Seay Tennis Center’s operations. I considered Whitley Penn’s assistance with analyzing the Seay Tennis Center’s internal controls and other accounting procedures and issues to be necessary for me to be able to provide legal advice to HPISD. A true and correct copy of the engagement letter between TK and Whitley Penn is attached as Exhibit 1.

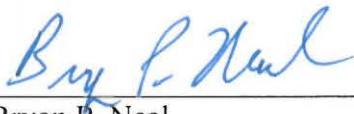
6. At the conclusion of Whitley Penn’s work, it provided a report to me summarizing its findings regarding financial aspects of the Seay Tennis Center’s operations (the “Report”). The Report was a communication from Whitley Penn to me only. The Report included findings as to the Seay Tennis Center employees’ management of finances and adherence to financial controls, as well as recommendations related to the Seay Tennis Center’s financial operations going forward. I used the Report to complete my investigation into the allegations regarding the Seay Tennis Center and to provide legal advice to HPISD.

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 TK and now HK, as well as the Office of the Attorney General in connection with responding to the Public Information Act request at issue in this lawsuit. At the time I provided the legal advice to HPISD, I did not provide a copy of the Report to anyone at HPISD.

8. As required by law, HPISD provided a copy of the report to the Texas Attorney General's office to obtain a ruling that the Report was not subject to disclosure under the Public Information Act, Chapter 552 of the Texas Government Code. A true and correct copy of HPISD's letter to the Attorney General, less its exhibits, is attached as Exhibit 2.

9. The Texas Attorney General's office issued a letter with its findings regarding the Report. A true and correct copy of that letter is attached as Exhibit 3.

Dated: February 6, 2024.



Bryan P. Neal

SWORN TO AND SUBSCRIBED BEFORE ME this 6 day of February, 2024, to certify which witness my hand and seal of office.



Notary Public In and for the State of Texas

My Commission Expires:

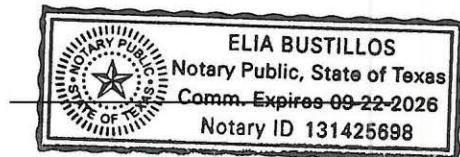


EXHIBIT 1

August 6, 2019

Bryan P. Neal, Partner
Thompson and Knight LLP
One Arts Plaza
1722 Routh Street
Suite 1500
Dallas, Texas 75201

Re: Highland Park ISD

Dear Mr. Neal:

Whitley Penn is pleased to have been retained by your firm, Thompson & Knight LLP, on behalf of your client, Highland Park Independent School District (referred to as the "client" or "HPISD"), to assist you with an attorney investigation of certain allegations.

We understand that we are acting as a representative of you in your role of providing legal advice to the client, as well as addressing anticipated litigation that may arise related to the allegations at issue, and that our role therefore will be subject to the attorney/client and work product privileges. Accordingly, any information we obtain in connection with this engagement or that we develop or communicate to you will be regarded as confidential and will not be disclosed to any third party except upon express authorization by you or an order from a court. Please further refer to the attached Privacy Policy.

Although they may change somewhat through mutual discussion, our primary responsibilities will be to work with you to (1) review documentation concerning the conduct of certain employees with respect to financial matters related to the Seay Tennis Center (STC); (2) work with you to interview, or consult as to the topics of interviews to be conducted by you or others of, certain HPISD employees or former employees associated with STC; and (3) develop the report described below.

Whitley Penn is not licensed to practice law; we will not give legal advice. Unless requested and covered under a separate engagement letter, we will not perform an audit or accounting review, or prepare compilations on any financial data for any business entities related to this engagement.

We will document the results of our findings in a written report directed only to you and marked "CONFIDENTIAL." It is the parties' intention that the report be and remain privileged. We understand that the applicable legal privileges are subject to waiver and can be challenged in

court and that it is therefore possible that the report would be disclosed at some point, though that is not the present intention. In light of that possibility, we will make it clear in our report that the findings, opinions, and other statements in the report are intended for the sole and exclusive use of you and the client and are not to be relied on by any third party.

Neither party anticipates that we will provide testimony concerning the report or our work under this engagement. Should that change we will discuss the terms of such testimony and document any needed modification of this engagement.

HPISD will be responsible for paying our fees for all services performed in connection with this engagement. Invoices will be directed to you at Thompson & Knight LLP and may at your option be paid directly by Thompson & Knight LLP or forwarded by you to the client for direct payment by the client. We agree to send invoices to you by e-mail to facilitate the process. Further, if we are directed to begin any work prior to the date this engagement letter is signed, the client responsible for the payment of those fees. Following the commencement of work on this project, fees and expenses will be billed monthly and are due upon presentation of statements.

In investigatory work, estimating future costs and expenses is difficult. If we provide a budget of fees and expenses, it is only an estimate. Our work will be billed per hour at the professional fee rate effective at the time work is being performed. The current hourly rates range from \$170 to \$445 subject to review and adjustments periodically. In addition to this hourly fee, direct out of pocket expenses, including credit card and wire fees, will be billed at cost. Failure to make the payments required by this agreement, or failure by us, you, and/or your client to comply with the terms of this agreement will release one another from this agreement and any further work on your clients' behalf. The client will remain responsible for any unpaid balance.

All outstanding invoices must be paid before we issue or release our final report. In the event our report is issued and released without full payment of invoices and requested retainers, such is not a waiver to right to full payment of all funds due. Upon release of our report the client hereby consents to pay in full all accrued charges. If for any reason the engagement is terminated prior to its consummation and we are requested to terminate work, then our fee shall not be less than our total time and costs at the normal rate for such projects, plus out-of-pocket expenses.

All payments are due as of the billing date shown on the monthly statements, and are payable upon presentation in Dallas County. A 1% monthly late charge will be added to all accounts thirty days or more past due. Any payments on past-due statements shall be first applied to the oldest outstanding statement, including any due and unpaid interest.

If at any time during the course of this engagement a payment is more than forty-five days past due, we may discontinue work until such account is current, terminate the engagement (which will still require the payment in full for our services), or require a signature on a promissory note to secure the payment of any outstanding balance. Your client must agree to perform any and all obligations on such a promissory note as part of this engagement.

In the unlikely event differences concerning our services or fees should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of all parties, Thompson and Knight LLP and/or Highland Park ISD and Whitley Penn agree not to demand a trial by jury in any action, proceeding, or counterclaim arising out of or relating to our services and fees for this engagement. Any controversy, dispute, or questions arising out of or in connection with this agreement or our engagement shall be determined by arbitration in Dallas County, Texas (or other mutually agreed county within Texas) conducted in accordance with the rules of the American Arbitration Association, and any decision rendered by the American Arbitration Association shall be binding on both parties to this agreement. The costs of any arbitration shall be borne equally by the parties. Any and all claims in arbitration relating to or arising out of this contract/agreement shall be governed by the laws of the State of Texas and to the extent any issue regarding the arbitration is submitted to a court, including the appointment of arbitrators or confirmation of an award, the District courts in Dallas County shall have exclusive jurisdiction. Any action arising out of this agreement or the services provided shall be initiated within two years of the service provided.

This letter replaces and supersedes any previous proposals, correspondence, and understanding, whether written or oral. The agreement contained in this engagement letter shall survive the completion or termination of this engagement. This agreement is binding and states the full agreement, unless amended in writing signed by both parties.

Either you, your client, or our firm may terminate this engagement at any time upon written notice. In the event of termination, we will be compensated for our time and fees incurred up to the date of termination.

If these terms and conditions are acceptable to you and/or your client, please confirm our agreement by signing and returning a copy of this letter. Should you have any questions regarding our proposed services, please do not hesitate to contact us at (214) 393-9430.

Your signature below is authorization for us to proceed under the terms of this proposal.

Sincerely yours,

Whitley Penn LLP

HPISD accepts responsibility for the payment of Whitley Penn fees under this engagement letter.

ACCEPTED this 7 day of AUGUST, 2019.

Law Firm Acceptance:

Attorney Name: Bryan P. Neal

Signature: Bryan P. Neal

Title: Partner

Law Firm: Thompson & Knight LLP

Client Acceptance:

Client Name: MIKE WHITE

Signature: MIKE WHITE

Privacy Policy

CPAs, like all providers of personal financial services, are now required by law to inform their clients of their policies regarding privacy of client information. CPAs have been, and continue to be, bound by professional standards of confidentiality that are even more stringent than those required by law. Therefore, we have always protected your right to privacy.

Types of Nonpublic Personal Information We Collect

We collect nonpublic personal information about you that is provided to us by you or obtained by us with your authorization.

Parties to Whom We Disclose Information

For current and former clients, we do not disclose any nonpublic personal information obtained in the course of our practice except as required or permitted by law. Permitted disclosures include, for instance, providing information to our employees, and in limited situations, to unrelated third parties who need to know that information to assist us in providing services to you. In all such situations, we stress the confidential nature of information being shared. Unless otherwise noted, we may distribute information to you via facsimile or e-mail to the numbers and addresses provided to us by you.

Protecting the Confidentiality and Security of Current and Former Clients' Information

We retain records relating to professional services that we provide so that we are better able to assist you with your professional needs and, in some cases, to comply with professional guidelines. In order to guard your nonpublic personal information, we maintain physical, electronic and procedural safeguards that comply with professional standards.

Disposing of Confidential Current and Former Clients' Information

We engage the services of a document destruction company for the shredding of hard copies of confidential documents and information. Additionally, we delete electronic data files that have been retained in accordance with our record retention policy.

Your privacy, our professional ethics, and the ability to provide you with quality financial services are very important to us.

Whitley Penn

EXHIBIT 2

Holland & Knight

One Arts Plaza | 1722 Routh Street, Suite 1500 | Dallas, TX 75201-2532 | T 214.964.9500 | F 214.964.9501
Holland & Knight LLP | www.hklaw.com

J. Meghan McCaig
+1 214-969-1172
meghan.mccaig@hklaw.com

September 21, 2022

Submitted via online portal
Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Public Information Request HPISD No. 1TPPF

Dear Attorney General Paxton:

I represent Highland Park Independent School District. On August 22, 2022,¹ HPISD received a written request for information from the Texas Public Policy Foundation. I have attached a copy of the request as Exhibit A. As outlined below, the information requested is excepted from disclosure because it is covered by the attorney-client privilege.

1. Background

The request relates to a report prepared for Thompson & Knight LLP² by Whitley Penn, LLP (the “Report”) regarding the Seay Tennis Center, a facility operated by HPISD. Thompson & Knight—a law firm and outside counsel to HPISD—engaged Whitley Penn to assist Thompson & Knight in investigating potential legal concerns in certain aspects of the operations of the Seay Tennis Center (including the financial aspects of the operations). Whitley Penn was acting as a

¹ This letter was not submitted within ten business days of the date HPISD received the request because HPISD’s position is that it (as opposed to its attorneys) has no responsive information. Because the requestor has continued to press the issue and the potentially responsive information is plainly privileged, however, HPISD is submitting this request. The ten-day provision does not impact HPISD’s ability to raise the attorney-client privilege exemption from disclosure. *See Paxton v. City of Dall.*, 509 S.W.3d 247, 265–67 (Tex. 2017); *see also* Tex. Atty. Gen. Op. OR2020-09258, 2020 WL 1658526, at n.1 (Mar. 25, 2020) (citing *Paxton v. City of Dallas* for the proposition that “the attorney-client privilege is a compelling reason to overcome the presumption of openness” due to failure to comply with section 552.301); Tex. Att’y Gen. Op. OR2018-23843, 2018 WL 6056550, at n.1 (Sept. 25, 2018) (same). Because of the timing, HPISD is submitting this single letter, rather than separate letters, containing the information Tex. Gov’t Code § 552.301.

² Following an August 2021 merger with Holland & Knight LLP, Thompson & Knight is now Holland & Knight.

representative of Thompson & Knight to assist Thompson & Knight in providing legal advice to HPISD related to the investigation. A copy of the engagement letter that outlines the nature of Thompson & Knight's engagement of Whitley Penn is enclosed for your office as Exhibit B. In it, Whitley Penn acknowledged that it was acting as a representative of Thompson & Knight and that Whitley Penn's communications would be subject to the attorney-client privilege.

The Report was never disclosed to HPISD, but Thompson & Knight used the Report to provide legal advice to HPISD. The Report has never been disclosed to any third party and has been maintained confidentially by Thompson & Knight. A copy of the Report is enclosed for your office as Exhibit C.

2. The Attorney-Client Privilege Applies to the Report

The Report is excepted from disclosure under the Government Code section 552.107(1).³ That Section has been interpreted to protect the same information that is protected under Texas Rule of Evidence 503 and therefore protects information covered by the attorney-client privilege.

The Attorney General's Public Information Handbook, 2022 edition states:

When seeking to withhold information not subject to section 552.022 of the Government Code based on the attorney-client privilege, a governmental body should assert section 552.107(1). In Open Records Decision No. 676 (2002), the attorney general interpreted section 552.107 to protect the same information as protected under Texas Rule of Evidence 503. Thus, the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under rule 503. In meeting this standard, a governmental body bears the burden of providing the necessary facts to demonstrate the elements of the attorney-client privilege.

First, the governmental body must demonstrate that the information constitutes or documents a communication. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. Third, the governmental body must demonstrate that the communication was between or among clients, client representatives, lawyers, and lawyer representatives. Fourth, the governmental body must show that the communication was confidential; that is, the communication was "not intended to be disclosed to third persons other than those: to (A) whom disclosure is made to furtherance the rendition of professional legal services to the clients; or (B) reasonably necessary to transmit the communication." Finally, because the client can waive the attorney-client privilege at any time, the governmental body must demonstrate that the communication has remained confidential.

2022 Public Information Handbook at 88 (Office of Attorney General, 2022) (citations omitted).

³ The attorney-client privilege precludes disclosure of the report regardless of whether section 552.022 applies. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

Request Letter

Page 3

First, the Report is a “communication” from Whitley Penn to Thompson & Knight.

Second, all communications by Whitley Penn to Thompson & Knight were made to facilitate Thompson & Knight’s rendition of legal advice to HPISD, as reflected in Whitley Penn’s engagement letter and in the Report itself. *See Exhibits B, C.* Specifically, HPISD engaged Thompson & Knight to investigate potential legal issues concerning the Seay Tennis Center’s operations, including its financial operations. Thompson & Knight, in turn, engaged Whitley Penn—an accounting and consulting firm—to assist it with the financial portion of the investigation.

Third, the Report was prepared by the representative of a lawyer (Whitley Penn) for a lawyer (Thompson & Knight). Communications by a lawyer’s representative to the lawyer are expressly within the privilege. Tex. R. Evid. 503(b)(1)(E) (covering communications “between the client’s lawyer and the lawyer’s representative”); Tex. R. Evid. 503(a)(4)(B) (defining a “lawyer’s representative” to include “an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services”). Moreover, the representative-communication aspect of the privilege covers communications between an attorney and a professional engaged by the attorney to provide information within the scope of the professional’s expertise. *See, e.g., Pasadena Refining Sys., Inc. v. United States*, No. 3:10-cv-0785, 2011 WL 1938133, at *1 (N.D. Tex. Apr. 26, 2011) (noting that the attorney-client privilege “covers communications not only with lawyers but also with representatives of lawyers or persons whom lawyers employ to assist in providing legal services,” including “accountants” and citing *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)); *Bearden v. Boone*, 693 S.W.2d 25, 27–28 (Tex. App.—Amarillo 1985, no writ) (communications by investigator to husband’s attorney were protected by the attorney-client privilege because husband’s attorney hired investigator to investigate wife for the purpose of facilitating the rendition of legal advice to the husband).

Finally, the communication was intended to be confidential, and neither Thompson & Knight nor Whitley Penn have disclosed the Report to any third parties, including HPISD.

In sum, all of the requirements of Texas Rule of Evidence 503 have been met, and the Report therefore is privileged and not subject to required disclosure. Moreover, it does not matter that portions of the Report may contain factual statements because such statements are contained in a communication from a lawyer’s representative to the lawyer. Further, the entirety of the Report was for the purpose of rending legal services and thus is protected as privileged under *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 330–31 (Tex. App.—Austin 2000, pet. denied). *See also Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information); Tex. Att’y Gen. Op. OR2019-27665, 2019 WL 5488971 (Oct. 11, 2019) (applying *Harlandale* and concluding that entirety of information withheld was protected from disclosure); Tex. Att’y Gen. Op. OR2017-11751, 2017 WL 2642205 (May 30, 2017) (same).

Pursuant to section 552.301(a) of the Government Code, this letter is submitted in order to seek a decision as to whether the attorney-client privilege applies to the Report.

Should you have questions or need additional information, please feel free to contact me at 214-969-1172.

Request Letter

Page 4

Sincerely,

A handwritten signature in black ink that reads "Meghan McCaig". The signature is fluid and cursive, with "Meghan" on the top line and "McCaig" on the bottom line.

Meghan McCaig

cc: Requestor (with no Exhibits B, C)

EXHIBIT A

From: Rob Henneke <rhenneke@texaspolicy.com>

Date: Monday, August 22, 2022 at 8:48 PM

To: moranj@hpisd.org <moranj@hpisd.org>

Subject: Open records request

To the Custodian of Records for Highland Park ISD:

I am writing to submit a request, under the Texas Public Information Act, that the following documents to be provided by Highland Park Independent School District ("HPISD"):

1. a copy of the report prepared by Whitley Penn related to risk management of the Seay Center;
2. a copy of the report prepared by Whitley Penn related to its audit of the Seay Center; and

3. copies of all reports prepared by Whitley Penn related to the Seay Center within the last four years.

This request specifically extends to documents held by Whitley Penn and by HPISD's attorneys, as those documents are held by HPISD's agents and therefore in HPISD's care, custody, or control. I request responsive documents provided via email to me or otherwise electronically on a CD-ROM if too large to email

The Texas Public Policy Foundation is a 501(c)(3) non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise. Because this request is in the public interest, I request that all fees be waived.

Sincerely,

Robert Henneke

+++++

Robert Henneke
Executive Director & General Counsel
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700 (o)
rhenneke@texaspolicy.com
www.americanfuture.com
@robothenneke

EXHIBIT 3



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 30, 2022

Ms. Meghan McCaig
Counsel for the Highland Park Independent School District
Holland & Knight, L.L.P.
1722 Routh Street, Suite 1500
Dallas, Texas 75201-2532

OR2022-36895

Dear Ms. McCaig:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 982861 (HPISD No. 1TPPF).

The Highland Park Independent School District (the "district"), which you represent, received a request for specified reports during a defined period of time. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the information at issue has previously been made available to the public. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); see also Open Records Decision No. 400 (1983) (governmental*

¹ We note, and you acknowledge, the district did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision. *See Gov't Code § 552.301(b), (e).* Nonetheless, because the attorney-client privilege encompassed by section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352; *see also Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).

body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The requestor asserts the district has previously released the information at issue. However, we note section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. Upon review, we have no indication the information at issue has been previously released in its exact form to any members of the public. Therefore, we find section 552.007 is inapplicable to the information at issue and we will address the argument against its disclosure.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, as follows:

[T]he 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[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed report subject to section 552.022(a)(1). The district must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise section 552.107 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information at issue under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted information.

Texas Rule of Evidence 503(b)(1) provides the following:

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:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huite v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the submitted information was prepared by a representative of the district's outside counsel and was communicated to district officials in their capacities as clients. You state the information at issue was communicated in furtherance of the rendition of professional legal services to the district. You also state the information at issue was intended to be, and has remained, confidential. Upon review, we find you have demonstrated applicability of the attorney-client privilege to the submitted information. See *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney's entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purposes of providing legal service and advice). Thus, the district may withhold the submitted information pursuant to rule 503 of the Texas Rules of Evidence.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.legalattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 982861

c: Requestor

Automated Certificate of eService

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Meredith Walker on behalf of Meredith Walker

Bar No. 24056487

mwalker@wabsa.com

Envelope ID: 84293132

Filing Code Description: Motion - Summary Judgment

Filing Description:

Status as of 2/8/2024 3:54 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Christy Spring		cspring@wabsa.com	2/8/2024 11:44:10 AM	SENT
Yvonne Simental		ysimental@texaspolicy.com	2/8/2024 11:44:10 AM	SENT
Robert Henneke		rhenneke@texaspolicy.com	2/8/2024 11:44:10 AM	SENT
Anjela Young		ayoung@wabsa.com	2/8/2024 11:44:10 AM	SENT
Chance DWeldon		cweldon@texaspolicy.com	2/8/2024 11:44:10 AM	SENT
Meredith Walker		mwalker@wabsa.com	2/8/2024 11:44:10 AM	SENT
Jerome Patterson		jpatterson@wabsa.com	2/8/2024 11:44:10 AM	SENT
Crystal Hernandez		chernandez@wabsa.com	2/8/2024 11:44:10 AM	SENT

Associated Case Party: TEXAS PUBLIC POLICY FOUNDATION

Name	BarNumber	Email	TimestampSubmitted	Status
Christian Townsend		ctownsend@texaspolicy.com	2/8/2024 11:44:10 AM	SENT