

CAUSE NO. DC-23-01161

TEXAS PUBLIC POLICY	IN THE DISTRICT COURT
FOUNDATION	§
Plaintiff	§
VS.	§
HIGHLAND PARK INDEPENDENT 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