Affirmed and Opinion Filed July 16, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00813-CV

TEXAS PUBLIC POLICY FOUNDATION, Appellant
V.
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-23-01161

MEMORANDUM OPINION

Before Justices Garcia, Breedlove, and Lewis
Opinion by Justice Garcia

This case arises out of Highland Park Independent School District's (the "School District") refusal to produce a report requested by the Texas Public Policy Foundation ("TPPF") pursuant to the Texas Public Information Act. The trial court reviewed the report *in camera* and determined that the report is privileged. After a bench trial, the court concluded the privilege was not waived and denied TPPF's requested mandamus relief.

In three issues, TPPF argues the trial court's order is erroneous because: (i) the report is not protected by the attorney-client privilege, and even if portions of the report are privileged, the non-privileged portions must be disclosed because the

report is core public information, (ii) the School District waived the privilege, and (iii) the trial court erred by excluding evidence that would have given context to the alleged waiver.[1] As discussed below, we affirm the trial court's order.

I. BACKGROUND

The School District retained the law firm of Thompson & Knight LLP (the "Law Firm") to investigate and provide legal advice concerning the District's Seay Tennis Center (the "Center"). Specifically, Bryan Neal, an attorney with the Law Firm was retained to opine on legal issues involved in the Center's operations, including employees' handling of the financial operations of the Center.

The Law Firm engaged an accounting and consulting firm, Whitley-Penn to assist Neal with the investigation. To this end, the Law Firm's engagement letter outlined that the Law Firm was retaining an accounting firm "to assist . . . with an attorney investigation of certain allegations" in furtherance of the Law Firm's rendition of legal services to the School District. Neal considered Whitley-Penn's assistance when analyzing the Center's internal controls and other accounting procedures to formulate and inform his legal advice to the School District.

Whitley-Penn prepared a report (the "WP report") and provided it to the Law Firm as a communication from Whitley-Penn to attorney Neal. Neal used the report to complete his investigation into the allegations regarding the Center and to provide

[1] TPPF's stated issues do not align with the issues raised in the body of the brief. We address all issues raised, albeit not in the numerical order of the stated issues.

legal advice to the School District. The Law Firm did not provide a copy of the WP report to anyone at the School District when it provided its legal advice, nor has the report been released to any third parties outside the context of this litigation.

On March 29, 2021, Michael White, the School District's then Assistant Superintendent for Business Services responded to an inquiry about the Center in an email (the "White Email"). The White Email stated that "there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged." The White Email did not expressly reference or disclose the contents of the WP report or the legal advice provided by Neal.

TPPF submitted a request for a copy of the WP report pursuant to the Texas Public Information Act ("PIA"). In response, the School District sought an opinion from the Texas Attorney General that the WP report was not subject to disclosure under the PIA because it was protected by the attorney-client privilege. The Texas Attorney General agreed, and opined that the entirety of the WP report is protected from disclosure by the attorney-client privilege.[2]

TPPF subsequently filed an original petition for writ of mandamus seeking disclosure of the WP report. *See* TEX. GOV'T CODE ANN. § 552.321 (providing for writ of mandamus to compel governmental body to make information available for

[2] Attorney General opinions, although persuasive, are not binding on the courts. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996).

public inspection). The School District answered, and the parties filed cross-motions for summary judgment.

At TPPF's request, the trial court conducted an *in camera* review of the WP report. The court subsequently informed the parties that it had "completed its *in camera* review of the Whitley-Penn Report and affirms the retention of same by [the School District] based upon the privilege as invoked."

The trial court conducted a bench trial on the remaining issue—whether the privilege had been waived. When the trial concluded, the court issued a final written order denying TPPF's application for a writ of mandamus. The trial court also made findings of fact and conclusions of law that included the following:

- 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.

- 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.

- 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.

TPPF now appeals from the trial court's final order.

II. ANALYSIS

A. Is the WP Report Protected by the Attorney Client Privilege in Whole or in Part?

TPPF argues the WP report is not privileged.[3] Alternatively, TPPF insists that even if the WP report is privileged, the non-privileged information within the report must be disclosed because it is core public information.

1. Completely Privileged

TPPF requested the WP report pursuant to the PIA. *See* TEX. GOV'T CODE ANN. §§ 552.001–.376. The policy behind the Act is reflected in the statement that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." TEX. GOV'T CODE ANN. § 552.001. The Act is to be liberally construed in favor of granting requests for information. TEX. GOV'T CODE ANN. § 552.001(b).

The Act "guarantees access to public information, subject to certain exceptions." *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011). The PIA contains a non-exclusive list of categories of public information, TEX. GOV'T CODE ANN. §552.022, as well as certain specific exceptions from required disclosure. *See id.* §§ 552.101–.163. Public information includes

[3] To facilitate meaningful review of the issues raised on appeal, at our request, the trial court provided us with the WP report for *in camera* review.

information that is collected, assembled, or maintained by or for a governmental body. *Id.* § 552.002(a). Upon receiving a request for public information, a governmental body must promptly produce the information for inspection, duplication, or both, *Id*. § 552.221, unless an exception applies. *See In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001).

Whether information qualifies as "public information" under the Act and whether an exception applies are questions of law. *Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273, 279 (Tex. 2023); *Abbott v. N.E. Indep. Sch. Dist*., 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.). Consequently, our review is de novo. *Adkisson v. Paxton*, 459 S.W.3d 761, 768 (Tex. App.—Austin 2015, no pet).

If a governmental body considers the requested information exempt from disclosure, and there has been no previous determination about the requested information, the governmental body must submit to the attorney general written comments stating why any claimed PIA exceptions apply and must request an opinion from the attorney general about whether the information falls within the claimed PIA exceptions. TEX. GOV'T CODE ANN. § 552.301; *City of Houston v. Houston Chronicle Publ'g Co*., 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ). The School District did so here, and the attorney general concluded the WP report is protected from disclosure by the attorney-client privilege.

Nonetheless, TPPF argues the WP report is public information that must be disclosed. The PIA identifies eighteen specific types of public information that are referred to as "core public information." *See* TEX. GOV'T CODE ANN. § 522.022; *Tex. Dep't of Pub. Safety*, 34 S.W.3d at 114 n.4; *Abbott v. Dallas Area Rapid Transit*, 410 S.W.3d 876, 880 (Tex. App.—Austin 2003, no pet.). The statute describes the core public information at issue here 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.

TEX. GOV'T CODE ANN. § 522.022(a)(1).

There is no dispute that the WP report is core public information. The question is whether an exception applies in the instant case.

As reflected above, the statute provides that core public information is not excepted from disclosure unless it is "made confidential under [the PIA] or other law." The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential under Section 522.022. *See In re City of Georgetown,* 53 S.W.3d at 336. The attorney-client privilege governed by Texas Rule of Evidence 503 is the category of confidential information at issue here.

Rule 503 provides that a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the

purpose of facilitating the rendition of professional legal services to the client." TEX. R. EVID. 503(b)(1). At the core of the privilege is the notion that the communications are "made for the purpose of facilitating the rendition of professional legal services." *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996) (orig. proceeding). The privilege protects such communications that are between and among the lawyer, the client, and their respective representatives. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49–50 (Tex. 2012).

A communication is "confidential" if it is not intended to be disclosed to third persons other than (1) those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or (2) those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a). The presence of third persons during the communication will destroy confidentiality, and communications intended to be disclosed to third parties are not generally privileged. *See id*. Further, the person who holds the privilege—the client—waives it if "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." TEX. R. EVID. 511(a)(1).

The attorney client privilege exists to facilitate free and open communication between attorneys and their clients. *See Paxton v. City of Dallas*, 509 S.W.3d 247, 259–60 (Tex. 2017); *see also Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993). The privilege "applies with special force" in the governmental context

because "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest." *Paxton*, 590 S.W.3d at 260.

In the court below, the School District argued and the trial court concluded that Whitley-Penn was a lawyer's representative. Rule 503 defines "lawyer's representative" as "one employed by the lawyer to assist in the rendition of professional legal services." TEX. R. EVID. 503(a)(4)(A)–(B); *XL Specialty Ins. Co*., 373 S.W.3d at 49–50*; see also Univ. of Tex. Sys.*, 675 S.W.3d at 283–87 (because independent firm conducting investigation to assist in the rendition of professional legal services was lawyer's representative, communications were privileged).

The trial court's findings of fact included the following:

> 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.

TPPF does not challenge these findings. Unchallenged findings of fact are binding on an appellate court unless the contrary is established as a matter of law or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). Here, the evidence establishes that the School District retained Neal to provide legal advice and Neal retained Whitley-Penn to assist with the financial and accounting aspects of providing such advice. There is no evidence suggesting otherwise. Accordingly, the trial court's binding, unchallenged findings support its conclusion of law that Whitley-Penn was a lawyer's representative. *See Levu GP, LLC v. Pacifico Partners, LTD*, No. 05-16-01167-CV, 2018 WL 4039638, at *5 (Tex. App.—Dallas Aug. 23, 2018, pet. denied) (mem. op.).

TPPF argues that whether Whitley-Penn was acting as a lawyer's representative misses the point because the attorney-client privilege does not apply when the attorney is employed in a non-legal capacity such as an accountant, escrow agent, negotiator, or notary public. In other words, TPPF argues that attorney Neal was acting in some capacity other than as an attorney.

In support of its argument, TPPF relies on *In re Texas Farmers Ins. Exch*., 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) and similar federal court cases. This reliance is misplaced.

In *Farmers*, the evidence established that Scott, an attorney, was acting in the capacity of an insurance investigator rather than as an attorney. *Id*. at 341. The court concluded that communications made in the capacity of investigator were not

privileged. *Id.* Significantly, however, the court noted that "[I]f Scott demonstrates that he communicated to Farmers while acting in his professional capacity as an attorney, such communications would be subject to the attorney-client privilege." *Id.*

The fallacy of TPPF's argument arises from an assumption that an attorney's (or his representative's) investigation of facts somehow forecloses a conclusion that the attorney was providing legal advice. But as illustrated in *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 334 (Tex. App.—Austin 2000, pet. denied), factual investigation and the provision of legal services are not mutually exclusive.

In *Harlandale*, a school district retained an attorney to investigate a grievance and provide legal analysis. *Id.* The court concluded that the attorney functioned as an attorney and therefore her report was exempt from disclosure under the PIA. *Id.* at 334–35. In so concluding, the court held:

> [A]lthough [the attorney] performed an independent investigation and then detailed her findings in a discrete portion of her final report, the investigative fact finding was not the ultimate purpose for which she was hired . . . We therefore conclude the attorney was retained to conduct an investigation in her capacity as an attorney for the purpose of providing legal services and advice.

Id. The court further noted the legitimate concerns of the PIA and the attorney-client privilege and stated, "[I]n weighing these competing concerns we need not surrender the fundamental protections afforded by the privilege to uphold the interests of the Act." *Id*. at 335.

TPPF's proposed application also ignores the express parameters of Rule 503. Rule 503 does not require that a communication be for the primary purpose of soliciting legal advice; the communication need only be made to *facilitate* the rendition of legal services. *See In re Fairway Methanol LLC*, 515 S.W.3d 480, 489 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (emphasis added).

In the present case, there is nothing to suggest that attorney Neal was acting in any capacity other than as an attorney retained by the School District to provide professional legal services. Those legal services included investigation. The record reflects that Neal's communications with his attorney representative, Whitley-Penn, were made for the purpose of facilitating the rendition of those legal services. Accordingly, the WP report falls within the scope of the attorney-client privilege. The trial court did not err in concluding that the report was privileged and not subject to disclosure.

2. Partially Privileged

TPPF acknowledges that if Rule 503 applies to a communication, the entire communication is protected from disclosure. But TPPF insists, without supporting authority, that this general rule does not apply to "core public information" under

Section 552.022(a).[4] This argument ignores the express language of the statute and circles back to the principles previously discussed.

TPPF suggests that the text of the PIA contemplates that some portions of a document may be privileged while others are not. This is true for one of the eighteen categories of core public information listed—attorney's fees bills. *See* TEX. GOV'T CODE ANN. § 552.022(a)(16). That section provides that an attorney's bill is public information even if the bill also contains non-discoverable information protected by the attorney-client privilege. *See id.* But the Legislature did not include this exception in any of the other eighteen categories of core public information, including the type at issue here. *See* § 552.022(a)(1)–(18). Instead, the statute provides, without exception, that core public information such as a completed report, audit, evaluation, or investigation is not excepted from disclosure unless made confidential by the PIA or other law. *See* § 552.022(a)(1). We presume that if the Legislature had intended to parse confidential information from non-confidential information for all eighteen categories of core public information, it would have so stated.

Moreover, TPPF provides no guidance for determining how we might isolate non-privileged information from otherwise privileged material, or any realistic way

[4] The School District argues that TPPF did not raise this issue in the trial court and therefore it was not preserved for our review. The record reflects, however, that TPPF generally argued for full or partial disclosure in the briefing it submitted to the trial court.

we might determine what that information might be. Likewise, TPPF offered no such guidance to the trial court. Therefore, on this record, the trial court did not err in concluding that the WP report in its entirety is exempt from disclosure. TPPF's issues concerning privilege are overruled.

B. Was the Attorney-Client Privilege Waived?

At trial, TPPF argued that the White Email referred to the WP report, and therefore the privilege was waived as to the entire report.

Rule 511 states the general rule governing when a privilege is waived by voluntary disclosure. "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 . . ." TEX. R. EVID. 511(a). This rule "allows a partial disclosure of privileged material to result in an implied waiver of the privilege as to additional material that has not been disclosed." *In re Alexander*, 580 S.W.3d 858, 869 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding). Here, the record reflects that there was no disclosure, partial or otherwise.

TPPF contends the White Email "claimed that the [WP report] showed there was 'no mismanagement' and 'no malfeasance' occurring with the Center." This mischaracterizes the White Email by selecting words and phrases from two distinct paragraphs. Significantly, however, neither paragraph mentions the WP report.

TPPF seeks to link use of the word "investigation" in the first paragraph of the email to White's conclusions in the second paragraph of the email. The context and tense of these separate paragraphs, however, do not support TPPF's interpretation.

The first paragraph states:

> As to allegations or rumors about the Seay Tennis Center, please know that the District's attorneys (copied on this email) conducted a thorough investigation, which included reviewing all of the types of documentation that you mention and doing so with expert assistance. Afterwards, the District took all steps it believed were appropriate, including revamping the Seay Tennis Center organization and management structure.

In the second paragraph, the email states, in pertinent part:

> The changes with Seay began almost a year ago and have been in place for some time now. From our perspective, we have fully, finally, and properly addressed any needed significant organizational or management changes. We are managing the Center in a way that we are comfortable is best for the District . . . Further, to address some of the comments in your earlier emails, **there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged.**

(Emphasis added).

The trial court found the email does not disclose the contents of the WP report or the legal advice provided by attorney Neal. The record supports this conclusion.

On its face, the email does not expressly mention the WP report or refer to its contents. Although White testified that his reference to "expert assistance" meant the WP report, referring to the fact that the attorneys utilized the report does not equate to White's disclosure of or reliance on its contents. Further, there is no

disclosure of attorney Neal's conclusions about the WP report or any other documents reviewed in the course of the investigation. There is no reference to any legal advice Neal may have given.

The first paragraph referencing the investigation describes past events, including the resolution of any issues with the Center, as evidenced by the past tense of the phrase "the District took all steps it believed were appropriate . . . ." The second paragraph then describes the current state of affairs, as evidenced by use of the present tense phrases "we are managing the Center in a way that we are comfortable is best for the District," and "there is no mismanagement occurring."

The second paragraph does not refer to the investigation, the WP report, or any other documentation the attorneys may have reviewed. Instead, it states White's conclusion about the current state of affairs at the Center, specifically, that "there is no mismanagement occurring, there is no malfeasance occurring, and there are no funds being misdirected or mismanaged." White offers no basis for his conclusion, and there is nothing to suggest that his present conclusion was based on the WP report or the advice of counsel. In fact, White testified that he had never seen the WP report. On this record, there is simply no evidence that the attorney-client privilege attached to the WP report was waived.

TPPF also argues the trial court erred in concluding that the privilege was not waived "because the [School District] Board of Trustees had not officially waived the privilege by majority vote." Although one of the trial court's conclusions stated

that the Board must waive the privilege, the court did not expressly state that this was its basis for concluding the privilege was not waived. Instead, a separate legal conclusion stated only that "the privilege has not been waived." Regardless, because we have concluded that the White Email did not waive the privilege, we need not also consider whether White had the authority to do so. *See* TEX. R. APP. P. 47.1.

TPPF's issues concerning waiver are resolved against it.

C. Did the Trial Court Erroneously Exclude Evidence?

TPPF complains that the trial court refused to admit uncontested evidence, refused to allow White to testify about the context of his email, and refused to allow evidence or testimony regarding communications that prompted the White Email. According to TPPF, "the Judge steadfastly refused to allow the parties to put on their case." The record does not support TPPF's characterization.

When the trial began, counsel for TPPF informed the trial judge that the sole remaining issue was waiver and identified the White Email as the basis for its claim. The trial court instructed TPPF that its examination of the witness it elected to call would be limited to the issue before the court. When TPPF advised that it planned to call the tennis instructor whose resignation letter prompted the investigation of the Center, the judge inquired about the relevance of such testimony to waiver. TPPF could not identify anything. The judge told TPPF:

> I will let you put on a witness solely related to the issue of waiver and past his name and what he does, any testimony that is not related to waiver this court is not going to receive.

TPPF opted to call White as a witness instead of the tennis instructor. During that examination, the court reminded counsel several times that the scope of the testimony was limited to the issue of waiver and the White Email.

It is well-established that a trial judge has broad discretion in determining how to conduct a trial, and he may properly intervene to maintain control in the courtroom, expedite the trial, and prevent what he considers to be a waste of time. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240–241 (Tex. 2001) (per curiam). The trial judge's effort to focus the trial on the only relevant issue before the court (as identified by counsel for TPPF) does not establish that the court erroneously excluded evidence.

Moreover, to the extent that evidence was excluded, the issue was not preserved for our review. *See* TEX. R. APP. P. 33.1. The Rules of Appellate Procedure and the Rules of Evidence require a party to preserve error regarding a complaint that the party did not have an opportunity to present evidence in the trial court. *Kaur–Gardner v. Keane Landscaping, Inc*., No. 05-17-00230-CV, 2018 WL 2191925, at *2 (Tex. App.—Dallas May 14, 2018, no pet.) (mem. op.). If evidence is excluded at a bench trial, to preserve error, the party must make an offer of proof, *see* TEX. R. EVID. 103(a)(2), or a bill of exception, *see* TEX. R. APP. P. 33.2.

"To preserve error adequately and effectively, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility." *Coleman v. Coleman*, 170 S.W.3d 231, 239 (Tex. App.—Dallas

2005, pet. denied). "The offer of proof serves primarily to enable the reviewing court to assess whether excluding the evidence was erroneous and, if so, whether the error was harmful." *Fletcher v. Minn. Mining & Mfg. Co*., 57 S.W.3d 602, 608 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). An offer of proof allows the trial court to reconsider its ruling in light of the proffered evidence. *Id.*

We cannot determine whether evidence was improperly excluded unless the evidence is included in the record. *Sw. Country Enters., Inc. v. Lucky Lady Oil Co*., 991 S.W.2d 490, 494 (Tex. App.—Fort Worth 1999, pet. denied). The only way the evidence will be included in the record is if the complaining party made an offer of proof or a bill of exception. *Id.*

TPPF did not make an offer of proof or a bill of exception. Accordingly, it failed to create a record that would allow a merits review of its complaint. *See In re C.C.E.*, 530 S.W.3d 314, 322 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (holding party failed to preserve error regarding complaint she did not have an opportunity to present evidence where record did not demonstrate that party requested an opportunity, offered evidence that was excluded, or made an offer of proof or bill of exception); *see also C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 594 (Tex. App.—Dallas 2003, no pet.). TPPF's complaint about the exclusion of evidence is resolved against it.

III. CONCLUSION

Having resolved all of TPPF's issues against it, we affirm the trial court's order.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

Concurring Opinion Filed July 16, 2025

In The
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Fifth District of Texas at Dallas

No. 05-24-00813-CV

TEXAS PUBLIC POLICY FOUNDATION, Appellant
V.
HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-23-01161

CONCURRING OPINION

Before Justices Garcia, Breedlove, and Lewis
Concurring Opinion by Justice Lewis

Based on the specifics of the case before us and without adopting all of the majority's conclusions, I join the majority's result. I write separately to highlight some dangers and absurdities that can result from an overbroad application of attorney–client privilege protections in the context of investigations. While these concerns are not original, this case well illustrates the reasoning behind the red flags. My hope is that the Supreme Court will provide our courts with guidance that narrows the potential for strategic abuses of a broad application of this sacred protection.

It comes down to this: should the results of a general, factual investigation conducted by a client's attorney be shielded from disclosure where an identical investigation conducted directly by the client would not be?

Here, we are faced with the former type of situation, though not one in which an attorney conducted the inquiry directly. That would prompt a different analysis.[1] Instead, the Law Firm hired a non-lawyer third party, Whitley-Penn, to investigate and provide non-legal expertise that the Law Firm and School District admittedly lacked in certain areas.[2] Whitley-Penn conducted the underlying factual inquiry, prepared the WP report, and provided it to the Law Firm. Then the Law Firm communicated the investigation results to its client.

No one challenges that the Law Firm was retained to provide legal advice. Indeed, as both the majority and School District note, no party presented evidence that attorney Neal was retained in a non-legal capacity or acting outside of his capacity as an attorney for the district.[3] But by choosing to conduct the entire factual

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[1] Courts have held that the 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 2000, pet. denied) (emphasis added) (protecting the communications of an attorney acting as an investigator where the attorney "functioned as an attorney" during the course of the investigation); *see also In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana Feb. 18, 1999, orig. proceeding [mand. denied]) ("[T]he privilege does not apply if the attorney is acting in a capacity other than that of an attorney.").

[2] While concerns similar to those expressed herein can arise in the context of an attorney acting directly as an investigator, the distance between investigating and providing legal advice is even more pronounced when a non-lawyer third party conducts the investigation in the area of that non-lawyer's expertise.

[3] I struggle to identify what evidence *could* be presented to assert an attorney's non-legal capacity in a situation such as this—even if the attorney's actions were primarily those that could be rendered by a non-attorney—so long as the attorney and client ascribed an advice component to the attorney's role.

investigation *through* the Law Firm, the School District renders it difficult—perhaps impossible under the broad interpretation questioned herein—to prove that the communication of even the basic revealed facts was not "made to facilitate" legal advice, triggering application of the attorney–client privilege. *See* TEX. R. EVID. 503(b)(1)(B). That being the case, it is hard to envision why any entity would not structure their investigations similarly if they desired to shield the results.

In such a scenario the attorney acts as a pass-through, albeit with a legal-advice filter, for the factual information unearthed in the investigation. If the lawyer is not, for example, an accountant, the lawyer will also pass on (without alteration, though perhaps with commentary) the accountant's recommendations and the results of any financial analyses conducted in the investigation. In such case, the lawyer is placed in the role of a mere conduit, passing on information used for business decisions, not legal advice. Such a broad application of the privilege strays from the privilege's intent. *See, e.g.*, *Tex. Farmers*, 990 S.W. at 341 (explaining that if a "blanket privilege" applied to factual communications, "insurance companies could simply hire attorneys as investigators at the beginning of a claim investigation and claim privilege as to all the information gathered. This is not the intent of the privilege.").

Our Court reviewed the WP report *in camera*, and, in my estimation, the nature of the report does not differ from one that could have resulted from a client's

internal investigation, without a lawyer intermediary.[4] And here, we are not dealing with a private-sector client but a government entity commissioning an investigation funded by taxpayers.

As a point of policy, citizens can benefit from government entities seeking legal advice, and those entities should be able to speak freely with their attorneys. In an effort to avoid disincentivizing those communications, though, we should not also incentivize government entities to structure investigations in a manner that would cloak the factual results from the review of the public that funded them.

While I believe that precedent and the facts of this case necessitate that I follow the majority on the result, this is, in my opinion, a matter on which the Supreme Court's review and redirection is warranted.[5] Accordingly, I respectfully concur.

/Jessica Lewis/
JESSICA LEWIS
JUSTICE

[4] Nothing in this concurrence should be read as describing or implying the contents of the report beyond this description of the overall nature of the report, which is at issue in the privilege analysis.

[5] While a recent case from the Supreme Court provides guidance on related issues, the report produced by the non-lawyer investigator in that case was made public. *See Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity*, 675 S.W.3d 273 (Tex. 2023). That and other facts make that case distinguishable from the case currently before this Court. However, many of the concerns raised in Justice Devine's dissent—including concerns regarding the broad interpretation of Rule 503—also apply here.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEXAS PUBLIC POLICY FOUNDATION, Appellant

No. 05-24-00813-CV V.

HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-23-01161.
Opinion delivered by Justice Garcia.
Justices Breedlove and Lewis participating.

In accordance with this Court's opinion of this date, the trial court's order is **AFFIRMED**.

It is **ORDERED** that appellee HIGHLAND PARK INDEPENDENT SCHOOL DISTRICT recover its costs of this appeal from appellant TEXAS PUBLIC POLICY FOUNDATION.

Judgment entered this 16th day of July 2025.