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April 3, 2024

**Via E-Mail: [cru@tea.texas.gov](mailto:cru@tea.texas.gov)**

Texas Education Agency  
Compliance Review Unit  
1701 N. Congress Avenue  
Austin Texas 78701-1494

Re: TEA Reference #INV2024-12-103 |

To Whom It May Concern:

Please be advised that the undersigned law firm represents the Fort Bend Independent School District in connection with the above-referenced Compliance Review, as well as matters generally related to board governance and general school law. This letter serves as the Summary Response requested by your office in connection with a complaint submitted by Trustee Malone on December 14, 2023 (the Complaint). Please copy me on future communications regarding this matter.

**Attorney-Client Privileged Information**

The Complainant is a district trustee. The Complaint alleges Open Meetings violations surrounding the voluntary retirement of the district's former superintendent, Dr. Christie Whitbeck. When filing the complaint, the Complainant released attorney-client privileged information consisting of email correspondence between her and the Board's counsel, Rick Morris (see initial Complaint e-mail attachment titled "Urgent Concerns"). The purpose of the attorney-client privilege is 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). "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.'" *Id.* at 260 (citing *In re Cty. of Erie*, 473 F.3d

413, 419 (2d Cir. 2007)). This promise of confidentiality fosters and encourages “a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business.” *Id.* “[S]ound judgment tells us that the people are best served when government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so,” operate in an atmosphere that encourages them “to seek out and receive fully informed legal advice.” *Id.* at 260–61.

Mr. Morris represents the Fort Bend Independent School District Board of Trustees as a body corporate, not individual trustees. The district’s Local Board Policy BDD (<https://pol.tasb.org/PolicyOnline/PolicyDetails?key=483&code=BDD#localTabContent>) affirms that “[t]he Board shall retain legal counsel to represent *the Board* in matters of Board governance and business of the District. The Board’s counsel shall be responsible *directly to the Board*.” (emphasis added). As a result, communications between trustees and Board legal counsel belong to the Board as the client and holder of the privilege. As a governmental entity, however, a school district must act through its agents. The power to waive the corporate attorney-client privilege generally rests with an entity’s management and is normally exercised by its officers and directors. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348–49, 105 S. Ct. 1986, 1991, 85 L. Ed. 2d 372 (1985). It is important to note that the officers and directors “*must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.*” *Id.* (emphasis added). And, under Texas law, the Board may only act by majority vote taken in a public meeting. Tex. Educ. Code § 11.051(a-1). Here, that means that only a majority of the Board, by vote, can waive the attorney-client privilege. The Board never voted to waive its privilege.

Because the Complainant disclosed privileged, confidential communications to the Compliance Review Unit without the consent of the Board, we respectfully ask, on behalf of the client, that the disclosed email be purged from the record.

### Jurisdiction

Section 7.028 of the Texas Education Code authorizes the Texas Education Agency to monitor compliance with requirements applicable to a process provided by Chapter 11, which includes the requirement that school boards act in compliance with the Open Meetings Act. *See* Tex. Educ. Code §11.051(a-1). The Agency’s monitoring authority is limited, however, and may be exercised only as necessary to ensure that a district’s actions



comply with federal law and regulations, financial accountability, data integrity, and qualifications for funding. Tex. Educ. Code §7.028. This complaint does not allege any violation or concern regarding any of those compliance areas. Thus, the Compliance Review Unit is not the proper authority to investigate this Complaint. Moreover, it does not have jurisdiction to enforce the Open Meetings Act. See, generally, Tex. Gov't Code, Ch. 551, Subchapter G (Enforcement and Remedies).

### Alleged Open Meetings Act Violations

Assuming for the sake of argument that the Compliance Review Unit has jurisdiction to investigate this Complaint, the District denies the speculative factual allegations in the Complaint in their entirety. The Complainant conjectures that an impermissible walking quorum must have occurred because the Board president, when meeting with the former superintendent, purportedly implied that four trustees would support termination of the superintendent's employment. As explained below, no walking quorum violation occurred.

On its face, the Complainant undermines her allegation when she alleges the former superintendent disclosed to her that the board president "implied" there were enough votes to support separation. See Complaint Question 3. The Complaint is notable for what it fails to allege, i.e., the Complainant does not contend the former superintendent told her the board president told her (the former superintendent) that she (the board president) had conducted a straw poll of a quorum of trustees to determine how they might vote if called upon to consider terminating the superintendent's contract. A speculative implication that something *may* have occurred is nowhere close to proof that it did.

The Complainant fails to appreciate that a board president can come to believe other trustees will support a leadership change simply by "reading the room" at publicly noticed meetings, during evaluations, and in discussions with fellow trustees in numbers less than a quorum that do not rise to the level of a prohibited series of communication. Based on the discussion of her evaluation that took place in a lawfully called closed session on June 28, 2023, Dr. Whitbeck knew several trustees were dissatisfied with areas of her performance. (See <https://meetings.boardbook.org/Public/Agenda/649?meeting=590279>). Having "read the room" herself, the superintendent was quick to contact an attorney after her November 8, 2023 meeting with the Board President to negotiate a retirement agreement. While the Complainant presumes collusion and illegal behavior, the facts do not support her speculation.



The Complainant additionally speculates a violation of the Act occurred during a statewide school board and administration convention in September 2023. Specifically, she alleges she was invited to “interview” the current superintendent “off the record” and again speculates that other trustees met with him during the convention. This simply did not happen as the current superintendent did not meet with any trustees during the convention and only exchanged pleasantries with the Complainant and the Board President when running into them. He did not have any substantive discussion with any trustee about coming to the district.

But even if trustees had met a potential future superintendent during the convention, there would be no violation of the Act since it specifically exempts from the definition of a “meeting” gatherings of quorums at state conventions and social functions if formal action is not taken and any discussion of public business is incidental to the convention. Tex. Gov’t Code § 551.001(4)(B). No “formal action” is alleged in the Complaint, nor did it occur. Likewise, no discussion or deliberation regarding the superintendency occurred.

The Complaint further states that four trustees “met on occasions” and the Complainant “believe[s] there was collusion.” This allegation of “collusion” is unsubstantiated. The Act does not prohibit a quorum of trustees from meeting if there is no deliberation regarding public business and your office should not infer violations of the Act merely because trustees sometimes meet. More is required to substantiate a violation of the Act.

The Complainant also alleges the Board met in closed session to “discuss [a] deal that [was] already done.” See Complaint, Question 4. The Board as a whole met and discussed the superintendent’s employment in a closed session on November 13. (See <https://meetings.boardbook.org/Documents/CustomMinutesForMeeting/649?meeting=606916>). No formal action was taken regarding the superintendent on that date and no “deal” was already done. On December 4<sup>th</sup> the Board voted in open session to approve a voluntary retirement agreement that was negotiated with the former superintendent through her legal counsel. (See <https://meetings.boardbook.org/Public/Agenda/649?meeting=608016>). At a subsequent meeting, the Board unanimously voted (including the Complainant) to name the current superintendent the lone finalist in open session at a duly noticed public meeting. (See <https://meetings.boardbook.org/Public/Agenda/649?meeting=614665>). The Complainant attended these meetings and participated in all votes. She had every opportunity to participate in both closed session and public discussions and final actions in accordance with the Act.

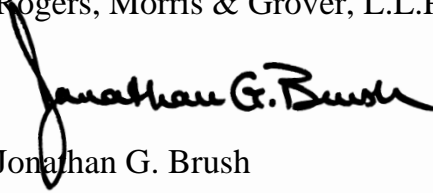


Conclusion

I hope this Summary Response adequately addresses the issues raised in the Complaint. Should your office require any additional information or have questions about the information provided, please do not hesitate to contact me. The District is fully committed to cooperate with your office in its review of this matter.

Very truly yours,

Rogers, Morris & Grover, L.L.P.

A handwritten signature in black ink that reads "Jonathan G. Brush". The signature is written in a cursive style with a large, looping initial 'J'.

Jonathan G. Brush

