



November 16, 2012

File No. 1087-55

**VIA EMAIL: [ssternberg@bhbmlaw.com](mailto:ssternberg@bhbmlaw.com)**

Scott L. Sternberg  
Baldwin Haspel Burke & Mayer LLC  
1100 Poydras St., 36<sup>th</sup> floor  
New Orleans, LA 70163

Re: Public Records Request Dated November 1, 2012

Dear Mr. Sternberg:

I am the Secretary of the Board of Directors (the "Board") of the Choice Foundation (the "Foundation"), and am writing in response to your letter dated November 1, 2012 (the "Request") to James Swanson and James Huger regarding the public records request made by Jessica Williams of *The Lens* on July 9, 2012. You have requested:

any and all documentation surrounding the board investigation into academic testing irregularities at Lafayette Academy that occurred during at least by April 2012, and furthermore request Ms. Mince's findings as well as her engagement letter with the Choice Foundation.

In accordance with Louisiana's Public Records Law, LA R.S. 44:1 *et seq.*, the Foundation denies the Request for numerous reasons.

As you may be aware, a teacher at Lafayette Academy was passed over for a promotion. This teacher was later placed on administrative leave, and the teacher's contract was subsequently not renewed. After these events, the disgruntled teacher made allegations of cheating on certain tests to the Foundation's Executive Director, Mickey Landry. As a result of this situation, the Board anticipated the very real possibility of a legal dispute.

The Board promptly took two actions. First, the Foundation, through its chairman Mr. Huger, called Ms. Lori Mince to engage her on a pro bono basis as counsel and investigator.<sup>1</sup> Ms. Mince is a lawyer and partner at Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., a New Orleans law firm with a longtime relationship with the Foundation. Second, Mr. Landry immediately notified the Board of Secondary Education regarding the allegations.

The initial reason for denying the Request is that there is no public record available to disclose. The term “public record” is defined in LA R.S. 44:1A(2)(a) as:

All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body.

Ms. Mince did not provide the Board with her draft report or any of her notes or materials that she may have produced during her investigation. Verbal communications between Mr. Huger and Ms. Mince, and between Ms. Mince and any other parties involved in the investigation, do not qualify as public records.

Second, and irrespective of the foregoing, any investigative materials or information would be privileged under LA R.S. 44:4.1(C), which states:

The provisions of this Chapter shall not apply to any writings, records, or other accounts that reflect the mental impressions, conclusions, opinions, or theories of an attorney or an expert, obtained or prepared in anticipation of litigation or in preparation for trial.

The Board engaged Ms. Mince as counsel and as an expert in anticipation of litigation. Her writings, records or other accounts are privileged materials. And contrary to the assertion in your Request, no legal notice of pending or threatened litigation is required for the exemption in LA R.S. 44:4.1(C) to apply.<sup>2</sup> The Board’s decision to engage Ms. Mince was in anticipation of litigation, and to the Board’s knowledge, that threat still exists.

Third, the documentation sought in your Request is exempt from disclosure under the well-established attorney-client privilege exception to the Public Records Laws.<sup>3</sup> Louisiana’s attorney-client privilege is contained in LSA-C.E. Art. 506, which states:

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<sup>1</sup> The Board has no written engagement letter with Ms. Mince.

<sup>2</sup> La. Atty. Gen. Op. No. 08-0240, 2009 WL 685287.

<sup>3</sup> *Texaco v. Louisiana Land & Exploration Co.*, 805 F.Supp. 385, 389 (M.D. La. 1992).

A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client, as well as the perceptions, observations, and the like, of the mental, emotional, or physical condition of the client in connection with such a communication, when the communication is: (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer.

Ms. Mince's communications with members of the Board or with employees of Lafayette Academy are privileged. These communications were confidential in that they were not intended to be disclosed to persons other than the Board, were made in confidence by the parties involved, and were conducted in furtherance of anticipated litigation.

Finally, the attorney-client principle has been reinforced by the United States Supreme Court in an analogous case in *Upjohn Co. v. United States*. The *Upjohn* Court held that communications made by employees to an entity's outside counsel as part of an investigation conducted by outside counsel at the request of the entity's board of directors are privileged and not subject to disclosure.<sup>4</sup>

Please feel free to contact me with any questions or concerns.

Sincerely,



Steven C. Serio

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<sup>4</sup> *Upjohn Co. v. United States*, 449 US 383, 395 (1981).