

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

DEC 20 2024

In the office of the
Court Clerk MARILYN WILLIAMS

THE SUSTAINABLE JOURNALISM FOUNDATION)
d/b/a NONDOC MEDIA and)
WILLIAM SAVAGE III,)
)
Plaintiffs,)
)
v.)
)
STATE OF OKLAHOMA, ex rel. BOARD OF)
REGENTS OF THE UNIVERSITY OF OKLAHOMA)
)
Defendant.)

Case No. CV-2021-1770
Hon. Michael Tupper

ORDER GRANTING SUMMARY JUDGMENT

INTRODUCTION:

This matter comes before the Court on Defendant's Motion for Summary Judgment in Response to Plaintiffs' Open Records Request for the release of two (2) Reports (collectively, the "Reports") generated by a private law firm hired by the Defendant University of Oklahoma ("University") to investigate allegations of misconduct. The Plaintiffs, a media organization and an individual, seek access to the Reports under the Oklahoma Open Records Act ("ORA"), 51 O.S. §§ 24A.1 *et seq.* The University argues that the Reports are privileged and/or exempt and not subject to release under the ORA. After reviewing the briefs, evidentiary materials, and applicable law, and having considered oral argument of counsel, the Court finds that there are no

genuine issues of material fact, and that the University is entitled to judgment as a matter of law.

ISSUE:

Whether the University properly denied Plaintiffs' request for "any and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim 'Trip' Hall," under the ORA. In other words, whether the University has proven, as a matter of law, that the Reports are exempt from disclosure under one of the ORA's exceptions.

MOTION FOR SUMMARY JUDGMENT STANDARD OF REVIEW:

If it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment for said party. *Rule 13(e) of the Rules for the District Courts of Oklahoma.*

Summary judgment is appropriate "if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." 12 O.S. § 2056. "Although the allegations of the pleadings standing alone may raise an issue of material fact, summary judgment is not to be denied if other documentation pertinent to the motions palpably show the absence of such an issue." *Weeks v. Wedgewood Village, Inc.*, 1976 OK 72, ¶ 12. Summary judgment allows a party to pierce the allegations of the pleadings in order "to show that the facts are otherwise than alleged." *Id.* Summary judgment must be based upon a record that is actually presented, not on a record that is potentially possible. *Graham v. Travelers Ins. Co.*, 2002 OK 95, ¶ 8, 61 P.3d 225, 228.

The Court, "in making a decision on whether summary judgment is appropriate" inevitably "considers factual matters," but the ultimate decision turns purely on legal determinations, i.e., whether one party is entitled to judgment as a matter of

law because there are no material disputed factual questions.” *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

MATERIAL FACTS RELATING TO THE REPORTS:

1. In 2018, the University received allegations of personnel (1) misreporting alumni information to a news media organization, and (2) engaging in sexual harassment or other misconduct (collectively, the “Events”). OU Ex. 2, Long Affidavit.
2. On July 26, 2018, the University retained the law firm of Jones Day for the purpose of “conducting an internal investigation regarding OU’s reporting of certain data to external publications.” The University sought legal analysis and advice from Jones Day in conjunction with the investigation. The Engagement Letter Regarding Data Reporting Investigation specifically defines the scope of relationship between the University and Jones Day as an attorney-client relationship. OU Ex. 2, Long Affidavit; OU Ex. 3, *Engagement Letter Regarding Data Reporting Investigation*.
3. On November 15, 2018, the University once again retained the law firm Jones Day, this time for the purpose of “conducting an internal investigation of possible misconduct by senior University personnel.” The University sought legal analysis and advice from Jones Day in conjunction with the investigation. The Engagement Letter Regarding Confidential Investigation of Misconduct specifically defines the scope of relationship between the University and Jones Day as an attorney-client

relationship. OU Ex. 2, Long Affidavit; OU Ex. 4, *Engagement Letter Regarding Confidential Investigation of Misconduct*.

4. During the investigations, the University provided Jones Day with internal documents, which were collected from various employees. OU Ex. 6, OU Dep. p. 81, lns 3-6; p. 82, lns 1-3, 8-14; *Court's In-camera review of Jones Day Reports*.
5. During the investigations, Jones Day conducted interviews with various university employees and other witnesses. OU Ex. 6, OU Dep. p. 85, lns 8-10; *Court's In-camera review of Jones Day Reports*.
6. Throughout both investigations, the University and Jones Day represented that Jones Day served as counsel to the University, the investigations were confidential, and the witnesses' identities would remain confidential to the best of the University's ability, and any witness statement or information provided would be protected by privilege from disclosure and is protected work product. OU Ex. 2, Long Affidavit; OU Ex. 6, OU Dep. p. 183, lns. 1-25, p. 184, lns 1-8. *Court's In-camera review of Jones Day Reports*.
7. At the conclusion of its investigations, Jones Day produced two (2) reports (respectively "Alumni Donor Report" and "Sexual Misconduct Report") for the University, which contained the results of their investigations, legal analysis, opinions, and advice, as well as counsel's mental impressions. Further, the Reports were researched and prepared on behalf of the University to address the

events. OU Ex. 2, Long Affidavit; OU Ex. 6, OU Dep. p. 126, Ins. 22-25, p. 147, Ins. 3-23; *Court's In-camera review of Jones Day Reports*.

8. On February 20, 2019, the OU Board of Regents entered executive session to discuss the investigations with counsel. OU Ex. 2, Long Affidavit; OU Ex. 5, *Minutes of a Special Meeting*, The University of Oklahoma Board of Regents.
9. A primary purpose of the Jones Day Reports was to permit the Board of Regents of the University of Oklahoma and its administration to be informed and advised concerning the Events and their legal ramifications, and to be able to engage in frank discussion. OU Ex. 2, Long Affidavit.

MATERIAL FACTS SPECIFIC TO ALUMNI DONOR REPORT:

10. Jones Day's work related to the Alumni Donor Report included a review of who was involved, for how long, what data was falsified, what the correct data was, and whether university personnel received bonuses, retention agreements or other forms of special remuneration for participating. Jones Day's work was comprehensive. Thousands of documents were reviewed, and numerous interviews were conducted. Pls. Ex. 1, Affidavit of James Gallogly. *Court's In-camera review of Jones Day Reports*.
11. The Alumni Donor Report contains legal analysis, opinions, and advice, as well as counsel's mental impressions. Additionally, the Alumni Donor Report was researched and prepared on behalf of the University to address the event. Pls. Ex

G; Pls. Ex. F, OU Ex. 6, OU Dep. p. 81, lns 3-6; p. 82, lns 1-3, 8-14; p. 85, lns 8-10; p. 126, lns. 22-25, p. 147, lns. 3-23; OU Ex. 2, Long Affidavit; *Court's In-camera review of Jones Day Reports.*

12. Upon its completion in September 2018, Jones Day provided the Alumni Donor Report to the OU Office of Legal Counsel. The OU Office of Legal Counsel then provided the Alumni Donor Report to James Gallogly, who at the time was President of the University of Oklahoma. OU Ex. 6, OU Dep. p. 93, lns. 17-21.
13. After the Alumni Donor Report was issued, the former general counsel of the University, Anil Gollahalli, and then OU President James Gallogly met with the press to explain that certain university administrators had falsified data sent to *U.S. News & World Report* ("*U.S. News*"). Pls. Ex. G. Articles following these interviews are publicly available. Pls. Ex. 1, Affidavit of James Gallogly. Additionally, after the issuance of the Alumni Donor Report, the University disclosed information about the University's misreporting to *U.S. News*. Pls. Ex. H; Pls. Ex. K.
14. The University, through its Office of Institutional Research and Reporting, made a written disclosure to *U.S. News* stating that the University had previously reported inaccurate alumni donor information to *U.S. News*. The information forming the basis of the disclosure was possessed by the Office of Institutional Research and Reporting separate and apart from the Alumni Donor Report. The

Alumni Donor Report was not provided to *U.S. News*. OU Ex. 6, OU Dep. p 35, lns, 24-25; p. 36, lns, 1-6, 18-25; pp. 37-49, lns, 1-25; p. 50, lns, 1-12; p. 96, lns. 14-25.

15. Subsequently, the Alumni Donor Report was the subject of a multi-county grand jury subpoena, and pursuant to a joint-interest agreement, the University provided the report to the Oklahoma State Bureau of Investigation ("OSBI"). OU Ex. 6, OU Dep. p. 94, lns. 15-25, p. 95, lns 1-3.

16. The University's General Counsel's Office did not release the Alumni Donor Report to anyone else. OU Ex. 6, OU Dep. p. 96, lns 4-13.

17. The Alumni Donor Report was not provided to David Boren or his attorney. OU Ex. 6, OU Dep. p. 92, lns. 13-16.

18. The Alumni Donor Report was not provided to the OU Foundation, which is a private, separate legal entity from the University. OU Ex. 6, Deposition of Guy Patton, p. 18, lns. 13-18; p. 57, lns 15-22; p. 61, lns. 12-25; p. 62, lns. 1-9 and 21-24; p. 86, lns. 14-16; p. 87, lns. 8-10; p. 91, lns. 12-14.

MATERIAL FACTS SPECIFIC TO SEXUAL MISCONDUCT REPORT:

19. Around November 2018, because of sexual misconduct allegations, the University initiated a Title IX investigation. Jones Day conducted the University's Title IX Investigation on behalf of the University, as opposed to the University's Title IX office, because the subject of the investigation was the highest ranking official on the university campus, and therefore, the Title IX office could not conduct the

investigation without facing concerns of bias and conflict. OU Ex. 6, OU Dep. p. 148, lns. 10-19.

20. Jones Day issued a report of its investigation in early April 2019. This 2nd Jones Day report (“Sexual Misconduct Report”) was received by the University’s Office of General Counsel from Jones Day in April 2019. Pls. Ex. 1, Affidavit of James Gallogly; OU Ex. 6, OU Dep. p. 122, lns 1-2.
21. As part of the Title IX investigation, the University shared redacted excerpts of the Sexual Misconduct Report with former OU President David Boren’s attorney Clark Brewster, specifically relating to and limited to the allegations against Boren and the support for the allegations. OU Ex. 6, OU Dep. p. 150, lns. 1-9, p. 154, lns. 12-24. These redacted excerpts were made available to Mr. Brewster in a digital format through a software that allowed for limited access for a specific time to view it. OU Ex. 6, OU Dep. p. 155, lns. 2-12.
22. The University made these redacted excerpts available to Mr. Boren’s attorney as part of the University’s Title IX protocol in providing the respondent with knowledge of the allegations and the evidence supporting those allegations. OU Ex. 6, OU Dep. p. 146, lns. 15-18; p. 150, lns. 6-9.
23. The University provided Jess Eddy, a complainant in the Title IX investigation, with a redacted excerpt of the Sexual Misconduct Report, specifically related to

and limited to a summary of his allegations. OU Ex. 6, OU Dep. p. 180, lns. 18-20, p. 181, lns. 7-9.

24. The University made these redacted excerpts available to Mr. Eddy as part of the University's Title IX protocol in providing the complainant with excerpts of the investigation relating to his claims. OU Ex. 6, OU Dep. p. 163, ln 25, p. 164, lns. 1-3.
25. Subsequently, the redacted portions of the Sexual Misconduct Report pertaining to his complaint were made public by Jess Eddy. This disclosure was made without the knowledge or consent of the University.
26. The University's Office of General Counsel provided the Sexual Misconduct Report to the University's Board of Regents, as well as then President Gallogly, in an executive-session meeting. OU Ex. 6, OU Dep. p. 128, lns. 22-25, p. 129, lns. 1-2, 16-19.
27. On February 20, 2019, the Board of Regents entered executive session to discuss the investigations with counsel. OU Ex. 5, Minutes of a Special Meeting, The University of Oklahoma Board of Regents.
28. Around March 2019, because of a formal criminal complaint being made, the University of Oklahoma Police Department requested the assistance of OSBI to conduct the investigation. OU Ex. 6, OU Dep. p. 195, lns. 22-25, p. 196, lns. 1-6.

29. During the criminal investigation, the University provided the Sexual Misconduct Report to the OSBI, pursuant to a multi-county grand jury subpoena and joint-interest agreement. *OU Ex. 6, OU Dep. p. 197, p. 5-10.*

MATERIAL FACTS REGARDING OPEN RECORDS REQUEST:

30. On May 1, 2019, the University received Plaintiffs' Open Records Act ("ORA") request for "any and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim 'Trip' Hall." *OU Ex. 2, Long Affidavit; OU Ex. 6, Savage ORA Request (May 1, 2019).*

31. On or about June 12, 2019, the University responded to Plaintiff Savage stating that it considered his Request to seek records related to a specific employee confidential and would not undertake a search for records that would not be released even if they existed. The University further stated that "any report that legal counsel, retained by the University, provides at the conclusion of any investigation of any employee would be confidential pursuant to 51 O.S. §§ 24A.5(1)(a), 24A.7(A), and 24A.12." *OU Ex. 2, Long Affidavit; OU Ex. 7, Open Records Eml., OU Open Records Response – RE: Open Records Request.*

32. On June 10, 2021, Plaintiffs filed their Petition for Relief for Violations of the Oklahoma Open Records Act.

COURT'S IN-CAMERA REVIEW OF JONES DAY REPORTS:

33. On July 10, 2024, the Court conducted an *in-camera* review of the Alumni Donor Report and the Sexual Misconduct Report. This review was conducted in the Court's chambers with no other person present. During the review, the Court carefully examined the contents of the Reports. The *in-camera* review was conducted pursuant to the Court's Order entered on January 23, 2024.

ANALYSIS:

34. The "Legislature's emphatic message to government agencies is, unless otherwise specifically excluded, the public must have prompt and reasonable access to records." *Okla. Ass'n of Broads.*, 2016 OK 119, ¶ 15, 390 P.3d at 694 (citations omitted). The ORA was created to "ensure and facilitate the public's right to access to and review of government records so they may efficiently and intelligently exercise their inherent political power." 51 O.S. § 24A.2. Courts "must construe the Act's provisions to allow access unless an exception clearly applies; the burden is on a public agency seeking to deny access to show that a record should not be made available." *Okla. Ass'n of Broads.*, 2016 OK 119, ¶ 15, 390 P.3d at 694; *see* 51 O.S. § 24A.2. "Unless a record falls within a statutorily prescribed exemption in the Act, the record must be made available for public inspection." *Ross v. City of Owasso (Ross II)*, 2020 OK CIV APP 66, ¶ 9, 481 P.3d 278, 282. The University "has authority to make the initial determination whether its records are exempt."

Merrill v. Oklahoma Tax Comm'n, 1986 OK 53, 831 P.2d 634, 640 (citing *Tulsa Trib. Co. v. Oklahoma Horse Racing Comm'n*, 1986 OK 24, 735 P.2d 548, 552).

35. The Court must determine if the University's asserted privileges exclude the reports from disclosure. *Ross*, 2020 OK CIV APP 66, ¶ 8, 16 P.3d 468, 470; *see also* 12 O.S. § 2513. If the Court determines the University properly relied on a privilege to deny Plaintiffs' ORA request, then summary judgment is appropriate. 51 O.S. § 24A.5(1)(a) (The ORA's disclosure requirement "does not apply to records specifically required by law to be kept confidential including: a. records protected by a state evidentiary privilege, such as the attorney-client privilege, the work product immunity from discovery and the identity of informer privileges.").

The Jones Day Reports are protected under the Attorney-Client Privilege:

36. The attorney-client privilege exists to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

37. Whether the attorney-client privilege applies "is a question of fact for the trial court." *Cooper v. State*, 1983 OK CR 154, ¶ 4, 671 P.2d 1168 at 1172.

38. The Court finds that the attorney-client privilege applies to the Jones Day Reports. Specifically, the Oklahoma attorney-client privilege applicable to the Reports, 12 O.S. § 2502, provides:

D. There is no privilege under this section:...

7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

39. It is undisputed that the University retained the law firm of Jones Day for two (2) distinct and specific purposes: (1) to conduct "an internal investigation regarding OU's reporting of certain data to external publications," and (2) to conduct "an internal investigation of possible misconduct by senior University personnel." The Court has conducted its *in-camera* review of the Reports. Collectively, the Reports are comprised of confidential communications, summaries of witness interviews, the results of investigations, legal analysis, opinions, advice, and mental impressions conveyed to the University by its attorney, Jones Day. The Reports contain confidential communications made for the purpose of facilitating the rendition of professional legal services to the University, and thus fall within the Oklahoma attorney-client privilege found in 12 O.S. § 2502. Moreover, the Reports relate specifically to legal advice or strategy sought by the University, and thus the privilege applies. *See United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998).

40. In this case, the Reports were created as a confidential communication between the University and its outside legal counsel for the purpose of providing legal advice regarding the respective investigations. As such, the Court finds that the Reports are protected by the attorney-client privilege.

41. The evidence in the record clearly demonstrates that the University was seeking legal advice when it engaged Jones Day on July 26, 2018, and again on November 15, 2018. The initial engagement letters indicate that Jones Day was hired to conduct “an internal investigation regarding OU’s reporting of certain data to external publications,” and to conduct “an internal investigation of possible misconduct by senior University personnel.” Although the letters do not use the phrases “legal advice,” “legal assistance,” or the like, there is no magic phrase that must be included in an engagement letter to invoke the attorney-client privilege. *See Doe 1 v. Baylor University*, 320 F.R.D. 430, 436-37 (W.D. Tex. 2017). The letters plainly indicate that the University hired a law firm to obtain legal advice. Moreover, the engagement letters clearly state that the University and Jones Day “are entering into an attorney-client relationship.” OU Exs. 3 and 4, Engagement Letters. A primary purpose of the Reports was to permit the University and its administration to be informed and advised concerning the events and their legal ramifications. OU Ex. 2, Long Affidavit.

42. The Court finds that the Plaintiffs have not raised a genuine issue of material fact regarding the privileged nature of the Reports.
43. Plaintiffs claim the scope of the attorney-client privilege excludes protection from communications made between employees of the University prior to Jones Day's hiring. The Court finds this argument unavailing. *See Doe 1 v. Baylor Univ.*, 320 F.R.D. 430, 436 (W.D. Tex. 2017). ("The research undertaken by an attorney to respond to a client's request [for advice] also falls within the reaches of the privilege.").
44. Throughout both investigations, the University and Jones Day represented that Jones Day served as counsel to the University, the investigations were confidential, and the witnesses' identities would remain confidential to the best of the University's ability, and any witness statement or information provided would be protected by privilege from disclosure and is protected work product. OU Ex. 2, Long Affidavit. OU Ex. 6, OU Dep. p. 183, lns. 1-25, p. 184, lns 1-8.
45. The Court finds that the Reports constitute "communications" that concerned a "pending investigation, claim, or action," as contemplated by 12 O.S. § 2502(D)(7). Further, the Court finds that, pursuant to 12 O.S. § 2502(D)(7), disclosure would "seriously impair the ability" of the University "to process the claim or conduct a pending investigation, litigation or proceeding in the public interest."

46. The evidence submitted shows that the University sought advice from Jones Day to better understand its legal obligations and liabilities – the exact sort of behavior the privilege seeks to encourage. The communications between the University and Jones Day contained within the Reports are therefore subject to the attorney-client privilege.

47. Plaintiffs' argument that for communications that involve closed or completed investigations, claims or actions - "there is no privilege" as a matter of law - is unpersuasive. The Reports are covered by the attorney-client privilege, the University has never waived its privilege to these Reports, and absent a voluntary waiver, the privilege is not dissolved simply because the investigations are now closed or completed. Moreover, privileged communications made during the existence of an attorney-and-client relationship remain protected from disclosure even after that relationship has been terminated. *See Thompson v. Box*, 1994 OK CIV APP 183, 889 P.2d 1282, 1284.

48. The Court finds no genuine issue of material fact as to whether the Reports were "made for the purpose of facilitating the rendition of professional legal services to the client" under 12 O.S. § 2502(B). The Court determines that the Reports were, in fact, made for such a purpose.

The University never waived its attorney-client privilege:

49. As stated above, the University never waived its attorney-client privilege to the Reports. For waiver of privilege to apply, Oklahoma law requires that the University “voluntarily disclose or consent to disclosure of any significant part of the privileged matter.” 12 O.S. § 2511.
50. With specific regards to the Alumni Donor Report, the Court finds that there was no voluntary disclosure of any “significant part of” the Report. Ms. Heidi Long identified the disclosure to *U.S. News* and testified the information therein was possessed by the Office of Institutional Research and Reporting separate and apart from Jones Day. The Alumni Donor Report was not provided to *U.S. News*. OU Ex. 6, OU Dep. p 35, lns, 24-25; p. 36, lns, 1-6, 18-25; pp. 37-49, lns, 1-25; p. 50, lns, 1-12.
51. In addition, Ms. Long confirmed that the Alumni Donor Report was shared with the OSBI. That disclosure, however, was pursuant to both a Joint Interest Agreement and a subpoena from its grand jury inquiry. OU Ex. 6, OU Dep. p. 94, lns. 15-25, p. 95, lns 1-3. The University did not wish to hinder the OSBI investigation and shared a common interest in a full investigation, and thus, entered into the common-interest agreement which allowed the University to provide the Reports to the OSBI without waiving privileges. OU Ex. 6, OU Dep. p. 197, lns 5-25, p. 198, lns. 1-25, p. 199, lns. 1-15.

52. The Court determines that these limited and narrow disclosures fall far short of a waiver of privilege through “disclosure of any significant part of the privileged matter” as contemplated by 12 O.S. § 2511.
53. With specific regard to the Alumni Donor Report, Plaintiffs argue that disclosures by then OU President James Gallogly and former general counsel of the University, Anil Gollahalli to members of the press constitute a waiver of the attorney-client privilege. The evidentiary record submitted regarding these disclosures do no support Plaintiffs’ argument. The evidence presented for the Court’s consideration on this issue is essentially that Gallogly told the press “We found errors, and we corrected them. We found people who acted below the standard of the university, and they don’t work for us anymore.” *See* Pls. *Ex. G*. There is no evidence that Gallogly or Gollahalli released detailed findings of fact or recommendations contained within the Reports to the press. There is no evidence that Gallogly or Gollahalli quoted excerpts from the Alumni Donor Report or paraphrased communications contained within the Alumni Donor Report. There is no indication in the evidentiary record that the disclosures made to the press provided substantial detail about both what the University and its employees told Jones Day and what advice the University received in return. There is no indication that Gallogly or Gollahalli named specific individuals and data sources to the press. Neither Gallogly’s nor Gollahalli’s statements to the

press constitute a voluntary waiver of the privilege attached to the Alumni Donor Report. Nor does the release of information from the University to *U.S. News* amount to a voluntary disclosure of the contents of the Alumni Donor Report. The evidentiary material submitted on this issue shows that the University “told *U.S. News* that it had inflated its alumni giving data since 1999.” See Pls. Exs. J, H. Additionally, the University told *U.S. News* “that, for many years, its Health Sciences Center’s data was incorrectly included with the OU data reported to *U.S. News* for its Best Colleges rankings.” See Pls. Exs. H, Q. These disclosures are a far-cry from a voluntary, detailed disclosure of previously confidential communications within the Alumni Donor Report, but rather disclosures more akin to generic statements from the investigation.

54. Further, the privilege belongs to the University and not its agents. Given the University’s present motion and the undisputed actions it has taken to protect the privileged nature of the Jones Day Reports, it is clear the University never intentionally waived its privilege to the Jones Day Reports.

55. With specific regards to the Sexual Misconduct Report, the Court determines that there was no voluntary disclosure of this Report. Pursuant to statutory duty and due process, the University was required to share redacted excerpts of the Sexual Misconduct Report with David Boren and his attorney Clark Brewster. OU Ex. 6, OU Dep. 143, Ins. 21-25, p. 144, Ins. 1-25, p. 145, Ins. 1-25, p. 146, Ins. 1-25, p. 147,

Ins. 1-25, p. 148, Ins. 1-7; *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019). Boren's review of the Sexual Misconduct Report was protected and limited in access and time by software. OU Ex. 6, OU Dep. p. 155, Ins. 3-16. Ms. Long also testified that complainants are afforded the same right as a respondent to a claim. OU Ex. 6, OU Dep. at p. 163, ln. 25, p. 164, Ins. 1-3. The University provided Jess Eddy with only a limited portion of the Sexual Conduct Report containing the information he provided, and the University never provided Eddy with the Sexual Misconduct Report in its entirety. OU Ex. 6, OU Rep. Dep. at pp. 182:20-185:19; pp. 173:25-174:5; p. 190, Ins. 8-19. Lastly, the evidentiary record is clear that the University produced the Jones Day Reports to the OSBI pursuant to a grand jury subpoena and Joint Interest Agreement. OU Ex. 6, OU Rep. Dep. at pp. 197:5-199:15. These disclosures in no way provide substantial detail about both what the University, its employees, and other witnesses told Jones Day or what advice the University received in return. The Court determines that these limited disclosures do not fall within the waiver of privilege contemplated by 12 O.S. § 2511. Lastly, disclosure of privileged information must be something more than talking about a fact that may or may not be within the privileged document or acknowledging a discussion of underlying facts within a privileged document. *See Rowley v. Rowley*, 144 Okla. 147, 290 P. 181 (1930); *Wright v. Quinn*, 201 Okla. 565, 207 P.2d 912 (1949) and *In re Swartz's Will*, 79 Okla. 191, 192 P. 203 (1920); *Allen v.*

State, 25 Okla. Cr. 64, 248 P. 655 (1926); Oklahoma Evidence Subcommittee, *Note Re: Okla. Stat. tit. 12, § 2511*.

The Sexual Misconduct Report is protected under the Identity of Informer

Privilege:

56. In addition to attorney-client privilege, the Court finds that the Informer Privilege is applicable to the Sexual Misconduct Report. The Oklahoma informer privilege states:

The United States, state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting the investigation. *12 O.S. § 2510*.

Contrary to Plaintiffs' assertions, the informer's privilege is not limited to police officers and prosecutors, but rather the privilege has been extended to other governmental agencies involved in investigations. *See Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021 (5th Cir. 1978). *See also Film Allman, LLC v. Sec'y of Lab.*, 682 F.App'x 860, 861 (11th Cir. 2017).

57. Further, the Court finds that the informer's privilege is also consistent with Title IX confidentiality requirements related to witnesses providing information related to sexual misconduct. *See 34 C.F.R. § 106.71*.

The Sexual Misconduct Report is protected under the Work-Product Doctrine:

58. Plaintiffs argue that the University is not entitled to the work-product protection because the University did not engage Jones Day in anticipation of litigation. Further, Plaintiffs argue that any work-product protection has been waived. The University disputes these arguments.
59. Work product typically constitutes documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, as well as the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, of which a court shall protect against disclosure. *See Scott v. Peterson*, 2005 OK 84, 126 P.3d 1232, ¶ 8; 12 O.S. § 3226(B)(2). Factors relevant to determining the primary motivation for creating a document [include] the retention of counsel and his involvement in the generation of the document and whether the document was instead prepared in response to a particular circumstance. *See Doe 1 v. Baylor Univ.*, 320 F.R.D. 430, ¶ 20 (W.D. Tex. 2017).
60. The evidence submitted demonstrates that OU's decision to hire Jones Day to investigate "possible misconduct by senior University personnel" and lead the University's Title IX investigation was not part of a "routine practice" of the University but was substantially motivated by its anticipation of litigation. On November 15, 2018, when the University hired Jones Day, the prospects of litigation certainly existed. The work-product arising out of the Sexual

Misconduct Report is therefore protected. The Court concludes that the Sexual Misconduct Report is a “document or other tangible thing that [was] prepared” as part of Jones Day’s investigation and is protected work-product.

The Jones Day Reports are not protected under the Deliberative Process Privilege:

61. “The primary purpose of the deliberative process privilege is to protect the frank exchange of ideas and opinions critical to the government’s decision-making processes where disclosure would discourage such discussion in the future.”

Vandelay Ent., LLC v. Fallin, 2014 OK 109, ¶ 21, 343 P.3d 1273, 1278.

62. The Court declines to expand the deliberative process privilege to the Jones Day Reports. To date, the deliberative process privilege has only been explicitly applied to the Governor in Oklahoma. *Vandelay Ent., v. Fallin*, 2014 OK 109, ¶ 21, 343 P.3d 1273, 1278 (internal brackets omitted). Obviously, the University is not the Governor. While the deliberative process privilege may have been extended beyond the governor or chief executive officer in other jurisdictions, there has been no explicit statutory or appellate authority for its extension in Oklahoma. Indeed, the Oklahoma Supreme Court has only made passing reference to agencies possessing the privilege elsewhere. *State ex rel. Oklahoma State Bd. Of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 77, 489 P.3d 36, 63 (“An administrative disciplinary process has the potential of possessing confidential attributes in various parts of the process, such as...the deliberative phase

(executive session) of a public individual proceeding.”). The Court declines to extend the privilege in the instant case.

Specific ORA Exemptions apply to the Jones Day Reports:

63. Irrespective of the applicability of attorney-client and work-product privileges to the Jones Day Reports, ORA exemptions support the University’s withholding of the Jones Day Reports. The University relied upon two (2) exemptions from ORA disclosure: 51 O.S. § 24A.7 (Personnel records) and 51 O.S. § 24A.12 (Investigative files).

The Personnel Records Exemption applies to the Jones Day Reports:

64. The Court finds that the Jones Day Reports include personnel records under Oklahoma law. The University’s decision to withhold a personnel record is subject to the ORA balancing test. *Ross V. City of Owasso*, 2020 OK CIV APP 66, ¶¶ 11-15, 481 P.3d 278, 282 (citing 51 O.S. § 24A.7(A)(1)). Because § 24A.7 state that the University “may” release personnel records, the decision to withhold said records are discretionary in nature. *Id.*

65. The Court finds that both Jones Day Reports constitute a “personnel investigation” as contemplated by 51 O.S. § 24A.7 (A)(1).

66. Further, from the evidentiary record, the Court finds that disclosure would constitute a clearly unwarranted invasion of personal privacy, and thus, the Court

finds that the University properly exercised its statutory discretion in withholding the Reports from disclosure, pursuant to 51 O.S. § 24A.7 (A)(2).

67. The evidentiary record is clear that the University properly weighed the interests against disclosure against the policy of openness for the public good. For instance, the record is clear that the University considered interests against disclosure, including the fact that disclosure would 1) breach representations the University previously made to witnesses that the information would remain confidential in the Reports; 2) cause a chilling effect in future investigations by ensuring the University cannot maintain confidentiality of information gained from witnesses, informants, and potential victims; and 3) undermine the University's ability to fully report and/or investigate matters mandated by law. OU Ex. 2, Long Affidavit; OU Ex. 9, Final ORA Letter. The Court finds each of these considerations to be sound, supported by the evidentiary record, and buttressed by policy considerations recognized in Oklahoma law supporting the exemption.

68. The Court finds it significant that the Reports include summaries of interviews conducted by Jones Day with individuals who were assured that their identities and the information they provided would remain confidential. Protecting the confidentiality of these individuals is critical to ensuring the integrity of such investigations, as it encourages candor and participation. Disclosing the Reports could undermine these assurances and have a chilling effect on future

investigations, where potential witnesses could be reluctant to participate if confidentiality cannot be guaranteed.

69. The Plaintiffs suggest that the Reports could be released with the identities of those interviewed redacted, arguing that this would adequately protect the confidentiality promised to interviewees while still allowing for public access to the Reports. However, this proposed solution is insufficient for several reasons:

a. Risk of Indirect Identification

i. Even with redacted names, individuals could potentially be identified through other details in the Reports, such as the specific content of their statements, the context of their interviews, or other identifying information inadvertently disclosed in the narrative. In a university setting, where communities are often small and close-knit, it is more likely that individuals familiar with the circumstances could piece together enough information to identify the interviewees, thus violating the confidentiality assurances.

b. Chilling Effect on Future Participation

i. The effectiveness of redaction as a safeguard is limited and may not sufficiently reassure future participants in similar investigations. If individuals fear that their identity or the substance of their confidential communications might be indirectly revealed, even

though a redacted report, they may be less willing to participate fully or candidly in future investigations. This reluctance could compromise the ability of the university or other public bodies to conduct thorough and effective investigations.

c. Protection of Sensitive Information

- i. Beyond just the identities of the individuals, the content of their interviews includes sensitive or personal information that could cause harm or embarrassment if disclosed, even in redacted form.

The Investigatory Reports Exemption is inapplicable to the Jones Day Reports:

70. The Court finds the “investigatory reports” exception to the ORA does not apply to the Jones Day Reports. The University cannot invoke the investigatory files exemption codified at 51 O.S. § 24A.12 because neither Jones Day nor the University are an “agency attorney” permitted to assert that exemption.

The witnesses involved in these investigations have a constitutional right to privacy:

71. The Court finds that witnesses who provided information contained within the Reports have a constitutionally protected privacy interest in the contents of the Reports because of their personal nature. This conclusion is well supported by precedent from the Supreme Court and this circuit. In *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court held that the

constitutional right to privacy includes an "individual interest in avoiding disclosure of personal matters...." Relying on *Whalen*, the Court held in *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir.1986), that "[d]ue process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state." Information is protected by the right to privacy when a person has "a legitimate expectation... that it will remain confidential while in the state's possession." *Id.*

72. The witnesses possess a constitutionally protected privacy interest in the Reports because the Reports contain private disclosures made under assurances of confidentiality relating to highly sensitive matters. *Court's In-camera review of Jones Day Reports*. The Reports are the product of numerous people placing their trust in the University and participating in a voluntary process that many participants conditioned upon confidentiality. These individuals shared private details about events, and the University assumed an obligation to maintain the confidentiality of these details to the best of its ability. OU Ex. 2, Long Affidavit; OU Ex. 9, Final ORA Letter.

73. Other than Eddy, there have been no witnesses come forward and waive their constitutionally protected privacy interest in the content of their statements contained within the Reports.

CONCLUSION:

74. The University has met its burden of showing that there is no genuine issue of material facts regarding the privileged status of the Reports and that the Reports are exempt from disclosure under the ORA. More specifically, the University properly withheld disclosure of the Jones Day Reports, which are records that fall outside of the ORA, §§ 24A.1 through 24A.30, for the following reasons:

- a. Attorney-client privilege applies to the Jones Day Reports.
- b. The informer privilege applies to the Sexual Misconduct Report.
- c. The University has not waived its privileges.
- d. The Sexual Misconduct Report is protected work-product.
- e. The University properly exercised its statutory discretion in withholding the Jones Day Reports, pursuant to 51 O.S. § 24A.7(A)(1) and (2).
- f. The ORA does not apply to the Jones Day Reports, pursuant to 51 O.S. § 24A.5(1)(a).
- g. The witnesses have a constitutionally protected right to privacy in the Reports.

75. Accordingly, the Court concludes that the University is entitled to judgment as a matter of law.

76. It is therefore ordered that the University's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 20th day of December 2024.


HON. MICHAEL TUPPER
DISTRICT JUDGE