IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM FOUNDATION d/b/a NONDOC MEDIA and WILLIAM W. SAVAGE III, Plaintiffs,	
-vs-	No. CV-2021-1770
STATE OF OKLAHOMA, ex rel BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, Defendant.	

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TRANSCRIPT OF PROCEEDINGS

HAD ON NOVEMBER 15, 2024

BEFORE THE HONORABLE MICHAEL D. TUPPER

DISTRICT JUDGE

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PROCEEDINGS

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THE COURT: I'll show that we are here in the matter of the Sustainable Journalism Foundation doing business as NonDoc Media, as well as William Savage, Plaintiffs, vs. The State of Oklahoma ex. rel. Board of Regents of the University of Oklahoma. This is case No. CV-21-1770, and this matter comes on for hearing today on the defendant University's Motion for Summary Judgment. That Motion has been on file since February 13th of 2023. That matter has been fully briefed, and the Court is in receipt of those briefs. Both sides have submitted evidentiary materials, both in support and in opposition to the Motion. The Court has received all of those materials, and certainly believes it has fully considered the premises in this case.

So I want to allow both sides an opportunity to make oral argument today, both in support of the Motion and in opposition to it, and we will go from there.

On behalf of the plaintiff, Plaintiff, Mr. Savage, appears in person today, and is accompanied with counsel, Mr. Blake Johnson and

Mr. Lin Weeks.

The defendant is present through its attorneys. Mr. Michael Burrage is present, Mr. Austin Vance is present, Mr. Drew Neville is present, Mr. Armand Paliotta is present, and Mr. Martin Weitman is present on behalf of The University.

I appreciate counsel presenting me in advance with slides that I expect you intend on going through for purposes of the oral argument today. I've got my own copies of those, and it looks like you've got some projected as well.

And I want to welcome everyone here. I can tell the courtroom is quite full. Everyone is welcome in here. I do just want to remind everyone who is in attendance that I don't allow any audio or video recording of the proceedings. There is some signage posted outside on my door. So you're certainly welcome to be present and listen. We do have an official record being made of these proceedings so if you wish to have an official record of this we've got a court reporter who is making that record.

Okay. And I know counsel recalls this. We had a conference call about some of the

logistics -- the mechanics of this hearing, so I expect all of us to be on the same page there.

So, with that, is the plaintiff ready to proceed -- plaintiffs?

MR. JOHNSON: We are, Your Honor.

THE COURT: And is The University ready to proceed?

MR. BURRAGE: We are, Your Honor.

MR. VANCE: Your Honor, we do have one administrative matter, before we go to the Motion for Summary Judgment. We had prepared and circulated a couple of journal entries with the plaintiffs, as related to the matters that you had just discussed, both the Court's prior in-camera review, which we were directed to prepare some sort of memorialization for the Court on how the in-camera review occurred, and then a second journal entry as it related to the October 10th hearing where Plaintiffs raised the question of how will confidential information be discussed today, the mechanics that you're speaking of.

So we prepared journal entries that have been circulated to the Plaintiffs. If we could just memorialize that so we can have it plainly in the record. I don't think there will be any

dispute as to what's in the journal record [sic], but I would like -- you know, just request the Court look at it, and then I guess hear what Plaintiffs have -- what their objection would be to entering those journal entries for those proceedings.

THE COURT: Okay.

I have yet to see the content of any journal entries. Mr. Weeks, do you wish to respond?

MR. WEEKS: Yeah. Your Honor, obviously I think we had a status conference on the 10th, and Defendant has circulated a journal entry. We indicated that we would review the transcript of that conference. There was a court reporter there. We ordered an expedited version of the transcript. It hasn't been provided yet because of the delay in Defendants getting us over what they think needs to be entered in the journal entry, and so we just haven't had a chance to review that journal entry against the transcript of the proceeding.

MR. VANCE: Your Honor, that's -- that's untrue. We provided these journal entries more than a week ago. One of them was provided in

August. They've had plenty of time to provide edits. They just didn't do it. And waiting on the transcript for this Court to enter a journal entry that dictates the mechanism of this hearing doesn't make a lot of sense.

MR. WEEKS: Well, I think the Court knows what it says in its status conference. I don't know if a journal entry that we haven't had a chance to review is appropriate here.

MR. VANCE: On this last point, Your Honor. The last thing I sent to them was local rule 16-K which said after a matter is presented it's our obligation as the prevailing party to present the journal entry to memorialize that. I have not heard any response as to why we shouldn't follow the local rules to get this memorialized.

THE COURT: Okay. Thank you.

I don't want to spend any more time arguing about that. We -- I had assurances from both sides that we were all under the same page for purposes of presenting oral argument today. I'll remind the parties that I've got the record, I've got the evidentiary materials, and you're going to point me to evidentiary materials. There is a protective order in place in this case, and

everybody's going to be bound by what was stated at the conference we had on this.

So go ahead and place those there. I'll certainly consider entering those. I'm a big fan of journal entries, but I don't want to spend any more time here. I want to hear oral argument. And if somebody during this oral argument breaches the scope and terms of what I had set out at our status -- our conference on this, by all means you can make an objection, and I'll have a context in which to rule on the objection.

MR. WEEKS: Your Honor, we would just state for the record that we object to you entering the journal entry as it's written there. We would like a chance to respond to it if you're considering an order.

THE COURT: I'm going to -- I don't intend on entering journal entries on what we had previously done today. That's not the focus of my attention today. Okay?

All right. With that, is The University ready to proceed?

MR. VANCE: Yes, Your Honor.

MR. BURRAGE: Yes, Your Honor.

THE COURT: Okay.

So the Motion, having been filed by The University, you're seeking summary judgment. We all know what the legal standard for summary judgment is. You know, in looking at the briefings, it seems there's -- the prime issues for the Court, as I see it, are: Are these Jones Day reports -- there's two of them -- are they open records, or are they outside of open records, due to some privilege or exemption? So that's how I am considering the motion for summary judgment. So we'll get into much more, I'm sure.

With that, Mr. Vance, are you going to be making the presentation, or is Mr. Burrage?

MR. BURRAGE: I have some brief remarks, and then he's going to make the legal argument.

THE COURT: Okay.

We'll start with yours, then, Mr. Burrage. Go ahead.

MR. BURRAGE: Thank you, Your Honor.

Your Honor, the Board of Regents at the University of Oklahoma is a constitutional body, and I've had the privilege of representing them for over two decades. It's an independent body. And the defendants in this case are Oklahoma citizens who serve as Regents that are appointed

by the Governor, and they're charged with running The University within the law of the State of Oklahoma, which is the constitutional and legal arguments. But I can tell you, with regard to this case, and the Board of Regents, as a body, they have always been at a consensus about their decisions, and their decisions weigh heavily, and one of their primary concerns is the students at the University of Oklahoma.

The Regents were presented with certain situations. They followed the law. They did exactly what they were supposed to do, and we think that after the Court reviews all of this the Court will find that they did follow the law.

With regard to certain matters under the Open Meetings Act, the Court knows that the Regents have certain discretion, and that discretion they're allowed to use and operate under, and the only thing that the Court can do with regard to their decisions is determine did they abuse their discretion? Did the Regents abuse their discretion? And I haven't seen any evidence that they have abused their discretion that is given them under the law.

I wanted to make those comments, and

Austin is going to make the legal arguments, Your Honor. Thank you.

THE COURT: Thank you, Mr. Burrage.

Mr. Vance, go ahead.

MR. VANCE: Thank you, your Honor.

Your Honor, when I -- speaking personally here for a second, I don't do criminal law, specifically because I don't have the constitution for it. I can't deal with the pressure of, you know, somebody's life being on the line, and the results that could happen from the sentence. That's the reason that my primary focus is on civil law, because I can deal with the thought of winning or losing money. This case has been totally different for me in that respect. The weight and risk of these more than 50 witnesses' information being disclosed is something that I deal with on a deep personal level, as it relates to just the horror that these people might experience.

I think about the potential students or people in Cleveland County who maybe cooperated with The University and provided the most personal information, information that The University could not coerce from them, but got from them

voluntarily by telling them -- assuring them that the information would maintain its confidentiality.

And as I think about this case and keep pushing forward, the truth is it's bigger than me, and it's not about me, but, just as it's not about me, it's also not about James Lankford, Jim Gallogly, or anyone else. This case is about Oklahoma law and protecting these witnesses. And, for that reason, Plaintiffs' reliance on other reports, other law firms in other states, simply are not applicable to the matter before the Court.

When we look at the material provided to the Court and the evidence, it's very clear that the Board of Regents, in a meeting, as an official act, as a constitutional body, passed a policy that would govern investigations into sexual misconduct or harassment. That policy states in clear black and white letter of law that is binding on The University that this confidence will be maintained, and there are repercussions to those agents of the University who choose not to maintain that confidentiality.

So the question before the Court, I think, is a lot simpler than the legal matters --

you know, the complexities of us running down these rabbit trails; it's a simple question of fairness. Is it fair to these witnesses that they only provided this private information under this assurance, and now it's at risk of disclosure? The University doesn't think so.

And this isn't a hypothetical. The policies and statutes here worked. Through this process of The University's investigation, it eventually resulted in a grand jury. The reports were shared with the Attorney General's office, and the grand jury didn't result in any indictments, but that was how the process was supposed to go. Their grand jury process is still secret in Oklahoma, and, just as that process is secret, there's no reason for this report to come out when it's not part of -- hasn't been disclosed in that process, and shouldn't be disclosed here. And, on this point, I think I need to address an interesting argument that Plaintiffs make that I think is incorrect, and it relates to how the informer's privilege and State agencies work together to stop crime.

As Plaintiffs know, because they're the ones who styled the case, it's The State of

Oklahoma ex rel. Board of Regents, which means that there is no reason that the Board of Regents can't cooperate with the Attorney General or the Oklahoma Bureau of Investigation when it's conducting investigations into these confidential matters. Instead, it's the natural result of the way that the Oklahoma Constitution has diffused executive branch powers between different boards and agencies.

So, in Oklahoma, the AG isn't appointed by the President, it's elected by the people. And the Board of Regents is a constitutional board that is on par with the Governor. But, in any event, all of these agencies can work together for criminal prosecution on behalf of the State. And, for that reason, through that whole process, we saw with the grand jury process working, this is not like other motions for summary judgment, as, Judge Tupper, you noted.

Here you are the finder of fact. You are the one conducting an administrative review of what The University did when it made a determination not to release these reports. You are also unique to the context of this case as discovery is closed. The Court denied the

plaintiffs' additional requests for discovery, and there is nothing else pending, which means that there is no other fact that would be revealed to the Court or discussed at a trial. This is it. This is the put up or shut up moment of litigation.

And I think the plaintiffs have lost the forest for the trees, as it relates to this administrative review. As my co-counsel, Mike, previously mentioned, the standard for the Court is abuse of discretion, as it relates to the personnel balancing test and investigative files consideration before the Court.

While The University, in the first instance, conducted a balancing test to weigh the pros and cons in the public benefit, that's not the same test as the Court. The Court is looking for a clearly erroneous standard. But as we turn to the more specific arguments --

THE COURT: Mr. Vance, on that point, the standard, because that's really important here, I heard what you just said, and how do you -- how does that standard work -- the deference and the abuse of discretion, how does that work in to the motion for summary judgment,

which is, you know, are there any material -- are there any disputes as to material fact?

MR. VANCE: Well, Your Honor, I would say the answer to that has to be no, but I'm going to answer that in a couple different ways.

THE COURT: Okay.

MR. VANCE: As it relates to deference and abuse of discretion, we would be looking at the ORA balancing statutory test so I'm going to put the privilege just to the side for a second.

On the privilege question, those will be a question of law that the Court resolves, based on the facts presented; but, on this balancing question, the way that the statute is structured is, first, The University makes its determination of weighing these factors of considering the, you know, private interest, harm, things like that against the public interests, and then when it gets to the -- you, the Court, you know, your job -- this isn't a de novo review. I think some of the language used is, like, clearly erroneous.

So I think the Court, as you're looking at it, the deference is I think the Court needs to be convinced that The University was acting unreasonably when it made this decision, and I

just don't think there's evidence before the Court for you to say The University acted unreasonably. Even if the Court would prefer a different outcome, that's not the same as The University acting unreasonable in making its determination in this case.

And I also think, you know, even though we're here on summary judgment, as I was reading Plaintiffs' briefs, I feel like the word "material fact in dispute" gets thrown around a lot, as is common in response to summary judgment, but there are some material facts that just -- it's not in dispute, and there's no way -- The University cannot meet whatever ridiculous burden Plaintiffs think they have to meet.

For example, on page 12 of the Plaintiffs' brief, they say, quote, "Notwithstanding The University's repeated claims that the reports" quote, "were created by its law firm, it has not established that Jones Day was acting in capacity of its attorney in completing that report."

I don't know how we can prove that the law firm, Jones Day, is an attorney or that it is a law firm. We all know that that's true. We

have submitted the contractual agreements between The University and Jones Day. There is -- there is no evidence anywhere in the world to clarify further that Jones Day is a law firm and that they provide legal services. So this just simply cannot be the type of facts that we're arguing about just because the plaintiff doesn't like the answers that they found in discovery.

And so the matter before the Court we've broken down into seven different reasons we think that The University prevails on summary judgment. These are broken brown in between both the five privilege kind of exceptions, and then the two statutory exceptions, and then the discussion of the *Anderson vs. Blake* case.

So here we think that summary judgment is appropriate for three different -- under three different policy analysis. One is just the straight question of law, is it privileged? We think so. We think any of the four or five privileges, depending on how you're counting, any one of them attaches, the case should be over, and the rest of the questions should be moot before the Court.

But if the Court gets past all of the

questions of privilege, then asked to look at the question of the determination made by The University, and find that it was unreasonable, and then the Court ultimately would -- after making a determination that it was unreasonable, the Court, I would assume, would say what public policy actually favored the disclosure vs. nondisclosure, but here it would be -- I think it's a long road to hoe to get to that point of this litigation.

THE COURT: On those four privileges, I just want to make sure that I'm thinking of the same ones that you're going to argue. The attorney/client privilege; the identity of informer privilege; the deliberative process privilege; and the fourth one was the --

MR. VANCE: We call it due process -- I don't know what you want to call it, Your Honor, but it's the *Anderson vs. Blake* question.

THE COURT: Okay.

MR. WEEKS: Your Honor, I think we would object to argument on the constitutional *Anderson vs. Blake* privilege, which did not appear in defendants' opening summary judgment motion. We are really far down the road. I mean, one, I don't know if that's true. I guess I have to look

at the Motion, but we've definitely been arguing this throughout the whole litigation.

THE COURT: Yeah, I've seen it cited. Go ahead. So those are the four privileges. And then --

MR. VANCE: Yes. The exceptions under the ORA we'll be looking at will be the personnel records and the investigative files, and then attorney work product. That number two there is -- as it's articulated, it's going to be kind of encapsulated with attorney/client privilege.

MR. WEEKS: Your Honor, attorney work product privilege was not in there.

THE COURT: There was -- it was referenced in the response -- the response to the open records request. It hasn't been briefed much -- I did take note of that -- but it has been raised in some of the evidentiary materials attached.

MR. WEEKS: Well, Your Honor, in order for us to have a full and fair opportunity to respond to arguments made in their motion, they need to raise it in their motion. We had a chance to respond to the arguments raised in their February motion in 2023, and we didn't have a

chance to respond to that because it wasn't raised.

MR. VANCE: Your Honor obviously can make a decision, but, just base level, they've had at least this presentation for several months that's discussed this, and then I know the reply argues it. Sitting here, I, you know, don't want to make a false representation to the Court, but I would be hard pressed to believe this.

MR. WEEKS: So that's exactly the problem. Because the reply argues it, because they're arguing it today, we didn't get to brief this issue.

THE COURT: All right.

Well, I'm going to consider privileges; I'm going to consider exemptions; I'm going to consider discovery protections. This isn't a surprise to anyone. So continue.

MR. VANCE: Thank you, your Honor.

So, as we continue -- and, Your Honor, I know that -- I truly appreciate the care and attention of this Court. I know you've done an in-camera review, and you've been paying attention. You obviously weren't the first judge to this case, and, just for purposes of the

presentation, when we had previously presented this -- well, The University considers it an analogous issue as it relates to the deposition of James Gallogly. Judge Walkley at the time had determined that James Gallogly could not take part in that deposition because, as The University had articulated, quote, "The information sought from the deposition of James Gallogly related to the Jones Day report is privileged."

Now, admittedly -- obviously, I'm not telling Your Honor that you have to do that because Judge Walkley did that. The case is still live, there's not final judgment. But just to the point that there has at least been one other, you know, judge in this case that did find in that context for that information, the information should be privileged, and I think, from that point forward, as far as The University was concerned, we were primarily investigating whether or not a waiver had occurred. But, regardless, the standards are still applicable.

I think both parties largely discussed *Ross vs. City of Owasso*, which is an Oklahoma civil appeals case that really got into the sort of standards that apply with the ORA and how it

works, but, as noted in that case, The University is entitled to the deference, as I mentioned as it relates to personnel records, investigative files, and those type of discussions, but the decision for the Court to make was whether or not we were unreasonable and abused that discretion when we made that determination.

And just quickly, while we'll get into this further, to remind the Court, between Ms. Long's letter denying the plaintiffs' request, clearly -- I think it was two or three pages I think very well written, to be honest, talks about the chilling effect that releasing these types of investigations would have on other witnesses. As I mentioned, you know, it was a voluntary thing that these witnesses did to get into this information, and if other people feel like they can't rely on The University's assurances then it will have this negative effect on investigations that have been recognized elsewhere.

So here we go -- here is with the quote -- the (inaudible) unreasonable judgment is the standards that we were looking at, and it -- as noted there at the bottom, the exception that the ORA simply does not apply if the Court

determines that these matters are privileged.

So turning to attorney/client privilege specifically, we see that it's not a high bar. The case of *Chandler vs. Denton* outlines it's a question of the status occupied by the parties, which the Court has the agreement between Jones Day and The University, and has reviewed the report that they created, as well as the communications that were kept in a confidential nature. And I think that, in addition to the fact that, you know, the documents produced, or what have you, marked with confidentiality and those types of things is further supported by the fact that The University -- and I don't think I have to (inaudible) in support of this, we have fought tooth and nail to maintain confidentiality in this case. I promise the Court I have never filed as much briefing on maintaining confidentiality as I have in this case because it's of such vital importance, and it's a central issue before this court.

And I also think I need to draw the Court's attention to *Oklahoma Association of Municipal Attorneys vs. State*, which is 1978 OK 59. That case specifically talks about the exact

language statutorily that the plaintiffs are relying on to put an additional burden on The University.

The plaintiffs argue that that statute says that The University's only entitled to privilege, it says something like it has to be for the purpose of litigation and something else, in addition to the requirements outlined there by *Chandler vs. Denton*, and as otherwise summarized by the statute.

Oklahoma Association of Municipal Attorneys analyzed that exact language, the exact language that the Plaintiffs are relying on to say there's an additional burden on The University. In that case, the Oklahoma Supreme Court said when we look at the legislative history as to how this additional attorney/client privilege requirement came into being, it was passed with the Open Records Act, so the purpose of this additional requirement for attorney/client privilege is if the privilege is going to be used in an open meeting to withhold information that would otherwise be disclosed. That's the last probably seven paragraphs of that *Oklahoma Association of Municipal Attorneys* decision, and as a Pepsi

Challenge to the Court, Judge, I promise if you go read that case you're going to agree with The University on that interpretation.

As it relates to the *Doe 1 vs. Baylor University* case out of the Western District of Texas, I think --

THE COURT: Before we get to *Baylor*, because I know that's going to be brought up by both parties, on this issue of attorney/client privilege, The University firmly believes these reports fall under attorney/client privilege. The plaintiffs firmly believe that these are not -- these do not fall under attorney/client privilege, and, even if they did, that there's been a waiver made of the privilege.

So I'm sure you'll get to waiver, but -- well, on the issue of waiver, The University -- it's been your argument that The University has the privilege, and only The University has the privilege, and obviously The University, it's not -- well, it's an entity. It's not a person, but it's made up -- The University's decisions are made by people, so who are the persons that would determine whether The University would or would not waive a privilege to these reports? Who makes

that decision?

MR. VANCE: Well, I would say it would have to be the Board of Regents. As far as I'm aware, they're the only ones who can take an official act like that.

THE COURT: The Board of Regents.

MR. VANCE: Yes, them, as a group, would take a vote.

THE COURT: Okay.

And that was my next question. Does it have to be unanimous? Is it majority? What would that look like?

MR. VANCE: Admittedly, Your Honor, as I stand here, I don't know the vote count, but I do know those answers are -- as to how meeting conduct occurs, I know that's clearly articulated. I just don't know the answer, whether it would be unanimous or majority, or how that waiver would occur.

THE COURT: Why not the president of the University? Why can't the president -- because that's going to be a position that the Plaintiffs take is that then President Gallogly, you know, had this press conference and talked to the media. Why is that not a sufficient waiver?

MR. VANCE: Well, a couple of reasons. One is that -- and obviously -- pardon for this not being in the briefing. I'm not entirely expecting this question, but the case of *Franco vs. The University of Oklahoma* --

THE COURT: I'm familiar with that one.

MR. VANCE: -- the question before the Court was whether or not The University had delegated authority to another professor, and the final legal holding in that case was unless there is actual deligation from the Regents to somebody beneath them, there is no, you know, apparent authority from anyone to take actions on behalf of The University. So, in that case, whoever *Franco* was saying, you know, "so-and-so offered me a job," the Court came down strongly and said, "This is a constitutional entity. We have said who acts on their behalf, and it's the Regents, and no one else acts unless they're told to," and we don't have that here.

THE COURT: So the president of The University can't waive The University's privilege?

MR. VANCE: I'm sorry, Your Honor. I --

THE COURT: So the president of OU, President Gallogly can't waive The University's

privilege?

MR. VANCE: No, Your Honor. And two points on that. One, it's in the Oklahoma Constitution and the statutes, as to Regents only. And, again, sorry to reference to prior to you, but you were not involved in this briefing, but when we briefed the issue of Jim Gallogly's deposition we focused a lot on the *Upjohn* case and its precedent, and how that relates to agents of The University, and (inaudible), and that's where Judge Walkley came down on the question of Jim Gallogly -- to Gallogly, no one showed that he had the authority to disclose this information, and so that's the reason that was all shut down.

So I would say the briefing on the deposition of Gallogly is where I think the Court will find very good authority for this question that you're talking about as relates to when the Regents waives it. There has to be some official act that's shown by the Regents at a meeting, in order for this conduct to be appropriate.

THE COURT: To show the intentional waiver.

MR. VANCE: Correct.

THE COURT: Well, and I understand -- I

wasn't presiding over the case at the time, but the -- the deposition of then President Gallogly got quashed, but the plaintiffs have submitted an affidavit from President Gallogly in this case, and that's part of their evidentiary materials in the case.

What significance should the Court take in that affidavit, for purposes of this hearing, because, you know, it says what it says, and the Court's got to determine, you know, reasonableness, deference, material issues about the waiver, so I guess what significance should the Court take with that affidavit?

MR. VANCE: Your Honor, I've got three points on the affidavit. First would be, you know, The University's position, and my position is still we previously asked the Court to strike that. The ruling didn't go our way, but our first thing, we don't believe Jim -- anything Jim Gallogly provides to the Court shouldn't be considered by the Court because it's only information that he would have received from his attorneys, and I think his affidavit even says something like -- he has a lot of things, like, "I was told this or that." They aren't based on his

personal knowledge. As you read the affidavit, he's talking about hearsay he got from other people, and if he were to identify who those people are I believe it would be the attorneys of The University.

THE COURT: Wasn't he given the Jones Day reports?

MR. VANCE: Yes, Your Honor, but --

THE COURT: He looked at them.

MR. VANCE: Yes, yes.

THE COURT: He saw the content. He's got the information.

MR. VANCE: Right, Your Honor, but he's not allowed -- I don't think the affidavit discloses the contents of the Jones Day report. He's definitely not permitted to discuss that, but if he's not discussing the contents of the Jones Day report, I guess I don't know what -- I don't know what his affidavit does to move the ball forward in the legal questions before the Court, other than noting the former president wants it released.

But I think -- I don't remember if it was in our motion or reply, but we had a quote from Jim Gallogly in another context where he's

not mad at The University and speaking more honestly, I think, he doesn't know if the report would be released or doesn't want the witnesses harmed, or something to that effect.

THE COURT: So there's been some news reporting on this, fair to say, and those -- the reporting's been submitted in the record in this case. What significance should the Court take to that reporting, for purposes of the legal determinations the Court has to make?

MR. VANCE: Your Honor, to be honest, I'm not -- I wouldn't say the Court would ignore them, per se. I just don't think they impact the question before the Court. So I think if the Court's looking at, for example, the ORA balancing test, the analysis provided by Ms. Long in that letter I think is just objective, and it's things that -- you know, the fear of having a chilling effect on the other witnesses coming forward, Jim Gallogly's opinion on that doesn't change whether or not that's true.

And whether or not this report, you know, has merit to it, it's been well documented, as the Court has it, that there is some sort of feud between Boren and Gallogly, for whatsoever

reason, and it's kind of infected this case as to how Gallogly presents these things within the affidavit, and whatnot.

But I don't -- I guess -- I don't think that the affidavit actually gets to the questions before the Court. I think it's part of the spectacle of trying to create a narrative of how The University just generally does wrong.

But we're here on a more narrow question of -- you know, the question of attorney/client privilege, and I think when we look at the facts of the ORA request as it was made, you know, Your Honor, on the face of it, it was, "We want the reports created by the law firm, Jones Day, from The University." When you make an objective -- like, an express request for a document that you've contained the elements of attorney/client privilege in your request, there's -- it's very unlikely that that's going to get fulfilled when you identify them as a law firm in your request and say, "We want the report they prepared," which brings us back to *Doe 1 vs. Baylor*.

There the Court noted that the Baylor University maintained the privilege or at least initially had the privilege, as it related to its

similar report for similar investigation because clearly the document itself revealed not only facts about the investigation or facts known to other people outside of the investigation, but also contained the attorneys' impressions, you know, their analysis, which facts they thought were special. And, to that point, the judge in *Baylor* noted that Pepper Hamilton, which was the counsel in that case, conducted an independent investigation, and so, you know, their findings are what -- the ultimate findings and whatnot is the impression of the attorney.

Now, where *Baylor* misstepped is they took those impressions from the attorney, the actual findings of fact out of the document, and then released it to the public, for whatsoever reason, and, upon doing that, that act by The University to choose to release a portion of the report itself waived that privilege is what was found in *Baylor*, but those facts are not present here.

THE COURT: What is The University's response to the plaintiffs' contention in this case that the privilege -- the attorney/client privilege excludes protection for

the communications that were made by the employees of The University prior to Jones Day hiring? The employees are communicating with one another, e-mails and such.

MR. VANCE: Yes.

THE COURT: Why does that -- and they even cite my old law school professor, Leo Whinery, for "a preexisting document or writing does not become privileged simply through its transfer to an attorney."

MR. VANCE: Well, Your Honor, I think this goes back to the request before the Court. The request before the Court was for the reports, not nonprivileged -- if they want to submit an Open Records Act request for communications from The University that aren't privileged, as you just phrased it, The University will take that open records request and look at it. That's not the open records request before the Court. The open records request before the Court is about these reports as they exist, and, I mean, the Court's seen them. They're not -- the reports as they exist would not be the best mechanism, if that's the goal of the plaintiffs. If the goal of the plaintiffs is to get those communications then

they should put in a request for that, and The University will respond, and we'll do this again, as it relates to those communications.

Also, as I looked -- I thought about that argument about the communications, the --

THE COURT: You're saying that the plaintiffs can make an open records request for communications that may or -- that may be in the Jones Day reports, and that -- we wouldn't be here today because there's no privilege to those?

MR. VANCE: Well, Your Honor, I'm not going to tell Plaintiffs how to phrase it, or whatnot. I don't know exactly. You know, we have arguments about it, but The University's position is consistent with Oklahoma law. Facts that are generally out and about in the public are not -- they don't become confidential just because they're placed in the report, so if they request facts from -- if they say, "We want the facts identified in the Jones Day report," that would cause issues with us going through and identifying them, but if they make a request for certain communications -- they know when Jones Day was retained, so if they want from prior to Jones Day's retention, I don't know, Your Honor, and I

really, you know, don't want to spin my wheels too much on it, but, yes -- the short answer is, yes, the Plaintiffs should make a request for those communications, if they want them, and we can see how that pans out, but that didn't happen in this case.

I also think that, as far as it relates to any additional communications Plaintiffs wanted, because, you know, discovery is over, the Court's rejected the additional motions to compel, there's no reason, in my mind, that those communications which were not compelled in discovery here would be produced there, but that's a whole -- you know, tons of different things can happen, different arguments. I don't know, Your Honor. That is my position.

THE COURT: What's The University's response to the plaintiffs' contention that because this whole -- these Jones Day investigations are now closed proceedings -- they've been closed for a few years now -- that, because of that, that these reports no longer concern a quote, unquote, pending investigation under 12 O.S. 2502, paragraph 7, so it doesn't -- attorney/client privilege is no longer in

existence because these are no longer pending?

MR. VANCE: Yeah, Your Honor, that goes back to my discussion of the *Municipal Attorneys* case where that section about the pending litigation -- I believe that section of the statute is the one where the Oklahoma Supreme Court there said that the legislative history shows that that's not meant to control privilege in hearings, it's meant to control privilege in open meetings. That additional requirement you're talking about for pending litigation is that analysis that the Court found in that *Municipal Attorneys* case.

THE COURT: That's the which case?

MR. VANCE: Right there (indicating). *Oklahoma Association* --

THE COURT: Yeah, I've got that.

MR. VANCE: It's 1978 OK 59.

And then, as the Court knows, you've been presented with the actual agreements with Jones Day and The University that shows that when they were retained on November 15, 2018, so, you know, as far as looking forward to the next open records request, I assume it's prior to that date, and we'll see how that goes.

THE COURT: So on those engagement letters, there's two of them. One is in reference to the *Alumni Donor Report*, one is in reference to the sexual misconduct report -- investigations. So the -- and I've really pored through those, and I think there are four or five pages with a lot of legalese, but the engagement letter seems to be pretty vague on just what the scope of the retention -- what they're being retained to do, and it says -- I think it's in the first paragraph, it says, "We're being retained to investigate allegations of" --

MR. VANCE: -- "possible misconduct by a senior" --

THE COURT: Yeah, it's one sentence in both -- in both engagement letters. So, you know, I'm considering that. I mean, I need to consider that to determine, okay, well, what were they hired to do, and what's the scope of their work? Attorneys are hired sometimes to do nonlegal work. Many times they're hired to do legal work where privilege comes into play. And this is part of the briefing is that the plaintiffs' position is that, "Yeah, they're a law firm, and, yeah, they're lawyers, but they're just doing more of an

audit versus legal work." And Gallogly apparently said that in a statement that "this is not, you know, trying to -- no one's going to court. It's not adversarial. It's more of an audit situation."

So I'm rambling, but the scope of the letters themselves -- because you're going to get into *Baylor* case, and the engagement letter in *Baylor* was analyzed, and some of the other cases that analyzed these engagement letters, they seem to be a lot more detailed in -- whenever the courts are finding that there is, in fact, attorney/client privilege, they're going to, you know, five different areas that the functions that the law firm's retained to hire, yet we just have one sentence here.

MR. VANCE: Sure. Well, Your Honor, I don't think there's -- one particular interesting part of this litigation I think is the fact that The University and their attorneys understand what their agreement between themselves meant. They got the report that they were after, and, as far as we're aware, there were no complaints that they failed to comply with their contract. So as far as both parties to the contract feel satisfied

that it was fulfilled, I don't know how Plaintiffs would have any standing to come in here and say that this doesn't cover the conduct discussed.

THE COURT: So they were writing that more as an understanding between the parties, not writing that for an outside audience who might later attack this.

MR. VANCE: Yes, Your Honor, but I also think, even in that one sentence that we have here, you know, the use of the language about "by senior University personnel" to me seems to track closely with the ORA statute exemption about personnel investigations being exempt from disclosure, which is one of the exemptions we're going to discuss.

I'm not from Jones Day. I don't know what this attorney was thinking, but if I had written that, and being aware of the law at issue, I would assume that's intentional. But -- and, as it relates, there's nothing -- it's not like there's an argument that we had this agreement with Jones Day, and then the report is somehow outside of the scope of what's contemplated here. It might be more specific, but it's definitely within the scope of this investigation to

personnel misconduct.

So, you know, without there being some sort of, I guess, authority from a court or something like that, telling us that, you know, courts aren't just looking at if an attorney's engaged, they're not just looking at if it's confidential, but we're going to pick at how they're engaged on the language between the client and the attorney. I think that's a sticky situation. I don't think that's the best use of time because, I don't know -- it seems like it would be difficult to get a uniform contract across attorneys that everyone agrees covers everything that should be covered. But, at the very least, I know that this scope of capacity of agency and this agreement covers what was done, and that these parties agreed to it.

And as it relates -- so the work product discussion, as it relates to the *Doe 1, Baylor* case that we're all I'm sure going to be discussing, the biggest takeaway I got from the *Baylor* case is the impressions of the attorneys, the things that they decided to include, the things that they decided not to include, the analysis of those things, so back to the point of

the communications that plaintiffs may request, I don't know what communications would ultimately be produced to them in an open records request, but all of those communications may or may not be included, I don't know. But the point is that the part of the Jones Day report when you read it, the thing that you're taking away from it isn't just the facts, it's how these attorneys saw the case and the advice they gave their client as relates to this.

So to the Court's point earlier about pending litigation or a concern of pending litigation, we briefed the question as to both reports that there is a civil legal threat to The University if either report is disclosed.

As it related to the *U.S. News & World Report*, we have an analysis of constructive fraud in Oklahoma as it relates to representations we made to *U.S. News*, and how that was ultimately resolved, which is a question of legal liability that The University was needing to consult with Jones Day, and then, as it related to the other Jones Day report, we've discussed ad nauseam about *Anderson vs. Blake*. It talks about the right of somebody to initiate cause of action for

constitutional violation when the state assures you they will keep something confidential, and then fails to do so.

THE COURT: Okay.

On work product, the concerns there you just raised, those are concerns The University has if these reports are released, but the issue, I think, for whether these reports in and of themselves are work product is whether Jones Day was retained to provide legal work, and that these reports were generated or created in anticipation of litigation, not whether if they get disclosed The University's going to be on the hook for something or be exposed to some liability, but whether Jones Day was investigating matters that could be anticipated for litigation purposes.

So you're making a claim that they are work product, the reports in and of themselves.

MR. VANCE: Yes, Your Honor.

THE COURT: Okay.

So that must mean that it's your position -- the University's position that these reports were created in anticipation of litigation. So, specific to the *Alumni Donor Report*, what specific litigation or type of

litigation was The University anticipating when it retained Jones Day to conduct the alumni donor misreporting?

MR. VANCE: So, your Honor, just as a function, how I think people generally retain attorneys is they don't always know the issue they have, but, in this instance, The University identified an issue and contacted an attorney, and the central issue, as we know from reporting and whatnot, is the misreporting of information to *U.S. News & World Report*.

Like, whether or not this gets released in Open Records Act is not the linchpin for that liability. The linchpin for that liability is the fact that it was misreported and represented to be something it wasn't, and the Jones Day report, you know, comes out with an analysis about how -- you know, whatever happened, and all that stuff.

THE COURT: So what litigation would that anticipate?

MR. VANCE: The litigation would have been -- so before, you know, there's disclosure to *U.S. News & World Report*, The University doesn't know how *U.S. News & World Report* will react, if it's entirely possible they run down to Cleveland

County and file a constructive fraud lawsuit against The University for making that misrepresentation.

THE COURT: Constructive fraud.

MR. VANCE: Constructive fraud, yes, Your Honor. That would be the cause of action that was at risk when The University raised this as an issue, and we outlined that in the briefing.

Likewise, with the -- and then --

THE COURT: And I'm sorry to keep interrupting, but with that -- okay -- constructive fraud was a legal concern or potential exposure that The University wanted to address. So the plaintiffs have presented material from President Gallogly, and I'm probably paraphrasing, but it was reported anyway that President Gallogly said something to the effect of, "There is no litigation. This is more akin to an audit." So The University says "We did it in anticipation of constructive fraud." The president of The University's saying, "We're not hiring these folks for anything other than to do an audit." Doesn't that create a material factual issue that the Court needs to resolve?

MR. VANCE: I don't think so, Your

Honor. I think that the -- from reviewing the report yourself and from the other information available in this case, I think the Court can objectively ascertain that there was a legal issue, regardless of Gallogly's impression.

And the fact that he said there's nothing pending and this is an audit is not mutually exclusive with an anticipated -- with litigation being anticipated, so we could say there's nothing going on now, and something may be coming down the road, and that's The University's concern.

THE COURT: And that's interesting, too, because this is so unique, in the sense that the Court's going to be the fact finder, regardless of whether this is determined at this stage or at a trial stage. Typically when a court's considering motions for summary judgment it's considering whether this should be presented to a jury. That's not an issue in this case.

So I hear your point to be that, "Judge, you can determine these -- if there are disputed facts, Judge, you're going to determine them, and so determine them."

MR. VANCE: Exactly. And I think to

your point, Your Honor, I hate to --

THE COURT: Don't I have to, though, at least make all reasonable inferences in the light most favorable to the non-moving party, though, for purpose of this hearing?

MR. VANCE: Well, your Honor, I just don't know what authority -- I mean, Gallogly's speaking as a former president just on his own. I don't know what authority he has to dictate how The University treats its privilege. And The University's been consistent -- the Board of Regents have been consistent in how they present this privilege, and as Judge Walk -- I think this all will fundamentally come back to the fact that Gallogly was shut down from talking about these things because he doesn't have authority from the Regents to discuss these things or make determinations about these things. That's only the Board of Regents. So anything Gallogly says about this, in my opinion, is probably not relevant, and he doesn't have authority to speak about it.

THE COURT: Let me then -- and I appreciate that answer.

With regards to the *Sexual Misconduct*

Report, it's The University's position that Jones Day was retained to investigate those allegations, and that was done in anticipation of litigation.

MR. VANCE: Yes, Your Honor. And, again, I would say it's the same scope of -- I don't -- I'm not going to say The University knew the cause of action, but it's clear they're worried about some legal liability to talk to an attorney, and we have identified in the briefing that the cause of action that, you know, if I was representing a plaintiff, and I was going to go sue The University is the cause of action I would do.

And I think that, consistent with the reports that you read, they're analyzing the -- you know, it's hard -- sorry, Your Honor. It's hard to discuss this without running afoul of our rules, but it's covered in the reports.

THE COURT: Okay.

And so the concern for anticipated litigation with regards to the *Sexual Misconduct Report*, it's not constructive fraud, it's more, you know, there was mention of harassment and things like that.

MR. VANCE: Right. I think on that end

it would definitely be the Title IX retaliatory action claims that related to how The University conducts Title IX investigations.

THE COURT: Are you going to talk about Title IX?

MR. VANCE: That's about the full extent of my discussion of Title IX.

THE COURT: Okay.

Well, I've got some questions about Title IX, but go ahead with your argument.

MR. VANCE: Okay.

So, as I had mentioned, you know, the mental impressions, work product protection is something that's discussed in *Doe 1 vs. Baylor*, which is a case that we briefed and had before the Court throughout this litigation, and there the Court -- you know, to answer your court's consideration of, "Don't we take things in the facts most benefiting the non-moving party," well, that's true as it relates to facts, but, once the Court has determined what it thinks -- the Court's going to make a determination of, "I'm taking these facts in the light most favorable to the non-moving party," but, once the Court has those facts in that light, it then has to go through the

process of weighing those facts. What does it mean for this case, now that it's made these determinations?

THE COURT: Uh-huh.

MR. VANCE: I think the evidence in this case will show that when you look at the actual documents, the evidence itself, The University has clearly outlined how its process works, that its process was followed, everything was done correctly. And then I think the plaintiffs' evidence, this attempt to create a material fact, is largely speculation, conjecture and people speaking out of turn who don't have authority to do so. So I don't think the Court's going to come down on the side that facts -- its decision about the facts itself is the problem, it's going to be how the Court weighs those things and the factors considered.

So, Your Honor, when you asked earlier, you know, asking about, "Well, doesn't Gallogly submitting an affidavit cause me a little concern," no, because the Court makes an objective analysis based on the evidence it has. And when we look at the factors and the evidence, regardless of Gallogly's opinion about all of

this, it is clear that the motivation of The University was to retain these attorneys to create a document to help them with their legal liability, and, for that reason, work product attaches.

Also, the documents that the plaintiffs relied on from Jess Eddy further support The University's position in this regard.

THE COURT: Mr. Vance, you just said what they were retained for. In the evidentiary materials presented, though, the -- specifically regarding the *Sexual Misconduct Report*, OU has indicated -- The University has indicated that its motivation in retaining Jones Day for that investigation was for the purposes of conducting a Title IX investigation. That's different than in anticipation of litigation, or is it the same?

MR. VANCE: Well, I think that in this case The University accomplished both goals through the same act, and, you know, the --

THE COURT: So one of their purposes is anticipation of litigation, protect The University's interest; another one is to perform a required Title IX investigation?

MR. VANCE: Absolutely, Your Honor.

THE COURT: So was Jones Day retained to perform a Title IX investigation?

MR. VANCE: I would say that was -- yes. The short answer is yes.

THE COURT: It doesn't say that in their engagement letter.

MR. VANCE: No, it does not say that. The way that the engagement letter is structured, as it discussed the misconduct of senior personnels, it was the intent of The University because they -- the investigation is the Title IX investigation. It's the same investigation. And, you know, as a practice as to how Jones Day interpreted The University's request, as they memorialized it in the agreement, I have no doubt -- and just do repeat it -- that The University and Jones Day knew what they were doing and what the investigation was for, and so they understood that this investigation was a Title IX.

And I think this is important because I think this concern was largely the crux of what the *Baylor* case was about, can an attorney do a Title IX investigation, and there the judge said yes. The answer was you can do both.

THE COURT: What is The University's

response, then, to the plaintiffs' attack or criticism of the manner in which the Title IX investigation was conducted, that the Title IX process was not followed?

MR. VANCE: I think -- Your Honor, I just -- I'm glad we're going to talk about this. It's silly. The complaints that the plaintiffs have raised are that they were trying to get The University in a catch 22 by saying there was waiver by releasing this, you know, information to former President Boren, or what have you, and, at the same time, saying that we didn't follow the Title IX process.

The Title IX process is an adjudicative process involving claimants and respondents that's regulated by federal law. We have case law that clearly shows -- you know, it's not Soviet Russia, we don't have secret trials. Somebody who has a claim made against them is allowed to review the evidence, have an attorney, respond, engage in the whole thing. The fundamentals of due process meant that President Boren and his attorney were already going to get a look at this Title IX investigation because that's what's mandated.

The fact that the Jess Eddy portion of

his own information shows that this was marked as attorney/client privilege, privileged and confidential, confidential attorney work product, further shows that, even when this information was given to third parties when it was compelled to be released to third parties, by law, it was still marked with indications of confidentiality and secrecy. And even in the part of the document that the plaintiffs released from Jess Eddy indicates in a footnote that Mr. Eddy was asked to not disclose this information, but, as The University noted in its briefing, The University cannot force somebody who reports something to them not to speak about it publicly. That would also be a form of retaliation that's not permitted.

THE COURT: So it's an undisputed fact that The University voluntarily released a portion of the *Sexual Misconduct Report* to Mr. Eddy; correct? That's not contested.

MR. VANCE: I would say it's not contested. I don't know if Mr. Eddy took paper copies or pictures of this document, so I'll say it's uncontested that Mr. Eddy saw this document, and then obviously left with a copy somehow.

THE COURT: And then The University showed it to him then.

MR. VANCE: Yes, I believe this is from the investigation.

THE COURT: Okay.

And, to the extent they showed him his portion or summary of it, that was at his request; correct? That's not disputed.

MR. VANCE: Yes, I believe so. If I remember right, I believe there were only two, or only a few requests, maybe two requests to review sections.

THE COURT: And, of course, President Boren and his attorney requested to see portions of the report?

MR. VANCE: Yes, Your Honor. And, you know, I will say that the transcript goes through the mechanisms that were put in place to make sure that was maintained -- it was exclusively available for his viewing, and for a temporary amount of time, so there were even additional protocols to maintain confidentiality, beyond the statutory minimum in that case.

THE COURT: I saw that. That was interesting to read how that can be done.

But back to Mr. Eddy. So The University takes the position that it is required, under Title IX, to release portions of the investigation, in this case, a report, to the complainants, upon request of a complainant.

MR. VANCE: Yes, Your Honor, I believe that's correct.

THE COURT: Okay.

And Mr. Eddy apparently shared this -- his position with the public. The University certainly didn't do it.

MR. VANCE: Correct, Your Honor.

THE COURT: Okay.

So if any other complainants were to request that those complainants be shown portions of their complaints in the report, would The University release those to those complainants?

MR. VANCE: Your Honor, my only hesitation is I haven't spoken with the client about it, but I don't know why that would be an issue.

And another point that The University has made throughout this litigation is, you know, for the number of witnesses involved in this case, The University can't and wouldn't stop them from

sharing anything that they wanted to publicly that was their personal information, but, even with this case going on for three or four years, Mr. Eddy is the only one who's ever come out and said, "I want this information public. I want people to know." And so --

THE COURT: So that's The University's understanding is that you've got Mr. Eddy requested information, he was provided it, and Mr. Boren was provided information -- content, and he was provided with it.

MR. VANCE: Yes, Your Honor. And especially as it relates to Boren, just as it relates to his rights, as somebody who has allegations made against him, and due process and those things, his was really at the apex of the constitutional right to look at the report.

THE COURT: Okay.

On the -- go ahead. It will come back to me.

MR. VANCE: No worries.

So, as previously mentioned, you know, Jones Day and The University requested Mr. Eddy keep this information confidential, but we can't force him to do that, and he chose not to do so.

So, as it relates to the informer's privilege, I think the interesting thing about the informer's privilege is, when I think about how it factually applies in this case, it seems like, between the informer's privilege and the *Anderson vs. Blake* due process concern, they really create -- really they overlap with each other to create sort of this due process privilege. It's a general concern that, you know, these people have their identity protected under the informer's privilege for providing information to a state agency, and then, in turn, at least as far as the Tenth Circuit is concerned, *Anderson vs. Blake* provides them additional assurance that information given in confidentiality will also not be disclosed.

So with the marriage of *Anderson vs. Blake* and the informer's privilege, you end up with basically a way that people can provide information to the state, and know that they won't be identified for providing information to the state, and the information they provide will be confidential.

THE COURT: On that informer's privilege, though, Mr. Vance, you know, I keep

reading that. I've got it in front of me, and I've looked at all the cases that have been cited for it, but the privilege says what it says. So regarding the *Alumni Donor Report*, how does the informer's privilege attach to the *Alumni Donor Report* if it does not involve an investigation of a possible violation of law to a law enforcement officer?

MR. VANCE: Well, Your Honor, on one -- first I will recognize that, yes, this argument does not as forcibly attach to the *U.S. News & World Report* investigation, as I think it clearly would attach to the sexual misconduct. I think the criminal element there is more patently obvious. But, as it relates to the *U.S. News & World Report* investigation, you know, just to remind the Court that that report was also swept up in the grand jury empaneling and investigation that occurred, again, I don't know what happened there because the process is secret, but, as far as the Attorney General decided to make it part of the sweep of the investigation, it did become part of an investigation.

THE COURT: You produced that pursuant to the Joint Interest Agreement and a subpoena for

it?

MR. VANCE: Yes, Your Honor.

THE COURT: Yeah.

MR. WEEKS: Your Honor, we object to discussion of this joint -- supposed joint interest report and subpoena, which defendant has not produced to us and which is not in the record.

THE COURT: That's one of the questions I've got. I'm going to hear your argument.

So the *Alumni Donor Report*, it's privileged under informer's privilege. I guess the "law enforcement officer" is what I'm struggling with there. In what way is The University a law enforcement officer?

MR. VANCE: Well, Your Honor, so let me clarify. I think, as it relates to -- I don't think I can stand up here and say that the -- I forget the name of the office that provided the information to the *U.S. News & World Report*. That's not a law enforcement agency.

THE COURT: It was The University's equal opportunity investigator, I think.

MR. VANCE: Yes. So the -- as it relates to the equal opportunity investigator, you know, as far as -- I think it's clear that this --

the report resulted from a policing and enforcement function that The University has, as it relates to alumni donations, but, as it relates to being a law enforcement officer, I don't think -- I wouldn't argue that that agency meets that definition.

I do think, though, their appreciation, given to the fact that, you know, The University is the one that has to enforce these alumni donations, but ultimately I would say, as far as the informer's privilege is concerned, as it relates to *U.S. News & World Report*, I wouldn't say The University hangs its hat on that for *U.S. News & World Report*, but it was swept up into the AG's investigation, as I previously mentioned.

THE COURT: So, to the extent you're arguing the identity of an informer's privilege, it's a more forceful argument with regards to the *Sexual Misconduct Report* as it is to the *Alumni Donor Report*.

MR. VANCE: Yes, Your Honor. But I will say -- and this is kind of where the back end of that due process privilege comes in. I think, as far as there have been all witnesses, as far as they were sure there wouldn't be confidentiality

from both reports that haven't been released, The University has maintained that confidentiality, so the due process privilege, I would say, attaches to both, based on that, you know, a similar assurance, obviously in a different context, but I would agree with the Court's analysis of the informer's privilege.

THE COURT: This is a common thread of The University's position. And, believe me, I'm sensitive to it, the confidentiality of these if you want to call them informers or witnesses, persons come forward, whistleblowers, however you want to characterize them.

The Open Records Act contemplates that, doesn't it, in 51 O.S. 24A.5(3), it says that "Any reasonably segregable portion of a record containing the exempt materials shall be provided after deletion of the exempt portion." So I understand the confidentiality concerns, but why can't The University or the Court -- why can't there be a function, through redaction or other measures, protect the identity of these individuals, and yet share the information? Why won't that work?

MR. VANCE: Well, I think if this case

was only about the informer's privilege, and if we could remove -- if we could redact names from the document and release it, and that was the only concern, that would work, Your Honor. I think the problem here, though, is, as it relates to *U.S. News & World Report*, I don't think -- maybe I'm wrong, but I don't think the plaintiffs just want to know who provided the information -- I don't even know if they care who provided the information to *U.S. News & World Report*, which would be the context of the informer's privilege.

I think Plaintiffs actually want the substance of the report itself, and there's no way that we could redact -- you know, because this document was a legal document prepared by an attorney, every sentence is going to be a reflection of what that attorney thought. It was important, this fact was important, my analysis of that fact, and the things that weren't included, things that perhaps Plaintiffs got produced in discovery that if they saw the Jones Day report weren't in there for whatever reason. We can't do that analysis without getting into the guts of the Jones Day report, and we can't do that and maintain the privilege. And that's basically the

catch 22 that The University is in.

As we can see here, Your Honor, I was obviously mistaken earlier, I am going to talk about Title IX because it's confidential under federal law.

THE COURT: Before you get there on this identity of informer's privilege, I am curious about any appellate authority. Well, I think the plaintiffs have cited some appellate authority where the informer's privilege is limited to law enforcement investigations. Is there any authority that you're aware of that expands that to non-law enforcement investigations or officers?

MR. VANCE: Your Honor, I think -- I was looking to see ahead of my -- I believe we actually did have a case, and I'm sorry, it's escaped me. I believe it's in our briefing that there was an executive agency on a federal level that had this expand to them, but I might be mistaking that --

THE COURT: I'll look at it again.

MR. VANCE: Thank you, Your Honor. I appreciate that.

And turning back to this -- the question of how the Court -- how The University conducted

its balancing test, and sort of the factors that were considered, I don't think that -- you know, I think that the consideration by The University in this case mirrors a lot of the considerations from the *Baylor* case in that really any university making these Open Record Act determinations, or whatever determination was set, and I think it's always going to be first and foremost that chilling effect of these investigations.

I think there's also the question of the rights of these defendants to not have an opportunity to defend themselves. You know, if this resulted in criminal charges of some sort then the defendant would get their day in court, they present their case, and we would get a final (inaudible).

What would happen here is an investigative report that went to the grand jury, and did not result in charges, would come out, and it might satisfy the curiosity of the public, but it doesn't assist the aims of The University to keep its students safe to ensure this kind of conduct doesn't continue. It only harms the efforts of The University to conduct these types of investigations. And that's why you see here in

the letter, as it was explained to the plaintiffs, that The University is worried about future victims that will need assistance and will be scared to come forward, scared that this information will be released to the public and put on Channel 9 news, or what have you.

And -- go ahead, Your Honor.

THE COURT: No, you go ahead.

MR. VANCE: So, as we see, you know, as outlined both in this letter, and is maintained throughout this litigation, The University has maintained and fully complied with its policies and its regulations, and what we're putting before the Court is largely just showing that all these policies and regulations have been followed.

And, while I appreciate the arguments of the plaintiffs, they can't change -- the facts of this matter are just a stubborn thing, and The University has always held the line on protecting these people's confidential information.

And, again, as it relates to these type of -- types of proceedings we're talking about, we have cases where we talk about disciplinary proceedings in other contexts where, you know, the importance of maintaining that in the deliberative

process privilege, about how agencies in charge of wellbeing or welfare need to be able to have frank conversations in how they're going to effectuate their policies.

And so we have, you know, a federal case from the U.S. Supreme Court, that's the NLRB, that extended the deliberative process privilege to the NLRB as a board. Similarly, while, you know, we have the deliberative process privilege is recognized in Oklahoma, it's only been extended to the Governor so far, but the underlying policy should extend to The University and the Board of Regents as well.

THE COURT: You may have just answered it, but in Oklahoma -- to your knowledge, is there any Oklahoma authority to support expanding the deliberative process privilege to The University?

MR. VANCE: I would say, yes, Your Honor. I think if you compare -- and this is the analysis The University did in the briefing, First looking at the *Vandelay* decision involving Governor Fallin, the Supreme Court went through the analysis of what are the constitutional powers dedicated to the Governor, and how do those affect her ability to, you know, govern. And there they

looked at the same language I previously mentioned, you know, that the Governor is responsible for the protection, security, and benefit, and general welfare of the State of Oklahoma, and so she's entitled to this deliberative process privilege in those discussions.

THE COURT: So, yeah, *Vandelay* applied specifically to governors' deliberative process, and that was in reference to Governor Fallin, but anything that has come off of that case that extends this deliberative process privilege -- because it is a recognized privilege -- any authority where an Oklahoma court has now expanded that privilege to a university?

MR. VANCE: Well, Your Honor, because you haven't written your order yet, I would say no.

THE COURT: You're asking me to extend and expand that privilege, then.

MR. VANCE: Oh, absolutely, but I think the Oklahoma Constitution justifies it. As you can see, Article VIII, Section 8 talks about how the University of Oklahoma is governed by the Board of Regents. And the analysis that The

University provides to the Court is that the same general welfare that the Governor holds for the whole state is vested with the Regents, as far as it relates to The University, and so it's really just a matter of copy and paste, as far as the logic from *Vandelay* goes to you're assuredly affirmed order in favor of summary judgment.

THE COURT: Okay.

MR. VANCE: But, as it relates to the personnel exceptions, you know, the quoted language in the statute, if it doesn't cover this type of investigation then I really don't know what would be covered, because the exact wording is, you know, "Exempt from discussion are," quote "internal personnel investigations" and then it provides examples of what those are, but, as the Court just saw, the letter retaining Jones Day said that they were retained for an investigation into higher personnel, or something to that effect. This is the language I was talking about that mirrors or is very similar to the ORA exception that shows that, I believe, that they were contemplating this type of investigation and this exception applying to the type of services provided.

In looking at the *Ross vs. City of Owasso* test, we know that this is a balancing test, as far as The University performs it, but we're here on an appeal from an administrative decision, and so then the Court then applies the abuse of discretion standard that was previously discussed.

And The University is aware and appreciates the concept of government actions generally being open to the public, or what have you, but those platitudes about the First Amendment are not as specific or controlling as the Open Records Act and the precedent of the Oklahoma Supreme Court.

And so when The University considered disclosure versus nondisclosure, the request -- these were the objective factors that The University considered and weighed against disclosing it, and that I've already discussed.

THE COURT: Uh-huh.

Mr. Vance, back to the *Sexual Misconduct Report* and Mr. Eddy's disclosure of his portions of the report, since that's already happened, why won't The University release at least his portions of the report to the plaintiffs in this case?

MR. VANCE: Well, Your Honor, I guess -- so why would we not release the same portion that he released previously?

THE COURT: Well, anything that relates -- he has a right to see, as a complainant, the information that is relevant to his complaint, under Title IX. He has sought that. He apparently is okay with releasing that in the public space. So The University's concern is, "Well, we want to protect complainants and its confidentiality, chilling effect." Not with Mr. Eddy.

MR. VANCE: I think the truth on the ground answers that question because Mr. Eddy already had his stuff so I don't know why he would make a request for it, and he's not the party that made the open records request in this case. So if Mr. Eddy makes that request, Your Honor, The University might just give it over to him, but he didn't make the request in this case. He's a nonparty.

So I -- he had the opportunity to intervene. He could have done any number of procedural things. He's been attending hearings. He just decided not to, and he's not the party

before the Court. There's just no standing to kind of address that issue.

THE COURT: All right. Thank you.

MR. VANCE: And so, turning back to these investigative reports, you know, we've discussed quite a bit about how the Open Records Act and the Attorney General's office generally treats these reports as confidential to conduct these investigations. To that point, you know, this thought that The University and its police department cannot cooperate with the OSBI and the AG simply cannot be the correct determination of law.

The Attorney General is the, I would say, default attorney for The University such as they have to approve other counsel that work for them, and there's no indication that this information was just shared by the State in seeking an investigation, criminal investigation or otherwise.

It's just there's no -- I guess the long and short of it is, Your Honor, I don't understand the logic that the Attorney General can't intervene in any state agency, and take over an investigation and see all those things. There's

no authority cited to that proposition. It's just kind of the analysis that Plaintiffs would lead the Court to believe. But, again, as they've styled this as The State of Oklahoma -- them versus The State of Oklahoma, obviously, the Attorney General should be entitled to look at documents held by the State of Oklahoma.

And the last privilege that's important to this case is this constitutional -- I'll call it due process privilege, what have you, but it's the privilege recognized in *Anderson vs. Blake*, which I know the Court's probably tired of hearing it because we've been talking about it for a couple of years.

Go ahead, Your Honor.

THE COURT: Yeah, Mr. Vance, on producing the reports to law enforcement, why hasn't that Joint Interest Agreement been produced in discovery?

MR. VANCE: So unfortunately, Your Honor, I think it's kind of a story of some maybe pettiness, or what have you, but in the -- the way that this came about was we filed our motion for summary judgment, and then we get -- we have discussions about discovery with opposing counsel,

and then when the response is due in June and July, in The University's position -- and this was briefed in the discovery -- that when Mr. Johnson joined the case the plaintiffs had new interpretations of their discovery requests that were articulated, never previously presented to The University, and that new articulation of what these prior discovery requests meant, it should have included the Joint Interest Agreement.

So we had some discussions about that, and The University had informed Mr. Johnson that before he entered the case NonDoc told The University that they don't want to do any informal discovery; that we are bound by the discovery code, and that's what we're going to follow.

So we told them that if they would issue a formal written piece of discovery that said "We want the Joint Interest Agreement," we would immediately produce it. We told them that in June, I believe, or July. There's e-mail correspondence to that effect. I think it's included within the briefing. We never got that discovery request.

THE COURT: So, had you received a proper discovery request, would you have produced

the Joint Interest Agreement?

MR. VANCE: We would have consulted with the Attorney General's office and see if they have any issue, and then we probably would have released it under confidentiality.

THE COURT: How about the subpoena? Those are two different things; right? Why hasn't the subpoena been produced?

MR. VANCE: The subpoena was withheld, pursuant to our arguments raised in the discovery briefing about the secrecy of the grand jury process itself, and that was, you know, briefed and argued then, and that would be the same arguments of The University today.

THE COURT: Okay.

This may be a question for OSBI, as opposed to The University, but, to your knowledge, what purpose would the production of the *Alumni Donor Report* serve in whatever criminal -- I mean, they investigate crimes.

MR. VANCE: Right.

THE COURT: So what purpose would the production of the *Alumni Donor Report* serve in any criminal probe?

MR. VANCE: So, to be honest, Your

Honor, I would be speculating to say to that. I would say that the -- you know, my understanding of the way that OSBI conducts investigations is, you know, if they are put on notice of another criminal act or something in an investigation they're probably not going to just ignore that, but, as for the actual purpose, I couldn't speak to that, Your Honor.

We just got -- we got the subpoena, entered into a Joint Interest Agreement, and complied. Generally The University's position is that the chief prosecutor of the State should work with The University to prosecute where appropriate.

So -- and, likewise, when The University or chief prosecutor, or The University itself tells someone that they're going to have a right to confidentiality, that assurance creates another right that does not exist in the abstract. So this right to privacy that the Tenth Circuit has recognized isn't a question of other facts or analysis; it's simply a question of did we tell them we would keep it a secret, and I think we showed that we did.

And because the policy passed by the

Regents memorialized that, as a representation that The University made, I don't think there's any legitimate argument against this constitutional right to privacy, as it relates to these witnesses, especially where it's just been repeated over and over again about how this cooperation could only occur if these people were made this promise of confidentiality. And it's repeated again in the policy of The University where it says, quote, "Investigators and those involved with the investigation are individually charged to preserve privacy with respect to any matter investigated or heard. A breach of the duty to preserve privacy is considered a serious offense, and may subject the offender to appropriate disciplinary action. Parties and witnesses are also admonished to maintain privacy with regard to the proceedings, and, if they are University employees, failure to maintain the privacy may result in appropriate disciplinary action."

This is the legal limit that The University can go to to prevent disclosure, because, as I mentioned, forcing witnesses, students, whomever, not to disclose this

information would be a different form of retaliation that we can't tell them, "You're not allowed to speak publicly about what happened to you."

All we do is suggest, admonish, hope that, you know, witnesses who cooperate won't disclose this information, but that's all we can do. And that's also why the plaintiffs' argument as to waiver must fail. Under 12 O.S. 2511 the word "voluntarily" is part of the context in which a waiver occurs. Here mandatory legal process means that this was not a voluntary waiver.

As it relates to being voluntary and intentional, The University would point the Court to this *Barringer vs. Baptist Health Care of Oklahoma* where there is no indication in this case of any intentional desire of The University to release the report and the contents of the report to the public. And when we look we see elsewhere in that case that the Court, in looking for waiver, is looking at the intent of The University. What did we mean to do? And we have told the Court what our intent was, which was not to waive this, but to maintain absolute confidentiality.

THE COURT: On that issue of waiver, then, I think a big part of the plaintiffs' argument in this case is -- again, it's not attorney/client protected, but even if the Court disagrees and finds that it is, The University's waived it, and they've spent some time on a couple of different areas, with regards to both reports.

With the *Alumni Donor Report*, the communications from a university staff member telling *U.S. News & World Report*, "Hey, here's where there were some misreporting," so that's waiver, according to the plaintiffs. And then the press conference. Apparently there was a press conference where President Gallogly and Anil Gollahalli, the General Counsel, spoke to the press, and they kind of -- they shared information. It was reported on, anyway.

First question I have: Does anyone have any record of what was said at that press conference? Does The University have, like, a record of what was actually stated?

MR. VANCE: To be honest, Your Honor, I'm not familiar with the press conference that you're referring to. As far as, you know, we conducted an investigation -- as a natural part of

taking on this lawsuit, we looked at potential areas of disclosure, and I don't believe that that press conference revealed any substantive information of the Jones Day report itself. And I think this also leads back to your first question, Your Honor, about the release of information to *U.S. News & World Report*. The --

THE COURT: I don't want to misstate the facts. Maybe the plaintiffs will correct this, but I've read everything. I got the impression that there was some type of -- maybe it's not a press conference, but statements -- public statements made by President Gallogly at the time he was president, as well as the general counsel, Mr. Gollahalli, that "We're sharing some information with the public about summarizing," essentially "what we found with the alumni misreporting." I thought that happened.

MR. VANCE: So, Your Honor, I think there might be a couple of different things you could be thinking of so I'll just run through them, and you can take your pick of what you like.

As it relates to statements by Gallogly, there are a series -- I mean, different statements, articles he said, different context at

different times. I think over two or three years there's probably five different articles where he says different things. We have him quoted saying, "Don't release the report; release the report; it's a legal matter; it's not," whatever. So I'm not familiar with what specifically the Court is referring to as this press release, but I do know there cannot be any indication that the substance shared was the substance of the Jones Day report. It might well have been.

As I recall, you know, President Boren had -- I believe he was off campus for a while, and his title position changed. I have no doubt there was some press releases that relates to that. So there were other things that maybe spun out of this. It's difficult to answer specifically about a press report that didn't contain substance of the Jones Day report.

But as it relates to this disclosure *to U.S. News & World Report*, I believe what the Court is referring to there is that the disclosure -- the details are in the confidential transcript, but I will say that the disclosure -- there is no indication that the information disclosed to *U.S. World & News* [sic] came from the reports, because

the data shared was data The University had previously.

THE COURT: And was that data that was shared -- well, that was an employee of The University that shared that data; right?

MR. VANCE: Yes, Your Honor.

THE COURT: Okay.

MR. VANCE: So as far as -- you know, it wasn't an inadvertent disclosure. There -- there was a disclosure to *U.S. News*, but the disclosure wasn't related to the Jones Day report. As turning back to the question of involuntarily disclosures that occurred, you know, we have the case of *Doe vs. Purdue University* from the Tenth Circuit getting to that point about how President Boren, as a respondent, had to have access to the report in order to make his legal arguments, or whatever, in this process. So there is no way The University could tell him, you know, "There's maybe a secret report involving you, but we're not going to let you see it. We're going to make a determination about you going forward." That's just not legally permissible. So there's no way that The University could have withheld it from him.

And, likewise, it just doesn't -- I think when the Court thinks about the plaintiffs' arguments, as it relates to Title IX, I don't think it's possible for the Court to envision a Title IX process that is actually functional in the way that the plaintiffs articulate it.

I don't know how anyone can go make a report to Title IX, and then, if the person they're complaining about is told about it, then potentially it has to be released to the public, because that's a waiver. This whole Title IX process falls apart, under the plaintiffs' interpretation of how this would work, and it really undermines the purpose of the federal law in protecting these people in the first instance.

So I guess my word of caution to the Court would be is if Your Honor can't draw a clear line as to how their articulation of the Title IX process works in the real world, I don't think it's safe for the Court to release these reports because other Title IX investigations are, for better or worse, going to look at your decision here to see how this goes forward in the State of Oklahoma.

So just to recap. I did a lot of

talking, Your Honor. I hope I answered any residual questions the Court had, but I believe that The University has shown that it's entitled to having these reports maintain their confidentiality, and, for the sake of the witnesses, I just really pray that the Court would grant our motion for summary judgment, and I request to be able to make a rebuttal after the response.

THE COURT: Thank you.

Before you sit down, the last No. 6 there, Investigatory Reports, that's an exemption under the Open Records Act; right?

MR. VANCE: Yes, Your Honor.

THE COURT: It's not a privilege, it's an exemption.

MR. VANCE: Similar to the personnel records exemption. Just as a matter of -- you know, we've briefed this a ton, and I don't want to just repeat definitions to the Court, but I think the Court --

THE COURT: I've got it --

MR. VANCE: Yes.

THE COURT: -- in front of me here, and so, in looking at it -- so you're claiming that

these reports are exempt under investigatory reports -- are exempt as investigatory reports, under 51 O.S. 24A.12. How do you read 24A.12 to extend to a public university, as opposed to the plain language which limits this to qualified agency attorneys and the Oklahoma AG, to D.A.'s offices, and to city attorneys' offices?

MR. VANCE: Well, Your Honor, as far as the agency attorneys go, I had thought about that a bit, as far as -- whether agency attorneys interpret it as an attorney of the state agency, which Jones Day was retained to do, as shown by the agreements, or if it means that an attorney acting with agency on behalf of the State department, either way that this investigation would be such as an agency attorney conducting it.

As far as the -- you know, Jones Day also, I think the record shows, coordinated with the attorneys of the General Counsel's office for the University of Oklahoma, and I believe that -- in co-counseling with the University of Oklahoma's General Counsel office, I just would believe that those attorneys would also qualify as agency attorneys for purposes of the statute. So as long as they're acting under the direction of agency

attorneys, and they're providing assistance to agency attorneys, I don't think there's any issue with that provision.

THE COURT: Did you cite any Oklahoma cases that support that interpretation; do you recall?

MR. VANCE: I don't believe we did, Your Honor, no. We just made the argument.

THE COURT: Okay.

Thank you very much, Mr. Vance. It is helpful. And you want to be heard in rebuttal; is that right?

MR. VANCE: Yes, sir.

THE COURT: Okay. Thank you.

All right. On behalf of the plaintiffs. I think you're going to be breaking up the argument as well?

MR. JOHNSON: That is right, Your Honor. And, if the Court agrees, it might be most convenient for us to just recess for about five minutes where we can get the text set up, and everybody can stretch their legs.

THE COURT: Let's do that. It's 10:35. We'll reconvene at 10:45.

(A recess was taken.)

Okay. I'll show that we are back on the record. Looks like everyone is present. And so, at this time, on behalf of the plaintiffs, you want to be heard in response to The University's argument supporting summary judgment. Go ahead.

MR. JOHNSON: Thank you, Your Honor.

I'm presenting argument this morning on behalf of Tres Savage, the Editor in Chief of NonDoc Media. As the Court knows, NonDoc is operated by the Sustainable Journalism Foundation. It's a nonprofit that strives to sustain reporting on under-covered civics issues and increase public knowledge to facilitate civic participation.

For years, NonDoc's been recognized as a preeminent outlet for coverage of Oklahoma civics, local, state, and tribal governments. It's been recognized as a best news website in Oklahoma by the Society of Professional Journalists. It also regularly reports on matters concerning the state's flagship university.

Tres receives all The University's press releases. He's present, and he reports at all the Board of Regents meetings and The University's press conferences. The University representatives are regularly providing quotes or otherwise

contributing to his reporting.

Tres was educated at The University of Oklahoma. When he and I were both undergraduates there, he was the Editor in Chief of the OU Daily. so I know it's from The University that Tres learned his (inaudible) commitment to reporting a story, and it's Tres's efforts to report a story that bring us here today.

As the Court knows, in 2018, The University engaged Jones Day, a large international law firm, to conduct two separate investigations into matters concerning its former president, our former Governor, and U.S. Senator, David Boren. The first investigation, as the Court knows, concerned allegations that, over the course of many years, President Boren and leadership under his direction manipulated or misreported alumni donor data to organizations like *U.S. News & World Report*, in order to inflate The University's ranking with those organizations.

We can't be sure, because discovery is very much incomplete, but it appears that the investigation into the alumni donor misreporting arose from information that was brought forward by a whistleblower within The University. The

investigation resulted in a report completed in September 2018 to be called the *Alumni Donor Report*. It was compiled using e-mails, documents and data, and interviews with employees of The University. The report, or some of the information contained within it, was shared with *U.S. News & World Report*, and it was discussed extensively by university officials in various public statements.

The second investigation concerned allegations that, over the course of several years, President Boren engaged in a pattern of sexual misconduct targeting University students and/or employees. Again, it's unresolved or, at least, disputed as to how this investigation began, but it resulted in a report that was completed in April 2019, the *Sexual Misconduct Report*.

Jones Day compiled that report, once again, following interviews with alleged victims and witnesses, mostly current and former University students and employees. That report was shared, at least, with President Boren and his attorney; one or more victims or witnesses who were interviewed by Jones Day; and the Oklahoma

State Bureau of Investigation.

Recognizing the strong public interest in these matters, The University paid Jones Day north of $1.5 million in public funds for its work related to the reports. This slide's extracted from our Exhibit "M." I emphasize the importance of this story, and I introduce these parties to clarify that Tres is not a gossip journalist, and his interest in reporting these matters is not salacious.

The Jones Day reports and the investigations that underlied them were reported on by virtually every major media outlet in the state, and prominent public officials have called for a full reporting on these matters. Senator James Lankford urged that if the facts never come out then it always hangs over The University.

Governor Keating, a former OU Regent, said, "I think it's the universal feeling of the Regents that when this is all over there will be an airing of what happened. We're all in favor of it."

State Senator, Julie Daniels, now the Floor leader, and our unnumbered exhibit from paragraph 7 through 11, said that, "The public has

a significant interest in its state universities being transparent, accountable, and responsible with revenue and donations, and citizens have a right to be informed, and taxpayers who attend or send children to school deserve to know what the Board of Regents learned."

As the Court's noted, former OU President, James Gallogly, also failed an affidavit, which I appreciate is under seal, but I'll direct the Court's attention to paragraphs 28 through 31 of that affidavit wherein former President Gallogly also calls on The University to restore public trust and confidence, and to avoid any indicia of a cover-up.

The University's filings are largely dismissive, sometimes derogatory of these opinions, but these public officials recognize something that's crucial to the heart of this matter, and that's that the same public interest that warranted a taxpayer-funded investigation into these matters also warrants transparency and accountability to the public, with respect to the resulting reports. That's why it's routine for reports like the Jones Day reports to be made publicly available, notwithstanding that they are

often conducted by privately retained counsel.

We see here a Jones Day report for the University of Southern California. It's an investigative report, along with Doug Phelps, for The University of Illinois.

We see O'Melveny & Myers's investigative report for the Board of Trustees of Claremont McKenna.

Here on the left is the report of the investigation into the City Council for the City of Owasso that is the subject of the *Ross v. Owasso* decision that was discussed extensively in Mr. Vance's presentation. Mr. Vance neglects to mention, though he cites the intermediate reports, appellate decision on an ancillary matter, that the Oklahoma Supreme Court ruled that report must be disclosed to the public, notwithstanding the fact that the City of Owasso tried to suppress it, and it did so by determining that their balancing act, with respect to the personnel records of exemption, was conducted improperly, and that the public interest actually outweighed the city's interest in privacy, and that's because public institutions don't have a right to privacy. Public institutions don't have an interest in

avoiding liability. Public institutions are responsible to their constituents, and public institutions owe to their constituents full transparency, even when mistakes are made, even when misconduct occurred.

Now, the Open Records Act enshrines these principles of transparency, as a matter of Oklahoma law. As explained in Title 51, Section 24A.2, the legislature enacted the ORA to safeguard the constitutional guarantee that political power is inherit in the people. The Supreme Court and the Association of Broadcasters recognize the legislature's, quote, "emphatic message to government agencies that the government must have prompt access to records." The Court explained that, quote, We must construe the Act's provisions to allow access, unless an exception clearly applies. And, quote, the burden is on the public agency seeking to deny access to show that a record should not be made available.

This is directly contrary to The University's argument that it enjoys some deference in invoking the privilege. Not so. The University, in fact, has to clearly show that a record -- that an exemption applies to these

records, and it has to do so on the basis of undisputed facts because this is the summary judgment motion.

As the Court knows, summary judgment is an extraordinary procedure that's appropriate only where there is no genuine dispute as to any material fact such that judgment is warranted, as a matter of law. At this stage, we don't do what Mr. Vance has asked you to do. This Court does not weigh facts. It doesn't assess competing versions of the fact, and decide which it finds to be more credible, or which it finds to be objectively true. As the Court noted, all reasonable inferences are drawn in favor of the nonmoving party, and where any factual dispute prevents resolution of the matter summary judgment cannot be entered.

Now, The University cites several purported exceptions to the broad mandates of the ORA. I'll first discuss their argument that the attorney/client privilege protects the reports, and then I'll address what I broadly described as their Title IX confidentiality arguments and their arguments regarding the interests, constitutional and otherwise, of the witnesses and victims.

Mr. Weeks will discuss waiver of privilege and confidentiality, and the remaining exceptions that were cited by the University.

THE COURT: Mr. Johnson, I appreciate that. On the standard of review, I heard The University. We all heard The University's position on how this court should review this. It cited the *Ross* case, and that was -- that was an appellate court reviewing a lower court, but that was for an abuse of discretion standard I think the appeals court used.

What standard should the trial court use for this? I understand the motion for summary judgment and the lens that I look at the evidence in, but what's the standard?

MR. JOHNSON: And I appreciate the invitation to clarify something, which is that the *Ross* decision concerns only one exception to the ORA. It exclusively concerns the personnel records exemption, and it's only under the personnel records exemption that there is a discretionary function for The University. And Mr. Weeks is going to discuss that at length.

But, importantly, The University has to initially make an affirmative determination that

the records are to be withheld. Mr. Weeks will explain that that's never happened. And thereafter the Court reviews the discretionary function to determine whether the balancing test was properly weighed; to determine whether, in fact, there is a private interest on the party withholding the document that outweighs the public's interest in the information that's being withheld.

The *Ross* decision overturned the trial court. The trial court basically said that because the City of Owasso had made the decision its discretion should be undisturbed. The Supreme Court said that's incorrect; that the City of Owasso did not properly evaluate the public's interest and the information that was contained in the (inaudible) report, and it overruled the trial court and mandated instructions for the report to be released. That's why you can see it in the slide, in our demonstrative.

Turning to the attorney/client privilege, as we've extensively briefed, whether the attorney/client privilege applies to any particular document or communication is, in the first instance, a question of fact. In *Scott v.*

Peterson, in 2005, Justice Edmondson wrote for the Supreme Court that, "The mere status of an attorney and client relationship does not make every communication between attorney at client protected by the privilege."

Magistrate Cleary in the Northern District discussed the relevant law in *Lindley v. Life Investors*, which we cite extensively beginning on page 5 of our brief. Reviewing the authorities, he said, "What is clear is that the determination is fact driven." The Court must, quote, consider the context of or circumstances surrounding the communication. And because the privilege is, quote, in derogation of the search for the truth, it is, quote, strictly construed, and the party asserting it has the burden of showing it clearly applies.

So to return to the Court's question, The University carries a very difficult burden. It must show that the privilege applies clearly, and, in order to do that, it must show that there is no fact dispute underlying the question of the application of the privilege, and, in every instance, the privilege has to be narrowly construed.

Because any factual dispute whatsoever prohibits summary judgment, The University cannot possibly carry that burden. There are obvious facts concerning the context and circumstances surrounding the report that remain unresolved at this stage, and one of those circumstances is that The University is a public body. Generally speaking, it does not have attorney/client privilege.

Oklahoma amended its Evidence Code in the late 1970's, and created a broad statutory exception to the attorney/client privilege. In Title 12, Section 2502(D)(7), the legislature states that, quote, there is no privilege as to a communication between a public officer or agency and its attorney, unless the communication concerns a pending claim, investigation 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 in litigation or proceeding in the public interest.

The Oklahoma Supreme Court recognized, in *Association of Municipal Attorneys* that this exception to the ordinary privilege comports with

Oklahoma's strong public policy of open records meetings and transparency.

The University has never fully reconciled their position with this very clear black letter law. It addresses it for the first time in this litigation in its reply brief where it cites the *Municipal Attorneys* decision that I just referenced. We can easily dispense with that.

Austin suggested that this case analyzed the exact language at issue in 2502. I urge the Court to take his Pepsi challenge. You can review the *Municipal Attorneys* decision from front to back, and you will find no mention whatsoever of Title 12, Section 2502 for a simple reason. The *Municipal Attorneys* decision was decided on April 25, 1978. Section 2502 was enacted by the legislature in that same spring session. It became effective on October 1, 1978. The *Municipal Attorneys* decision does not reference Section 2502 because that statutory section did not exist at the time that the Supreme Court decided that case.

As the evidence subcommittee notes observe, with respect to Section 2502, this was a

major statutory revision to the ordinary common law privilege. That's why the cases that do cite 2502 refer to Oklahoma's new Evidence Code.

It's also unclear what The University thinks the *Municipal Attorneys* decision stands for. It concerns the Open Meetings Act, and even there it recognizes that public bodies can enter executive session to obtain legal advice only where there is a pending claim, and public disclosure would seriously impair the ability to conduct it in the public's interest. Otherwise, every case that The University cites concerns private parties' invocation of the attorney/client privilege. None of those cases apply.

So, in order to prevail at this stage, The University must show undisputed facts proving that the reports relates to an existing investigation, claim or action, and the Court must determine that disclosure would seriously impair the ability of The University to conduct that pending matter in the public interest. The University never even endeavors to do this, and, to the extent that it does, there's an obvious genuine factual dispute that remains unresolved. As the Northern District explained in *Edmondson*

vs. Tyson Foods, the privilege does not apply to communications that were generated prior to a pending claim, or to those that concern a claim that is no longer pending.

The Western District acknowledged the same thing in McCurtry [sic] v. Aetna, and of course if a claim is no longer pending then disclosure cannot seriously impair the ability of an agency to conduct that claim.

Undeniably, as The University itself has made clear, there is no currently pending investigation or claim involving the reports. The Court noted this earlier. We discussed this at paragraphs 15, with respect to the *Alumni Donor Report*, and paragraph 38, with respect to the *Sexual Misconduct Report* of our statement of material facts.

As The University's Exhibit 9 to its Motion for Summary Judgment makes clear, in their original response to NonDoc's ORA request, Heidi Long, on behalf of The University stated, "This matter has been closed for more than two years."

In our Exhibit "L," in a letter from the former chairman of the Board of Regents to President Jim Gallogly, the chairman describes

"full and complete investigations."

If I could turn the Court's attention to The University's Exhibit 7, the Court will note an e-mail from The University's open records office to Mr. Savage describing the report as issuing, quote, "at the conclusion of an investigation."

The Special Investigator in charge of the investigation on behalf of the OSBI was quoted as early as 2020 as saying that the Oklahoma State Bureau of Investigation's investigation into David Boren and Tripp Hall has concluded. And contemporaneously, Clark Brewster, counsel to former President Boren, explained that this saga is over; thus, as explained in *McMurtry* and *Tyson Foods*, The University cannot invoke these prior completed investigations to justify application of the privilege today. And, of course, The University cannot credibly argue that it would be seriously impaired in conducting any pending investigation or claim, past or present, for reasons that the Court --

THE COURT: So is it the plaintiffs' position, then, that 12 O.S. 2502(D)(7), that's the attorney/client privilege that -- if there is one, that's the only basis that The University has

to -- only legal basis The University has to claim attorney/client privilege is 2502(D)(7); right?

MR. VANCE: Well, to clarify, I would say that (D)(7) is the reason The University cannot claim an attorney/client privilege.

THE COURT: Okay.

But if there is -- that's the analysis that the Court has to determine is if there is or isn't under that statute; right?

MR. JOHNSON: That's absolutely right.

THE COURT: Okay.

MR. JOHNSON: The Court would have to determine that there is a pending claim currently, and the disclosure of the reports would undermine the ability of The University to conduct that claim in the public interest.

THE COURT: So if that's the case, public bodies do have -- they assert attorney/client privilege, and this statute doesn't prohibit them from asserting it, but is your position that any time there is an attorney/client privilege it evaporates, once the investigation is closed, and so everything that was once privileged is now no longer privileged because it's not pending?

MR. JOHNSON: That's exactly right, Your Honor, and that's what the Northern District and the Western District have both unequivocally held in interpreting Oklahoma's attorney/client privilege statute. And that's the plain language of the statute itself, and it makes sense. You can't possibly claim that you couldn't -- that your ability to conduct a pending claim or investigation would be impaired, after that investigation is concluded.

As the Court noted, plainly, under these circumstances, the most probable adverse parties in any potential proceedings against The University, as relate to the Jones Day reports, would be either or both President Boren or victims of his alleged misconduct. But, as discussed in paragraphs 30 of 32, in our Statement of Material Facts, and as The University has acknowledged, The University willingly provided the *Sexual Misconduct Report* both to both President Boren and to Jess Eddy, one of his victims, as well as to other unidentified witnesses.

THE COURT: Is that an important distinction in this case vs. the *Baylor* case, that we're talking about a public university versus a

private university? Because that case did find that the reports were privileged.

MR. JOHNSON: And a crucial distinction is that that case was not decided under Oklahoma law --

THE COURT: Yeah.

MR. JOHNSON: -- and Oklahoma law departs from federal law. If we were in federal court --

THE COURT: That was a Western District of Texas, federal jurisdiction. Okay.

MR. JOHNSON: That's exactly right, Your Honor. And both the *Lindley* decision and the *McMurtry* that I'm citing from the Northern District and the Western District of Oklahoma are construing Oklahoma law on the matter, not federal law, as it relates to the attorney/client privilege.

THE COURT: So should I spend much time in the *Baylor* case for purposes of this case?

MR. JOHNSON: I think that what the *Baylor* case offers, by way of instruction to the Court, concerns waiver, which is a matter that Mr. Weeks will discuss. But, no, the *Baylor* case is of no moment to this Court, with respect to the

initial application of the attorney/client privilege because it is applying a different jurisdiction's law, with respect to the attorney/client privilege.

It is a unique species of Oklahoma law, but it is one that has full force, nonetheless, that a public body, in communicating with its attorneys, does not enjoy the privilege, except under these very limited circumstances.

THE COURT: Because that *Baylor* case, it did hold that the reports were initially protected attorney/client privileged materials, and they did find waiver in that case, but before *Baylor* waived their privilege they had the privilege, and the *Baylor* case stated that the research undertaken by an attorney to respond to a client's request for advice is also within the reach of the privilege.

So that's part of what The University's arguing to me is: "We do have attorney/client privilege, and the research and the information that the Jones Day attorneys obtained, that falls within the privilege."

MR. JOHNSON: That's right. And The University is absolutely 100 percent ignoring Oklahoma law. They are citing cases from other

jurisdictions that apply the laws of other jurisdictions, specifically federal law, in this instance, with respect to the *Doe v. Baylor* case, governing attorney/client privilege. That law is not applicable in this courtroom.

The State of Oklahoma's legislature has directed that its agencies are to be fully transparent and accountable to the people. All of that comports with the Open Meetings Act, the Open Records Act, and its own attorney/client privilege statute. The State of Oklahoma's policy on this issue is unequivocal, and The University does not respond to this argument whatsoever, but for to cite the *Municipal Attorneys* decision, which was, once again, decided before the statute was in effect.

There's not a response in a single filing by The University that even endeavors to show that there was a pending claim or investigation, and that their ability to conduct that pending claim or investigation would be undermined by disclosure.

And, of course, even where the attorney/client privilege is ordinarily applicable to the parties, unlike here, the privilege does

not merely turn on the fact that a communication was made by an attorney to a client. It turns on both the status of the parties at the time of the communication, and the contents of the communication itself.

Section 2502 restricts the scope of the privilege to confidential communications between attorney and client made for the purpose of rendering legal advice. Regarding the status of the parties, once then, it's not enough that one party was an attorney. On that point, our brief cites the *Peterson* case and the *In re Grand Jury* cases.

Put another way, you cannot turn information into a privileged communication merely by having your attorney tell it to you. The party has to be acting as an attorney in making the communication, and the nature of the communication has to be in the form of legal advice.

So, first, there is a fact dispute concerning the status of Jones Day in issuing the reports, and I think that fact dispute, as the Court is somewhat intuitive, is best illustrated by The University's own shifting theories of defense. On every new page of The University's

brief, it argues that Jones Day was playing a different role or acting in a different capacity, and those capacities and roles are fundamentally inconsistent with one another.

The University argues that Jones Day was private counsel providing legal advice to its client, the Board of Regents, in anticipation of litigation. Then it next argues that Jones Day acting as a Title IX investigator performing federally mandated responsibilities not to protect The University from liability, but to police its compliance with Title IX, and protect students who have claims against it.

Then The University argues that Jones Day was a proxy law enforcement agency conducting a grand jury investigation into President Boren or others. Again, fundamentally inconsistent with the idea that it's providing private legal advice, in an effort to protect its client from liability.

Then it argues that Jones Day was a policy adviser participating in the deliberative process concerning The University's management. Once again, that's fundamentally inconsistent with the idea that Jones Day was a Title IX investigator, or that it was a law enforcement

agent, or that it was private counsel providing legal advice to its client.

And, finally, it argues that Jones Day was acting on behalf of The University as an employer undertaking an HR investigation, in order to invoke the personnel records exemption.

All of these different roles are contradictory, and The University's attempt to raise any defense available, and then see what sticks, illustrates that there are unresolved factual disputes about the status of Jones Day, and that prevents application of the attorney/client privilege at the summary judgment stage. Not even The University seems to have a clear idea as to what role Jones Day was playing.

There are also factual disputes concerning the content of the Jones Day reports, or the nature of the communications themselves. As explained in *Lindley*, the focus of the inquiry remains fact intensive. For example, ordinary business advice is not privileged, even if it is communicated by a lawyer, nor is the recitation of generally reportable facts.

The privilege also doesn't include documents or records that were generated

independent to the investigation, prior to the attorney being retained, even if it's later provided to an attorney or compiled in a report.

The Court has reviewed Jones Day reports, and we haven't, but we believe these reports include a lot of this kind of stuff: The recitation of facts that were told to Jones Day by third parties, who were not clients speaking to attorneys; appendices and other documents containing communications, data, or records that were compiled and provided to Jones Day; general business advice; summaries of information that were relayed by others.

This stuff isn't privileged just because the person who compiled it into a single report held a law license. And Mr. Vance's concession that there are components or communications included in the reports that aren't privileged is damning. The law would then obligate them to provide those parts of the reports, and redact only the confidential or privileged information.

And, incidentally, Mr. Vance's representation is just dishonest. On May 4, 2020, The University of Oklahoma denied an open records request for communications or documents that were

provided to Jones Day in advance of its investigation into the *Alumni Donor Report*.

I'll now turn to The University's arguments regarding Title IX confidentiality, and the privacy interests of victims or witnesses who participated in the Jones Day investigations. First and importantly, these arguments do not concern the *Alumni Donor Report*. Nothing about the *Alumni Donor Report* implicates Title IX concerns. None of it implicates the vulnerable witnesses or victims of David Boren's misconduct.

THE COURT: I'm sorry. Nothing in the what?

MR. JOHNSON: Nothing in the *Alumni Donor Report* --

THE COURT: Oh.

MR. JOHNSON: -- implicates a Title IX interest, or presumably involves vulnerable witnesses who are reporting on President Boren's misconduct.

But, as to the *Sexual Misconduct Report*, The University has repeatedly suggested that NonDoc is deliberately or recklessly imperilling the safety of the victims of President Boren's alleged misconduct. Those suggestions are just

disingenuous and borderline (inaudible).

Let me put this matter to rest. NonDoc has offered to accept the *Sexual Misconduct Report* in a form that redacts identifying information of vulnerable witnesses. The University has refused to entertain that discussion whatsoever. And, importantly, The University's course in this litigation, with respect to the reports, has not been sensitive to or protective of victims. The only victim who has identified himself is Jess Eddy, and, in repeated filings, The University has vilified him for sharing his story of abuse, (inaudible) his motives and discredited him, even suggesting that he is lying about what happened to him, notwithstanding that Jones Day explicitly found him to be credible and his story to be truthful.

So NonDoc is not dismissive of the interests of victims, and The University's sanctimony on this matter just camouflages the week legal basis for their argument. The public has a right to know who it is that The University is actually protecting.

In any event, there are major factual disputes concerning whether Jones Day was

conducting a Title IX investigation; that is to say, whether any Title IX protections apply whatsoever. As I previously noted, there's a serious conflict between The University's alternating claims that Jones Day was private legal counsel to the Board of Regents, and its claim that it was performing Title IX duties on behalf of the Office of Institutional Equity. We cannot imagine that Jones Day was simultaneously trying to anticipate litigation, and also performing an investigatory role, under Title IX, that would actually expose potential liabilities for The University, not attempt to cover them up or provide legal advice as to how to avoid them.

The idea that The University -- that The University is retaining the exact same entity to provide its Board of Regents legal advice on reducing or minimizing exposure to liability and performing a Title IX investigation poses an enormous conflict of interest, one that Title IX regulations plainly prohibit.

Moreover, as the Court noted, The University's engagement letters with Jones Day, both of which are attached as exhibits to The University's filings, say nothing at all about

Title IX. They describe retention by the Board of Regents, and they include the Office of Legal Counsel as a contact. The Title IX office or the Office of Institutional Equity was not obviously involved in the formation of this relationship, or at any point in the investigations themselves.

Heidi Long's Affidavit, which The University cites, also says that Jones Day was hired to investigate and provide legal analysis and advice. She says that its purpose was to permit the Board of Regents to be informed and advised regarding the legal ramifications of potential misconduct. That is enormously different from the role of a Title IX investigator.

As we briefed, Title IX regulations require that all investigators undergo certain training. There is no indication in the record that Jones Day's various attorneys did so, and the investigations appear to have departed significantly from ordinary Title IX procedure, as the Court noted. For example, Jones Day reported to the Office of legal Counsel, not to the Office of Institutional Equity.

Title IX procedures require that notice

is provided to all parties at the outset of an investigation. It's not at all clear that that happened here. It requires that all parties be provided an opportunity to present evidence. We know that Jess Eddy was denied that opportunity when he contacted the Office of Institutional Equity. As both his Affidavit and the various exhibits that we attached to it indicate, he was actually told, contrary to what Mr. Vance just represented to this Court, that he was not a complainant in the Title IX investigation, which is why he wasn't provided with the full report. It was simply disingenuous for The University to claim now that the reason he was provided a portion of the report was because he is a complainant.

Moreover, Title IX procedure actually prohibits The University from requesting that any party to the proceeding, stay silent. The University claims that it did make that instruction to the various witnesses in the Jones Day report. And, importantly, Title IX culminates in an actual hearing before an adjudicatory panel. No evidence that that occurred here.

Finally, if I can direct the Court's

attention to our Exhibit "S," you'll see in an e-mail directed by Mr. Burrage to myself and Mr. Weeks, during the course of this litigation, and in response to what Mr. Vance called our informal discovery requests, which were written, specifically requested the documents that they've refused to provide.

If I can direct the Court's attention to Exhibit "S," you'll see that, in that e-mail from Mr. Burrage, Mr. Burrage explicitly states that there was no Title IX complaint or investigation into President Boren prior to Jones Day's retention. There wasn't a complaint made with the Title IX office directed at Mr. Boren prior to Jones Day being retained. So it's just not accurate, and it is not in good faith, that The University now, in an effort -- once again, raising any defense that may potentially stick, claim that Jones Day was somehow performing a Title IX investigation.

And, at a minimum, there are unresolved factual questions that prevent the Court from concluding, at this juncture, that Title IX procedure or restrictions apply to either report. Although, I'll note that The University actually

hasn't cited any governing law that directs that, even if they were prepared, pursuant to Title IX, the reports are therefore exempt from the Open Records Act. They just ask the Court to disregard that law because they claim they made promises of confidentiality to witnesses.

But even on that point, there are factual disputes. Jess Eddy, the only Jones Day witness from whom this Court has heard, disputes The University's claim that it promised all witnesses that absolutely everything they reported would remain confidential.

I'll direct the Court's attention to Mr. Eddy's Affidavit, paragraphs 11 through 16. Notably, what he describes does not sound like a Title IX investigation. He reports that there was no member of the Office of Institutional Equity present at his interview. In fact, there was no representative of The University present at all. He reports that the investigators did not make clear to him the purpose of their investigation. He even describes feeling ambushed when they suddenly changed their tone, and began to ask questions about his interactions with President Boren. And Mr. Eddy indicates that he asked

whether his interview was part of a Title IX investigation, and Jones Day's attorneys dissembled on this question. They told him, "We give the facts to The University. They decide what to do with them."

Mr. Eddy reports that he was advised only that Jones Day would try to keep his identity anonymous. And that is, of course, consistent with The University's actual policies governing investigations of sexual misconduct allegations. That policy was selectively quoted by Mr. Vance, but it includes the following language, under the heading "Privacy of Proceedings and Records."

"Individuals wishing to make legally confidential reports have the option of reporting those matters to the OU advocates, The University Ombudsperson, licensed counselors, health professionals, clergy, and attorneys, to the extent the complainant engages them in such private capacity. Although University officials will maintain an individual's privacy, to the best of his or her ability, individuals should know that University officials, outside the context of licensed counselors and health professionals hired in their private capacity, may not be able to

maintain legal confidentiality of the complainant. The University must weigh such requests for privacy against its duty to provide a safe and nondiscriminatory environment."

The policy goes on to state that "All records shall be maintained by the Institutional Equity office as confidential records, except to the extent that disclosure is permitted or required by applicable law or University policy," and says that "The University shall inform complainants if it is unable to ensure privacy."

In its reply brief, The University for the first time cites *Anderson v. Blake*, and argues that the witnesses who provided information to Jones Day have a constitutional right to privacy in that information.

Anderson v. Blake doesn't support that conclusion at all, and that case is of very limited relevance here. In that case, the victim of a sexual assault provided a video recording of her rape to the police, and an officer in the police department deliberately leaked the video to the media.

The decision that The University cites, the Tenth Circuit, merely affirmed the District

Court's denying of that officer's motion to dismiss on qualified immunity. It didn't make any holdings whatsoever as to the merits of either party's claim. And the relevant law regarding the right to privacy is merely that, A, where there is a legitimate expectation that the information will remain private; B, the government must have a legitimate interest or purpose in disclosing that information.

There is, at best, a fact question as to whether or not all the information provided to Jones Day was provided under a reasonable expectation of privacy. And, more importantly, the edicts of the ORA and this Court's Order provide a legitimate interest distinguishable from leaking the reports to the news, simply in order to generate media coverage.

While the facts of this case are not analogous to *Anderson v. Blake*, they are very analogous to *Abraham v. Phillips*, and that's a Pennsylvania Supreme Court opinion that we cite in our response brief. There Thomas Jefferson University, quote, "retained outside counsel to conduct an investigation and to render legal advice regarding a Title IX complaint." Like

here, Jefferson claimed that counsel conducted an extensive investigation, interviewed many witnesses and, quote, "advised these individuals that any information disclosed in connection with the investigation would be kept confidential." Jefferson therefore argued that the report generated by counsel was an attorney/client record, and that the privilege applied.

The Pennsylvania Supreme Court noted, as we urge, that the privilege applies only to communications made for the purpose of providing legal advice. It does not protect against disclosure of, quote, "underlying facts." The Court said, "A fact is not transformed into privileged information solely by virtue of having been communicated by counsel."

The Court then held that, "Even assuming the report was created by Jefferson's counsel in anticipation of litigation, Jefferson did not prove that the contents of the report are the type of communications that are privileged." The Court noted that the reports may include recitations of interviews with third parties that were not provided in a privileged context. The report might include documents and information generated

prior to the investigation, which is also not privileged.

Like here, Jefferson did not prove that any of the participants in the investigation were clients communicating with attorneys for the purpose of legal advice. Jefferson did not explain whether parts of the report merely recited factual matter that was learned during the investigation, which would also not be privileged.

So the Pennsylvania Supreme Court held that Jefferson failed to provide sufficient facts to prove that the report is privileged in its entirety, and therefore it did not satisfy its burden. The same is the case here.

The University asks this Court to apply the privilege merely because an attorney wrote the reports. As to their contents, The University simply asks this Court to take its word. The University fails to show that the privilege clearly applies. Factual disputes plainly prevents summary adjudication on these issues.

Before I conclude, I just want to reiterate that these reports tell one of the most important stories in Oklahoma history; a story abuse of public corruption, abuse of power, fraud,

and even sexual abuse at one of the State's most important institutions, and involving one of the State's most powerful individuals, over the course of a tenure that lasted nearly two decades.

The only ones who have read this story are the same members of The University's administration under whose nose all of this happened in the first place, and they refuse to let anyone else know what happened. They refuse to let anyone else know what they know. They ask us simply to trust them; that they know what happened, and they handled the matter appropriately.

The people of Oklahoma deserve to know how their tax dollars are spent, they deserve to know how their public institutions are run, and they deserve to know how people that are charged with carrying out the public's business are discharging their duties. The people of Oklahoma deserve to read this story, and the Open Records Act exists to facilitate a very important civic function that is played by organizations like NonDoc Media, and that function is to report this story to the people.

THE COURT: Mr. Johnson, to the extent

that -- your argument right there about essentially not having to trust The University on this, what weight or significance should the Court give to the fact that these reports were shared with law enforcement, and there was no criminal indictments that come out of this? Should that play into this at all? I mean, that's a determination of probable cause, essentially, and there hasn't been any results from the criminal investigation. Should that be of any concern for any of the work that I have to do in this case?

MR. JOHNSON: No, I think not at all. In fact, in the *Ross v. Owasso* case, Owasso made just that argument; that the reports did not actually describe criminal activity, as was evidenced by the fact that no crime was ever charged. And the Court said it still concerns matters of public importance: The ethical violations, the unprofessional conduct.

And I think whatever the nature of the allegations, and however those were transmitted to the law enforcement agencies, it's pretty apparent that the *Sexual Misconduct Report* and the *Alumni Donor Report* both concern matters of grave ethical importance. Whether or not OSBI was able to

determine that a crime was committed or that that crime was actionable, those are all questions of fact. Those questions of fact remain unresolved.

But I do think that there is some importance to the Court's consideration of that decision by The University to participate and cooperate with OSBI, and that is The University never imagined that they were violating the constitutional rights of privacy to any of the participants in the Jones Day investigation when they, as they say, complied with the subpoena. Why? Because the subpoena has the effect of law. The subpoena provides The University with a compelling justification to disclose the information, even if it previously determined that it included private matters.

That same thing is true of the Oklahoma Open Records Act. The Open Records Act provides a legal imperative to disclose those reports, and that's very, very different from a police officer, for purely prurient reasons, leaking of video of a rape to the news media.

THE COURT: On the issue of public policy considerations, both sides are raising significant public policy concerns that both sides

have. What is the plaintiffs' specific response to The University's exercise of discretion in withholding the disclosures because it would -- withholding the reports because it would breach representations The University made to these witnesses regarding confidentiality?

MR. JOHNSON: So that conflates two different exemptions purportedly applicable to the ORA. In the first instance, the personnel records exemption is what provides a discretionary opportunity to The University to decline disclosure if it determines that privacy interests outweigh the public's right to know.

THE COURT: They're raising that.

MR. JOHNSON: They raise the personnel exemption, but that's very, very separate from the question of the attorney/client privilege or the Title IX, slash, confidentiality concerns with respect to witness.

THE COURT: Let's look at it under the personnel exemption then.

MR. JOHNSON: Under that exemption, the balancing test would concern the privacy interests of the personnel, the privacy interests of the person about whom the records are maintained.

Presumably, in this instance, David Boren. And The University would have to determine that Boren's privacy interests outweigh the public's right to know.

THE COURT: I mean, David Boren's name is out there, but there's other employees, and there's other names in these reports that -- you know, the concern is that they were assured confidentiality, and here we are with the Court being asked to completely ignore that and release them.

MR. JOHNSON: Well, importantly, The University claims they were promised confidentiality. That has not been substantiated by any evidence in a record, and it has been contradicted by a statement provided by one of the actual witnesses to the investigation, so at minimum --

THE COURT: Ms. Long testified at length that these witnesses were assured confidentiality.

MR. JOHNSON: Ms. Long also testified that she was not present for any of the interviews themselves. Ms. Long's testimony, in any event, is a fact dispute, as between evidence applied by Mr. Eddy and testimony supplied by Ms. Long.

That's a fact dispute that the Court cannot resolve at this juncture.

THE COURT: Also in the disclosed portions of Mr. Eddy's portion of the report, Jones Day is making statements in there essentially that, "We assured confidentiality, wanted confidentiality. Apparently, he didn't," something to that effect.

MR. JOHNSON: It says that Mr. Eddy was asked not to -- asked to maintain confidentiality of the process. And so The University's position is essentially that their protection of the constitutional interests of all of these people relied on some 60 to 70 people never telling anybody what they heard. It's just not credible. The University's own policy says that they cannot legally maintain confidentiality, and that victims and witnesses have to be advised of that.

THE COURT: And what about the chilling effect concern? That's raised consistently in The University's briefing that if this -- these reports get released it's going to have a huge chilling effect on witnesses coming forward in the future.

MR. JOHNSON: Yeah, I think that's a

disingenuous argument. Not only is it wholly speculative, but, more importantly, if The University wanted best to protect the identities or the information that was provided to them by vulnerable witnesses then they ought to have comported themselves and handled themselves differently. The way you would do that, in the first instance, is suggesting to those people that they contact and consult with private counsel, counsel that's loyal to their interests, not by compelling them to attend a university -- I'm sorry -- to attend an interview with privately retained counsel under the auspices of their employment agreement. Those kinds of things aren't the sort of steps that you take when you're trying to protect witnesses; they're the sort of steps that you take when you're trying in the most urgent way possible to determine everything that's going on out there so you can make an informed decision about protecting your own self from liability.

THE COURT: Well, to date, the only individual that is in any of these evidentiary materials that has shared their identity is Mr. Eddy, so isn't it -- and I've seen the

reports. Isn't the only reasonable inference to draw from that fact is that these witnesses don't want their identities disclosed?

MR. JOHNSON: No, I don't think that's fair.

THE COURT: Have any come forward, then, who have participated?

MR. JOHNSON: Well, the Court would know better than do we because the Court gave The University an opportunity to actually inform interested parties, and give them an opportunity to come to the court and oppose disclosure of the reports to the Court for in-camera review, and, in general, to be apprised of this litigation. So the fact that none of them did so I think supports just as reasonably the opposite inference.

Importantly, the case law is very clear on this. To the extent that there is a legally-protected interest in the identifying information, with respect to some or all of the witnesses, then those portions of the report can be redacted to protect that interest while simultaneously facilitating the public's overwhelming right or overwhelming interest in transparency, the public's right to know.

THE COURT: How about the public policy concern that The University has that this undermines The University's ability to fully investigate matters that the law requires them to investigate; that if these things are all open records that it's just going to be very difficult for The University to conduct any type of investigations going forward?

MR. JOHNSON: Title IX regulations set forth an actual procedure to follow, in order for Title IX regulations to protect to the maximum extent that they are possible the identities and information related to complainants. The University followed none of those procedures here.

This wasn't a Title IX investigation. Title IX investigations are conducted by the Office of Institutional Equity. They aren't conducted by the Office of Legal Counsel or by privately retained counsel. Even where independent attorneys might perform an investigatory function under the Title IX procedures, they do so through the Office of Institutional Equity.

All the materials make clear what happened here, which is that the Board of Regents

asked Jones Day to provide it insight and information and analysis related to its liabilities. That's what Heidi Long's Affidavit says. That's what Heidi Long said in her deposition.

Nowhere does the Office of Institutional Equity reach out to Jones Day and ask it to perform a Title IX investigation. Jones Day's attorneys were not trained or qualified Title IX investigators. The *Alumni Donor Report* has nothing to do with Title IX. The procedure by which the investigations occurred in no way mirror the procedures mandated by Title IX.

If, in fact, this was a Title IX investigation, then The University's exposed itself to must greater liability by failing at every turn to observe any of the procedures or policies that Title IX mandates.

THE COURT: On the issue of redacting witness identities, I get your argument that you're offering a stipulation to redact their identities, but disclose the contents of their statements and the context of their statements, and things of that nature. We're talking about a university setting. A university's a pretty

tight-knit community, so if, while a blacked-out name blacks out the name, if you've got everything else, isn't it pretty easy to determine just who that person is when you're looking at all the other information that is -- so, I guess, isn't there an indirect concern about confidentiality with just blacking out someone's name? It's not hard to determine who that individual is and what they're saying, and so then all of the concerns about confidentiality are still there.

MR. WEEKS: And the short answer, Your Honor, is I don't know, because I haven't read the reports. They've been denied to us. So for me to answer the question about what effective measures could be taken to redact identifying information would be largely speculative, but the law mandates exactly that approach. The law mandates that if there are portions of the report that whether because they are privileged, or because they fall within any other exception, if there are portions of the report that ought not be disclosed then those portions are to be redacted, and the remainder of the report is to be provided.

There's simply no legal basis for the conclusion that the entirety of the reports ought

to be withheld from public disclosure on the basis of the identifying information relating to some, not all, of the witnesses who participated.

THE COURT: So I think you're referencing 24A.5(3). That's the mandate that "Any reasonably segregable portion of a record containing exempt material shall be provided after deletion of the exempt portion." I guess my questions go to, if you have experience in this space, how would the mechanics of that work? Who would do that work? The University? The Court? I guess I'm looking for just the logistics of that.

MR. JOHNSON: So ordinarily -- let's just take privilege as the example because I think it's the most familiar one. Ordinarily what would happen is if The University were to assert a privilege over some portion of the document, The University would make the initial decision to redact those portions of the document. The University would then provide a privilege log that indicates the nature of the information that was redacted, and the legal basis of their decision to apply those redactions. If we were to contest that matter, then the Court would have an

opportunity to review the unredacted portions in camera, in order to test The University's assertion of a privilege.

None of that has happened here. They've simply wholesale said, "We decided all of it is privileged." They even say that the information included in it is privileged. Information can't be privileged. Communications are privileged. The communications that precede the reports themselves, that precede the commencement to the investigation themselves, that information can't be privileged. The information that's relayed by third parties, that information can't be privileged, and it doesn't become privileged simply because The University took the step of asking an extensive lawyer to put a premature letterhead on it.

THE COURT: Thank you for that. Were you about to wrap up?

MR. JOHNSON: I'm here at the Court's pleasure.

THE COURT: I want to make sure I don't have any -- Mr. Weeks is going to speak to waiver, and what else is he going to speak to?

MR. JOHNSON: The personnel exemption;

the informer's privilege; the deliberative process exemption; any of the other remaining exemptions.

THE COURT: Let me just think for a moment.

There hasn't been much briefing on work product, but it's been raised, and there's been a bit of it, and it was certainly presented today. You touched on it. I guess I'm looking for a response -- a more specific response to the work product argument here that these reports, not only are they privileged, but they also constitute work product, and, therefore, they're protected from disclosure to get into the anticipation of litigation standard there. And we've got two reports: The *Alumni Donor Report* and the *Sexual Misconduct Report*. So any specific response on why these don't fall under work product?

MR. JOHNSON: Yeah. And, to be clear, Mr. Weeks will be addressing the work product doctrine at length.

THE COURT: Okay. That's fair.

MR. JOHNSON: I don't want to steal too much of his thunder, but our argument is obviously that the waiver doctrine applies equally to the work product doctrine as does to the

attorney/client privilege. As the Court intuited during Mr. Vance's presentation, the work product doctrine makes little sense where you are disclosing the information to the most probable adversaries in the litigation that you anticipate may be on the horizon. Here the reports were shared with *U.S. News & World Report*, who was the most obvious adversary in whatever hypothetical litigation might concern report No. 1, and it was shared with President Boren and one of his victims, with respect to report No. 2. Those are the most probable adversaries in any potential litigation, so it's hardly credible to suggest that those are the only people who should be able to see work product, the people who might be suing.

THE COURT: And I know Mr. Weeks is ready to be heard on that. So, Mr. Johnson, thank you. That's very helpful. I appreciate it.

Mr. Weeks, go ahead.

MR. WEEKS: Yes, thank you. Thank you, Your Honor.

I am going to discuss waiver, and I will discuss the asserted ORA exemptions. But, first, the Board of Regents didn't brief work product in

its February 2023 motion, so that issue is not before the Court, but they've raised it on reply and here today so I'll just touch on it briefly.

Unlike the attorney/client privilege, attorney work product privilege belongs to the attorney, not the client, so here Jones Day would have to assert that work product privilege. That case is *Ellison vs. Gray*. That's a 1985 Oklahoma Supreme Court case. Even if Jones Day were to assert that privilege, it would be wrong. Reports at issue aren't drafts; they're the final deliverable from Jones Day to the Board of Regents. There's also nothing in the record indicating that the reports contain opinion. Rather, the record indicates, and we believe that the Court's in-camera review probably confirmed that the reports include extensive recitations of fact.

THE COURT: Don't the reports -- some of the portions of the report have already been made public. Don't they all say "work product" on every page and "attorney/client privilege" and "confidential" -- confidentiality? So isn't that a pretty affirmative statement from Jones Day that they are asserting work product?

MR. WEEKS: No, Your Honor. I think, at some point during the process, while those reports were being drafted, Jones Day might have rightly have asserted work product privilege over the reports, but, at the point where they were the final deliverable that they delivered to their client, they're no longer attorney work product. They are a report delivered to (inaudible). It's not a draft, it's not notes.

Just as with attorney/client privilege for public entities, as Your Honor recognized, in order to assert the attorney work product privilege, the reports would have had to have been prepared in anticipation of litigation or in preparation for trial, and nothing -- nothing in the record indicates that's the case.

We know that Jones Day didn't create the reports for that purpose, and we know that because the Board of Regents didn't treat them confidentially because, as I'll show here shortly, the Board of Regents repeatedly disclosed significant portions of the reports to third parties, including adverse parties.

These disclosures of the reports undermine each of the exemptions and privileges

raised by the Board of Regents in this case. The disclosures waived the attorney/client privilege, and, to the extent that it is before the Court, they waived the work product privilege.

The disclosures that involved the identities of informers to parties with cause to resent the speaker waive the informer's privilege. And disclosures also breach the confidentiality needed for the Board of Regents to maintain its asserted -- the personnel records exemption, the Attorney General's litigation files exemption, and the executive privilege. Again, those exemptions require the Board of Regents to have maintained confidentiality, which it did not do.

So this is a fact inquiry. So keeping in mind that fact inferences fall in favor -- I would like to take Your Honor through some of the disclosures starting with the *Alumni Donor Report*. The University disclosed the information in the *Alumni Donor Report* to the press. Former President Gallogly and General Counsel for the Board of Regents, Anil Gollahalli, held a press conference at which they discussed the findings in that report. At that press conference -- if we look at the last paragraph here -- Gollahalli also

handed out documents that underlie the first report.

We can see that this document, which was produced to us in discovery, matches the information disclosed by Gollahalli at the press conference. This is Plaintiffs Exhibit J. It's part of a set of documents that form the factual basis for the first Jones Day report.

There are a number of cases that we cite on this pretty obvious point, that disclosures to the press or the public are waivers; right? We cite the *Dougherty* case out of the Eastern District of Michigan in which a draft press release was sent to the FDA; we cite the *Electro Scientific Industries* case out of the Northern District of California, which involves disclosures made through news releases; but maybe the best case for us on this point is the *Doe vs. Baylor University* case in which Baylor university released a summary of Pepper Hamilton's fact findings and list of recommendations publicly on its website. This mirrors the disclosure by The University in this case.

THE COURT: In *Baylor*, though, isn't this quite factually distinguishable from *Baylor*

on the issue of waiver? *Baylor* seemed to clearly have waived its privileges. It released two documents. One was a 13-page summary of the investigation and its conclusions, entitled "Findings of Fact" and another ten pages of recommendations. That's pretty clear waiver. At least, the Court thought so. In this case, isn't this a far cry from that type of disclosure?

MR. WEEKS: I think what happened during this press conference, and what happened during a few of the other disclosures that I'll discuss momentarily is quite similar to that disclosure.

THE COURT: Okay.

MR. WEEKS: The University disclosed a summary of the Jones Day findings in the *Alumni Donor Report* to the press.

THE COURT: You're calling this a press conference. Mr. Vance didn't know what I was talking about. And I think this is the thing that I was referencing. Do the plaintiffs have any record of this press conference about what was actually said? I know what's been reported here, and that's public domain there, but is there any record of officially what was disclosed at this press conference?

MR. WEEKS: Well, it's discussed also in former President Gallogly's Affidavit at paragraphs 13 and 14.

THE COURT: But not on an official record. I mean, years have gone by, and --

MR. WEEKS: To the extent that there's an official record, that would be something within The University's control, and we think that should have been produced to us in discovery; right? That would be a failing of The University in the discovery process because we certainly asked for all information involving the potential waiver of this information.

THE COURT: No one from the press has come forward and said, "Here's the recording I made of the press conference, and it's all right here"?

MR. WEEKS: I mean, I think the Court can take judicial notice of the recording, the contemporaneously-made recording of the press conference.

THE COURT: I can, yeah. Okay. I'm just looking for something -- the actual words that were -- the voices, I guess. Anyway, so go ahead.

MR. WEEKS: The University also disclosed the information in the financial misconduct report to David Boren and his attorney; right? This is the statement of former President Gallogly on the screen, and it's inconceivable here that Boren and his attorney would have responded to the report without having seen it. Again, this is disclosure to an adverse party. We cite the case, *Buffington vs. Gillette Company*, a Western District of Oklahoma case from 1980, voluntary disclosure to an adverse party of hospital records, waived the entire doctor/patient privilege in that case.

THE COURT: Yeah, there has been -- The University is not disputing it disclosed a portion *of the Sexual Misconduct Report* to Mr. Brewster and Mr. Boren, and they've indicated their reasons for doing that, and they characterize it as a catch 22 situation.

So is there a scenario that you could see where OU could comply with, say, a grand jury subpoena, and yet retain its privilege to the reports? Because that's part of the -- by sharing it with Mr. Boren, and by releasing it to the OSBI, they waived their privilege. Is there a

manner in which they could comply with the subpoena, and not waive its privilege? Could they have done something different?

MR. WEEKS: Just to clarify quickly, The University did disclose the second Jones Day report to David Boren, but this article concerns the disclosure of the first Jones Day report also to David Boren.

With respect to Your Honor's question, I think it would depend. It would depend, and we would need to see the subpoena. We would need to see the subpoena and any related communications; we would need to know the date of the subpoena and the date of the disclosure; and we would need to know what The University had done to contest the subpoena.

THE COURT: The University said you guys got into some semantics argument during discovery, and they were ready to give it to you, and you never asked for it.

MR. WEEKS: I don't think that's correct, Your Honor. In fact, we can show you the discovery request which very clearly contemplated the subpoena.

THE COURT: Okay.

MR. WEEKS: The University also made disclosures to *U.S. News & World Report*. We can see here that the Director of the Office of Institutional Research and Reporting sent a letter to *U.S. News* describing Jones Day's findings; right? That's not on the slide here, but that's Plaintiff's Exhibit H. *U.S. News* was clearly a third party here, and probably an adverse party.

THE COURT: Let's assume, for argument sake, that the reports fall under attorney/client privilege, and so you're indicating instances of waiver. One of the first questions I asked The University is, well, who gets to determine whether waiver's going to be made, or not? And they indicated it's the Board of Regents.

You're indicating that there is an employee who shared some information, and then President Gallogly and Mr. Gollahalli shared information.

MR. WEEKS: So even accepting The University's argument as true, which I don't think it is, the inclusion of Mr. Gollahalli at that press conference is significant because at the time he was counsel for the Board of Regents so it's not as if Mr. Gallogly was acting alone here.

Second, I think that of course -- of course The University President can waive privilege on behalf of The University. The University president is essentially the spokesperson for The University in that instance. This followed the Board of Regents's receipt of the first Jones Day report, and so the idea that The University President would be holding this press conference on his own, in some sort of unauthorized manner, I think is completely unsupported in the record, and the inference -- I think the strong inference would be that that was authorized by the Board of Regents. Even if it wasn't, I think there would still be waiver.

Just to finish on the disclosures made to *U.S. News*, this disclosure of the information in the first Jones Day report to *U.S. News* was later reflected in *U.S. News* publications and in a letter back from *U.S. News* to The University. And, I think, importantly, that's not all; right? There's a fact inference that more information than is in the exhibits in our response was actually disclosed to *U.S. News*.

If Your Honor compares Exhibit "H" with Exhibits "J" and "Q" -- these are Plaintiffs'

Exhibits "H," "J" and "Q" -- you'll see that *U.S. News* was in receipt of more information than is reflected in the letter, the only correspondence that The University has provided to Plaintiffs so far; right? The inference here is that there was more to this disclosure that Plaintiffs haven't yet been provided in discovery that's reflected back in these communications from *U.S. News*.

THE COURT: I've been looking very closely at Plaintiffs' Exhibits on this issue of waiver and the extent of material that has been provided to third parties, but, in the Court's review of it, doesn't disclosure of privileged information require more than simply acknowledging a discussion of underlying facts within a privileged document?

So there's some -- so I see what that says there. It says, "OU also disclosed to *U.S. News* that for many years its Health Sciences Center data was incorrectly included with the OU data reported to *U.S. News* for 'Our Best Colleges Rankings,'" period. So is that -- do you take that to mean that, okay, the Jones Day report is fair game now because they disclosed to -- that seems to me to be, "Here's a summary of what we

found. The report is much more detailed, but here's essentially the gist of it."

MR. WEEKS: Yeah. So there's a couple of issues there; right? We have asked for all communications between The University and *U.S. News* relating to or regarding The University's misreporting of alumni donor data. And, as I just mentioned, if you compare those exhibits, it's utterly apparent that more information went from The University to *U.S. News* than we've received from The University in discovery, so there is missing information in the record about this; right?

The fact that we haven't received that information from The University, despite requesting it here in our Request for Production No. 11, creates, I think, a fact inference that needs to be found in NonDoc's favor; right? We need to either have a shot at full and fair discovery, or the fact inference has to be that more information was disclosed.

The University also -- the Board of Regents also disclosed the information in the financial misconduct -- the *Alumni Donor Report* to -- through its meeting minutes. After it

retained Jones Day, the Board of Regents reported in its own meeting minutes a discrepancy in its response to the Voluntary Support of Education survey, the VSE; right? We can see here this is a -- we can see from this -- how serious the misreporting was; right? This is a chart from that same set of meeting minutes that shows that about $160- to $170 million per year were misreported as cash donations, rather than in-kind donations, over a period of three years. We suspect that the Court's in-camera review of the first report confirms that this information was present in the first Jones Day report, and possibly was even uncovered through the first Jones Day report.

Now, as to the second Jones Day report, the Board of Regents disclosed a portion of the *Sexual Misconduct Report* to Jess Eddy. Here's what we know. As Blake mentioned, The University told Jess Eddy earlier in this same exhibit, Plaintiff's Exhibit "C," that he was not a Title IX complainant. Two weeks later it decided to let him see portions of the second Jones Day report.

Now, The University made a major concession, during its presentation, that this

portion of the report is not exempt. They said that if Jess Eddy were to request it they would release it to Mr. Eddy. There is no justification for The University continuing to withhold that part of the report in this case, given that major concession that it has just made.

THE COURT: Whether Mr. Eddy believed he was a complainant, or not, isn't the crucial issue whether The University deemed him a complainant? Because, otherwise, why would they have released it to him, if he's not -- if both sides agree, "you're not a complainant," that doesn't make sense for The University to have shared it with him.

MR. WEEKS: Well, I don't think the crucial issue is The University's belief on this, in fact the reality of --

THE COURT: Yeah.

MR. WEEKS: -- but, even taking your point, I think, earlier in this Exhibit "C," The University represents to Jess Eddy, "You are not the complainant that initiated the second Jones Day report." It's not on the screen, but it's in Plaintiff's Exhibit "C."

THE COURT: Well, and there's reference

in those e-mails to making arrangements to look at the report, as we made with other witnesses, I think --

MR. WEEKS: Correct. And I will get to that.

But I just want to note, Jess Eddy, in this situation, held no power over The University. He didn't have a court order. He wasn't employed by The University at this time, but he was advocating for himself; right? He was advocating for himself in the press and in private, through correspondence with The University, and The University made a calculation in this moment, it made a decision to disclose a significant part of the second Jones Day report to Jess Eddy, and rightly so.

Jess Eddy was a victim of Boren's alleged sexual misconduct. He was adverse in this case; yet, The University made this calculation. And apparently it made that calculation, not only for Jess Eddy, but for at least one other witness; right? There's a fact issue on this point, but the inference here is, given this correspondence, that The University made disclosures to other witnesses.

THE COURT: Is there any evidence that any other witness, other than Jess Eddy and Mr. Boren, were shown excerpts of the *Sexual Misconduct Report*? Is that it, that statement, that they can arrange for that, "as we have with other witnesses," or is there anything else, other than that, that is evidentiary indicative that other witnesses were shown excerpts of the *Sexual Misconduct Report*?

MR. WEEKS: No, I think this is pretty unequivocal. The University says in this correspondence that it has arranged for other witnesses to review the second report.

So The University also disclosed the *Sexual Misconduct Report* to David Boren and his attorneys. They conceded that in their presentation. Boren, clearly adverse, yet The University let him review the report.

This last article -- right? -- the last article said that President Boren would have five days to review the report. That previous article that I showed was published April 17th. Boren was given extra time, an additional week with the report, until April 29th. And, as we saw earlier, his attorney then proceeded -- in Blake's

presentation we saw that his attorney, Brewster, proceeded to make statements about the information in that report to the press, following his receipt of the report. He said, "The sun has come up"; right?

We've cited the case, *Chandler vs. Denton*. This is a 1987 Oklahoma Supreme Court case. Even just conversing within earshot of an unnecessary third party waives the privilege, let alone disclosing a report to an adverse party. And I think the Court can be forgiven for asking, given The University's presentation, was this report ever supposed to have been confidential, or was it compiled with the express knowledge that it would be disclosed to Boren in this case? Right? I think the inference here has to be the latter.

The Court is probably also wondering, at this point, where is this response from Boren in the record; right? We asked for it in discovery. That request is here. The University confirmed that that response exists, yet they refuse to produce it. They also refused to produce correspondence between The University and former President Boren's attorney. There's no privilege over that correspondence. That's correspondence

between The University and a third party. Those are disclosures made to third parties.

The fact inference here has to be that Boren was given the entire report, that he was given it voluntarily, and, if there is communication from him and The University that says otherwise, it's not in the record. So that's how the inference has to fall, Your Honor.

Former President Gallogly also stated that The University disclosed the report to multiple crisis management firms; right? That's in the record. And, frankly, that makes sense -- right? -- that The University brought in crisis management firms to deal with the allegations in the second Jones Day report, but The University has never addressed those -- that fact in any of its papers. And, again, that would be waiver.

There's a final fact issue that I would like to discuss here on waiver involving The University's disclosures or the report to the OSBI. OU has conceded that it disclosed the reports in full to OSBI. The Court saw this earlier. This is attorney argument -- right? -- nothing more from Defendants' opening brief, and its argument is that it did so pursuant to a Joint

Interest Agreement, and in response to a multi-county grand jury subpoena. But, as we said before, if that's true, why aren't those documents in the record? We requested them. We requested those documents. The University has failed to meet its burden. It needs to demonstrate to meet its burden that the subpoena exists; that the dates match up; that the subpoena actually compels The University to produce the reports; and that the subpoena wasn't narrowed by the parties after receipt. None of that. None of that is in the record. The fact inference just has to fall in NonDoc's favor on this point. And the same is true on the first report. Just like with the second report, we made a document request that would encompass a subpoena to The University.

The Court can't determine whether a subpoena compelled The University to do something, unless it sees that subpoena; right? And Plaintiffs can can't adequately test that claim unless the subpoena is produced through discovery. Same for the Joint Interest Agreement.

And just stepping back on the Joint Interest Agreement, really, what joint interest could there be between The University and OSBI in

this matter? OSBI was investigating a former university official. That's essentially the opposite of a joint interest.

I just want to say another couple words on the discovery issues in this case.

THE COURT: Uh-huh.

MR. WEEKS: There's really only a few data points that the Court needs on discovery. We served our discovery requests on December 21, 2021. We did not receive any meaningful discovery from The University until 17 months later, May 22, 2023. Meanwhile, The University filed its opening brief on February 13, 2023. We didn't have meaningful discovery at that point. That took until May, and then we had 25 days -- 25 days to review the discovery, to take depositions, and to brief our response to summary judgment. Seventeen months, and then 25 days. No time was permitted by Judge Walkley to follow up on any discovery deficiencies that we saw. No time was permitted to promulgate additional discovery requests. That discrepancy, 17 months and 25 days, was prejudicial here. And more to the point, it left discovery in this case incomplete.

The University has chosen to litigate

this case in a certain way. They've chosen to fight tooth and nail every time we make a discovery request, dragging its feet, ignoring its discovery obligations. And, to some extent, that's its prerogative, but it doesn't get the benefit of the doubt for playing games in discovery. The University's actions has consequences, and the consequence here is that The University has created huge gaps in the fact record that it needs to meet its burden on summary judgment; right? Summary judgment can't be granted on the record that exists in this case. We need a narrowing of the issues, which I'll discuss shortly, and we need -- if any issues remain, we need a full and fair opportunity to take discovery.

So I'll move on now to the ORA exemption that the Board of Regents claims. It's failed, as a matter of law and on the facts, to show that these records should be withheld under the personnel records exemption. So, at the threshold here, not every record that mentions any university employee is a personnel record. Personnel record is a term of art. It refers to a certain type of employee record. And, in fact,

here we have former President Boren's personnel file. That was produced to us through discovery. They've given it to other journalists as well, and that's Plaintiff's Exhibit "N." This is what a personnel record looks like.

The Jones Day reports are something else; right? There's no evidence in the record that the first report relates to specific employees at all; rather, the first report seems to be an investigation of the development department, an entire department of The University. Even assuming, for the sake of argument, though, that these reports are personnel records, the Court would still have to determine, as a fact matter, whether they fall under 24A.7(A) or 24A.7(B). If they fall under "B" they cannot be withheld, and "B" includes final dispositions leading to the firing or forced resignation of an employee. If they fall under "A." there is still a fact analysis that needs to be conducted, and the Board of Regents hasn't even attempted to meet that burden; right? This is the *Ross vs. City of Owasso* case from 2020. And, as we point out, that case resulted in the release of the report in full.

Now, first there has to be a vote, a formal decision by the Board of Regents to maintain confidentiality of the record in question. There is nothing in the record indicating that that type of formal discussion occurred. And, in fact, the record indicates the opposite.

As we pointed out earlier, we have a highly respected member of the Board of Regents, former Governor Keating, speaking in the press saying that it's the universal feeling of the Regents that the reports should be released. Even if there was a vote, that wouldn't be the end of the story; right? The public interest in the reports has to be balanced against the showing made by the Board of Regents regarding the privacy of its personnel, and here the Board of Regents has not made that showing. There's no showing at all for the first Jones Day report. And, for the second report, at best, we have the attorney argument, we have Mr. Vance's personal concern, and we have the bare bones statement of Heidi Long about why it's important to keep the public in the dark about the school's reaction to alleged sexual misconduct by its own president.

On the other side of the occasion, we have Senator Lankford speaking to the press; we have Governor Keating -- former Governor Keating; we have Julie Daniels, in her Affidavit; we have Plaintiff, a highly-respected reporter, in his Affidavit speaking about the public interest; and we have former President Gallogly saying that he resigned because The University wasn't willing to step up and do the right thing here.

We also have a set of letters that seemingly authorizes bonus payments; right? Public money to Boren's inner circle, in the event that they were not -- that they were, like a -- we have a letter from the faculty senate -- that's Plaintiff's Exhibit "T." This is Plaintiff's Exhibit "U." We have a letter from the faculty senate urging transparency, and saying that failing to do so undermines victims, the opposite of The University's stance in this case.

And we have the fact that over one-and-a-half million dollars, at least, in public funds was spent to generate those two reports; right? The public interest here could not be stronger. The University is not separate from the public; its accountable to the public;

it's part of the public; and transparency will make The University stronger going forward.

The Board of Regents has also failed to demonstrate, both legally and factually, that an exemption meant for the Attorney General's litigation files should apply in this case. There's a statutory interpretation problem that can be resolved, as a matter of law, that Your Honor identified earlier. Essentially, this is an exemption meant for law enforcement litigation and law enforcement adjacent investigations. It just doesn't fit here. And so The University's argument, as I understand it, is that Jones Day was an agency attorney authorized by law to conduct an investigation. It doesn't make sense on a plain text reading of the statute, and it's certainly not the meaning of the statutory language.

That term, "agency attorney authorized by law" is explained in the *Rivero* case. If the Court looks at paragraphs 55 and 56 of *Rivero*, "agency attorneys means attorneys who are specifically authorized by the Oklahoma Administrative Code to work with the Attorney General's office to conduct investigations."

Right? In *Rivero* that was the medical examiner board looking into medical licenses. That's what's meant by "agency attorneys authorized by law," specific regulations in the Oklahoma Administrative Code that authorize an agency to conduct an investigation on the Attorney General's behalf.

OU has never shown, and it can't show that it was acting in a law enforcement capacity or that the reports were compiled in anticipation of litigation. In fact, we know from multiple places in the record, including the Affidavit of Jess Eddy, that The University never reported the conduct in either of the reports to law enforcement. Jones Day had no law enforcement or licensure, so this exemption does not apply.

The same issue is present with the Board of Regents's assertion of the informer's privilege. That privilege, as Your Honor recognized, only applies to investigations conducted by law enforcement agencies. It's never been clear, I don't think, how that would apply in any way to the first report.

The University did not report the allegations in the first Jones Day report to law

enforcement. The Court can refer to page 71 of the long transcript on that point. And, as we see on the slide, the same problem is present for the second report. The exemption also only applies to the identity of the informant; right? The University's stance that it would cover the entirety of both reports simply can't be squared with the law, in any way, especially given the requirement in the ORA that exempt information be redacted, and that the remainder of a document must be produced.

And finally, application of the informer's privilege requires a showing that the informer came forward voluntarily to law enforcement. This only applies to Jess Eddy. He's the only one who went to the police. No one else at any level of university leadership did that, and there's nothing in the record to demonstrate that any victims of former President Boren's alleged conduct came forward by themselves, rather than being approached by Jones Day.

The *Roviaro* case, the Supreme Court case from 1957, in our response brief, "Persons who supply information, only after being interviewed

by police officers, or who give information, as witnesses, during the course of an investigation, are not informants." Right? We also cite the (inaudible) case, the Fifth Circuit case. "Witnesses approached and interrogated are not eligible for the informer's privilege."

The executive privilege that The University asserts also does not apply, as a matter of law. And, even if it could, which it cannot assert that privilege, The University has not remotely met the fact burden that it would need to make to demonstrate that privilege.

As The University concedes, it is asking the Court to take up the pen as a legislator, and expand the scope of the ORA exemptions to include an executive privilege for the Board of Regents. That holding does not follow from *Vandelay Entertainment vs. Fallin*. The holding in that case rested on the specific constitutional powers of the Governor. These are powers that the Board of Regents doesn't have.

The Court, in that case -- the Supreme Court in that case also premised its holding on the importance of separation of powers between the state executive branch and the state legislature.

Again, it's not an issue for the Board of Regents.

Constitutional powers granted to the Governor, under Article VI of the Oklahoma Constitution, simply dwarf those given to the Board of Regents. I don't think that point can be debated. The exemption simply isn't available to the Board of Regents here.

THE COURT: I'm being asked to expand that.

I want to touch back on the personnel records exemption, 24A.7. I'm paraphrasing, but, at the sole discretion of the public body, a public body may keep personnel records confidential which relate to internal personnel investigations, including examination and selection material for employment, demotion, discipline, and there are some other matters there. But the *Alumni Donor Report*, The University's claiming that that's exactly what this was. They were investigating some alleged wrongdoing from its personnel, and they got the information, they took action. Those folks are no longer with the university. Isn't that the very essence of a personnel investigation involving employment, demotion or discipline?

MR. WEEKS: So I think our understanding, based on the record of the first Jones Day report, is that it's an investigation of the actions of a department of The University, rather than specific personnel.

In addition, that statutory language is interpreted by the *Ross vs. City of Owasso* case, so, even if there is a finding that it's that type of personnel record, there still needs to be a fact finding that there is a vote or a formal decision by the Board of Regents to make that record confidential; and, further, there needs to be public interest balancing. So the discretion there isn't a complete deferral of discretion, as The University has claimed, but rather involves multiple fact steps that haven't been shown in the record here.

THE COURT: Thank you.

You were finishing up on the deliberative process exemption --

MR. WEEKS: Yes, Your Honor.

THE COURT: -- or privilege.

MR. WEEKS: Yes, yes.

So, even if that privilege were available to The University, The University would

not, at this point in the case, have met its burden of demonstrating that the privilege applies to these records. It would need to show that the record were both predecisional and deliberative. Predecisional means that it preceded a decision made by the Board of Regents. The record lacks that information. What decision did the Jones Day reports precede? What were the dates of that decision, and how do they compare to the dates of the reports; right? None of that information is in the record.

And deliberative means that the record in question was not a final deliverable; right? That's also not the case. These weren't draft reports. The Board of Regents wasn't providing input on Jones Day's opinion here. They just received a final deliverable from Jones Day. There is no deliberation that went into the creation of these reports, from the standpoint of the Board of Regents.

And finally, like other privileges, the executive privilege, the deliberative process privilege could be waived through the Board of Regents's failure to keep the reports confidential. Its disclosures in this case are

further proof that the executive privilege would not apply, even if it were available to the Board of Regents.

This is not a case where deference is granted to the Board of Regents. In fact, the Open Records Act is set up so that public institutions are more accountable to the public, not less. Not only does the Board of Regents carry the burden of proof in demonstrating that its asserted exemptions and privilege exists and are available to it, but on this motion it was to demonstrate that there are no genuine issues of material fact.

As Your Honor recognized, the inferences and the conclusions in the record, at this stage, have to be taken in favor of NonDoc. As Your Honor also recognized, portions of the record that aren't exempt must be released. The Board of Regents has refused to acknowledge that requirement, even to the point of conceding that portions of the reports would not be exempt, and it has set up an almost impossible hill for itself to climb by refusing to do that, and instead moving for summary judgment on the entirety of both reports.

Its litigation tactics are its own prerogative, but the rules for summary judgment do provide the Court with a tool to deal with a summary judgment movant who has asserted multiple claims with no legal merit, as the Board of Regents has done here.

Under Rule 13(E), the Court is required to grant summary judgment in NonDoc's favor as to any privilege or exemption for which there are no set of facts under which the Board of Regents can carry its burden. We think that's the case for many, if not all of the exemptions raised by Defendants in this case. And even if it's not the case for all of them, the Court can and must grant partial summary judgment in our favor, and dispose of the claims that have no legal merit. That would narrow the issues in this case, and it would allow the parties to move forward in a more focused manner.

And that's one way we see this case moving forward. If the Court grants partial judgment narrowing the issues, NonDoc will assess any remaining exemptions and privileges that remain in the record, and, at that point, we'll either seek a discovery conference, and we'll

advise the Court of remaining discovery issues, some targeted limited discovery necessary to make fact determinations in this case, or we'll make a determination, and we'll advise the Court that we're ready to move forward either with our own summary judgment motion, or, as Your Honor indicated earlier, towards a bench trial.

Transparency will answer the questions posed by this report. It will make The University safer; it will make The University more accountable; it will make The University better run. Accordingly, we would ask the Court deny The Board of Regents's motion, and either grant full or partial summary judgment in favor of NonDoc. Thank you.

THE COURT: Thank you very much, Mr. Weeks. That's very helpful.

Okay. Mr. Vance, I know you want to be heard. It's 12:30, and I want to hear from you. In the interest of efficiency, and the volume of information that's already been presented, I would hope that we could limit it to ten minutes.

MR. VANCE: I can do that.

THE COURT: All right. Go ahead.

MR. VANCE: Thank you, your Honor, for

granting The University a quick rebuttal. As it relates, their -- I think the plaintiffs' position has lost the forest for the trees. All of the arguments I hear articulated in response are largely academic exercise about how attorney/client privilege works in the abstract or how these investigations might have occurred elsewhere, but The University is dealing with the facts on the ground. We're dealing with what actually occurred here. So when we hear Plaintiffs get up here and say, "How is it possible Jones Day is acting as both consultant, and providing an opinion about potential civil liability," well, attorneys are pretty good at chewing gum and walking at the same time. There's no indication or reason that Jones Day can't provide multiple legal services to a client. And I think Plaintiffs' counsel is aware that when clients come to attorneys, the attorney is analyzing a legal issue -- the client doesn't know what the problem is going to be -- and then the attorney gives them legal advice. That's the only way attorney/client privilege can function.

THE COURT: Do you not see a conflict of interest in Jones Day performing a Title IX

investigation while, at the same time, providing legal advice to The University in anticipation of litigation?

MR. VANCE: No, Your Honor, I think -- because this exact scenario was largely litigated in the *Baylor* case; but, no, there's no contradiction there because The University has to comply with federal law. You know, it's not good or bad that The University has to make that compliance. That's something The University has to do. Federal law also dictates the confidentiality that a company has to process.

The University is not sitting over here making determinations on if it wants to release Title IX investigation, or not. The University has no authority to do that on its own. It doesn't matter who requests it.

Now, to the point earlier about Mr. Eddy, I would direct the Court to the transcript where the discussion of his status is handled by Ms. Long, but, as it relates to him getting anything as a complainant, that's a slightly different question than the privilege issue before the court involving Jones Day, and, as we said, the *Baylor* case held that the same

status was available.

And, on the *Baylor* case, I don't understand -- it is disingenuous for Mr. Johnson to get up here and say, "You should look at *Baylor* for the waiver issue, but, on that privilege issue, don't read that part of the opinion," and say, "The University is relying on out-of-state decisions, but look at the Pennsylvania Supreme Court." This Court knows the authorities in Oklahoma, and The University has relied on *Chandler vs. Denton* for attorney/client privilege, and the *Municipal Attorneys* case as well.

And I have to make this perfectly clear on the record because I cannot believe what I heard. The attorney municipal case from 1978 analyzed the same language before the Court as it relates to the attorney/client privilege of government bodies. Mr. Johnson indicated that it was passed later. It was just renumbered. It's the same language.

That's -- so there is a Supreme Court precedent on point that says Plaintiffs are incorrect. The attorney/client privilege is as The University has described. And what the Oklahoma Supreme Court specifically noted in that

case was, while the statutory structure, as it's printed, you know, as it's codified, reads that way, when they look at the legislative history, the attorney/client privilege statute was passed first. Then the Open Records Act, which added that secondary consideration for anticipation of litigation.

The Oklahoma Supreme Court said that, by looking at the legislative history, it is clear that that privilege of attorney/client privilege was not abrogated by the Open Meetings Act's additional requirement of anticipation of litigation. Instead, the history shows that that was only meant to abrogate the way that privilege worked at open meetings, and that is the holding of the case. I have nothing else to argue to the Court, other than that's just not correct. We have the correct legal interpretation of the case.

As for statements related to -- Mr. Johnson made statements like we only have cases with private parties. That's not true. We referenced the *Municipal Attorneys Association* case. That's our principal case for attorney/client privilege, and that's an Oklahoma appellate case.

As far as some quote related to Mr. Burrage in an e-mail about the Title IX -- this is the only Title IX investigation, I don't really understand what the point of that argument was, but this is the only Title IX investigation The University has.

As far as there's no evidence that there was an assurance given, we provided -- the policy that has been enacted by the Board of Regents is legal effect. That is the law at The University. Everyone must comply with that policy. The University -- Your Honor has seen the policy. There cannot be a dispute that there is not an assurance given. It's part of the law and the policy at The University. So to come up here and act like there's a fact in dispute about that assurance just doesn't make any sense. And, as Your Honor noted, indications on Mr. Eddy's document have those same markings of confidentiality and privilege.

I would also like to point out something that Mr. Weeks said that I think is very interesting. He pointed out that Gallogly, apparently in his sealed Affidavit, says, "I resigned because the Regents wouldn't do the right

thing." Doesn't that indicate that Gallogly was acting against the Regents's interests, and he's been acting against the Regents's interests this whole time? He was mad because they wouldn't do what he wanted, so he quit and grouped up with the plaintiffs. That's their words. That's what Mr. Weeks just said. That's an indication that this is not a good faith effort by Mr. Gallogly just to get something released. He's got a vendetta, and he's going after The University for it.

The same with Mr. Johnson saying, quote, "Public institutions have no right to privacy." That is not true. The *Municipal Association* case clearly says that's not true. It says if public agencies did not have right to attorney/client privilege they would be subject to their adversaries who would have front row seats at court, front row seats to the fight to disclose how to take them down. That is what the Supreme Court precedent says.

There is no quote -- you will not find a quote that says public bodies do not have attorney/client privilege anywhere in the Supreme Court precedent because it doesn't exist.

THE COURT: Yeah. And I think they do have a privilege. But a specific response to the argument raised on 12 O.S. 2502(D)(7), that's where we're talking about public officers and public agencies -- and, again, it says what it says, but it plainly says, "unless the Court determines that disclosure will seriously impair the ability of the public office or agency to process the claim or conduct a pending investigation." Mr. Johnson pretty forcefully stated that not only is there no longer a pending investigation, but that privilege dissolves to all public universities, once the investigation is closed. I would like to hear The University's response to that.

MR. VANCE: Yeah, Your Honor. I think it largely comes back to that interpretation question. We think that's just not the correct way to interpret the statute, as it applies to privilege, on that *Municipal Association* case.

THE COURT: Okay.

MR. VANCE: But, as it relates to, you know -- I guess the pending -- it's largely a fact question, kind of hypothetical in some ways, but, as it relates to the pending matter, I don't know

at what point -- I guess, based on the plaintiffs' interpretation, I don't know at what point somebody who's not involved in a lawsuit would be able to definitively say this is no longer pending, we're not anticipating it.

As it relates to Title IX, I don't know how we would square away what the Court has just articulated as Plaintiffs' argument with the confidentiality of the federal regulation. I don't know how we could possibly release this information, and not run afoul of those federal statutes that don't let us do that, even if it is something that the Oklahoma statute would allow.

So I guess the first point would be I think the other breaches of privilege would make this question largely moot, but I just don't think there's any -- it couldn't be functionally possible that privilege evaporate. I just don't know how that would functionally work.

And as it relates to other concerns about the question of the personnel exception that Your Honor raised, you know, earlier I think you asked me the question about The University is an entity, not a person. It can't act on its own. And, as it relates to Mr. Weeks's argument that

the personnel investigation exemption shouldn't apply to these records because it was investigating a department, not personnel, one, the Court has seen the reports. I also think just logically it doesn't -- obviously, when you're investigating a department you're investigating the personnel and how they operate the department, what's occurred, what's the enforcement mechanism. It doesn't make sense. I don't even know what investigating the department at large would mean, except for that you're going to undertake a review of their policies, or operations, or something like that.

But, in the context of this case, the only matters that have been presented before the Court involve, I suppose you could say, folks at The University or personnel who probably didn't do what they were supposed to do, and the result of that was these investigations and reports, and, for those reasons, they're exempt under the ORA, as well as for all the privilege reasons that The University previously articulated.

I also think -- I'll end on this point. I think that the thought that the Regents never took an affirmative vote to make these documents

confidential doesn't make sense. The Board of Regents are the ones who retained Jones Day. That's their counsel. They can obviously take any action they want with these reports, as far as they decide and vote on it, and they've retained us to continue defending the confidentiality of those records. So there's no colorable basis that the Regents want these reports released, and they're just confused having us here defend them. There's no justification why an additional vote would be needed from the Regents to say, "We want to maintain these already confidential documents." That doesn't make sense.

And so I just really pray that the Court will affirm the Motion for Summary Judgment, and just really -- you know, as I said at the beginning, my main fear is for the witnesses that moved on with their lives, and having their parents, partners, bosses, whoever might find out about this stuff that they thought was behind them, and I know the Court will appreciate that in its consideration.

Unless there's any other questions from the Court --

THE COURT: You've answered them. I

appreciate it.

MR. VANCE: And, Your Honor, we can take this up in a minute, if you would like, but we would request some time after the transcript is ready to prepare proposed findings of fact and conclusions of law, however you want to take that up. I'll take a seat.

THE COURT: Thank you.

Okay. Counsel, that concludes the argument. And I mean this sincerely. I appreciate everyone very much. The manner in which you advocate on behalf of your respective clients, it's first rate, and it is very well received. We've been in here for nearly four hours, and everyone is tired and has a lot of information swirling through their heads.

And I think I indicated to you in the past, I don't issue rulings from the bench on matters like this. This is an important matter, and you've given me a lot to think about, and I've got some work to do now, and I'm going to do that work and get a decision on this, and give the reasons for the decision. So I need some time to do that. That's a long way of saying I'm going to take this under advisement, and I will issue a

written ruling. And I'm going to make it a priority, but, because of the extent of matters that you are presenting to the Court, please be patient with me, as you have been.

So I'm going to take it under advisement. I'm going to issue a decision, and, on that matter, you are requesting to submit proposed findings of fact and conclusions of law for purposes of summary judgment?

MR. VANCE: Yes, Your Honor.

THE COURT: Do the plaintiffs have any thoughts on that?

MR. JOHNSON: I think it's unnecessary. We've briefed all these issues at length. I think the Court's perfectly capable of arriving at its own conclusions, summarizing those, and publishing them for the parties.

THE COURT: Anything else?

MR. VANCE: Well, Your Honor, it seems like it's (inaudible) for the Court. We provide them, and you take what you like from them, and, if you don't, you write your own Order. But, yes, The University would like to, you know, with the aid of the transcript, be able to, you know, provide the Court its opinion as to how to rule,

and the plaintiffs would have the same opportunity.

MR. JOHNSON: I'll reiterate that I think it's unnecessary. I also think that it further delays litigation that has, at this point, been pending for an outrageously long amount of time. And, to the same extent, further taxes a party who is a nonprofit organization with additional legal work, additional legal fees, and additional time that -- once again, what they want you to conclude is very plainly indicated by their briefs. The arguments in favor of those conclusions are very plainly included in the briefs.

I would submit that if the Court is to determine, after review, that it is necessary or appropriate for the parties to submit their own recommendations as to findings of fact and conclusions of law that the Court can probably request the parties to do so at that juncture. I anticipate that the Court will probably find its way to a written decision without the help of the parties.

THE COURT: I appreciate that, Mr. Johnson.

So I'm going to do my work in this case so I'm not ordering findings of fact -- proposed findings of fact and conclusions of law. In the work that I have to do in issuing a ruling on this, I'm going to have to make some factual determination and some legal conclusions. So I'm going to decline your invitation to submit proposed findings of fact and conclusions of law. And if I change my mind as I'm doing my work I'll do just that. I'll let the parties know that I want proposed findings and conclusions on a certain area that would assist the Court.

So, at this point, I am going to do the work without any proposals from the parties. You've done a bang-up job briefing all of the issues in this case, and you've truly given me a lot to think about, so I will do that.

Anything else for the record before we adjourn, on behalf of The University?

MR. VANCE: No, Your Honor.

THE COURT: Okay.

Anything else on behalf of either of the plaintiffs?

MR. JOHNSON: Nothing, Your Honor.

THE COURT: Thank you very much. I'll

show we're adjourned.

CERTIFICATE

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

I, Melissa Rames, a Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct transcription of my shorthand notes of the proceedings had on November 15, 2024.

I further certify that I am neither related to, nor attorney for any interested party, nor otherwise interested in the event of said proceedings.

WITNESS MY HAND AND SEAL this 3rd day of February, 2025.

_____
Melissa B. Rames, CSR
Oklahoma CSR No. 1402
Expiration Date: 12/31/25