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IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM FOUNDATION *d/b/a* NONDOC MEDIA *and* WILLIAM W. SAVAGE III,

Plaintiff

v.

STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA,

Defendant.

Case No. CV-2021-1770

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
FILED
FEB 13 2023
In the office of the
Court Clerk MARILYN WILLIAMS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant State of Oklahoma ex rel. Board of Regents of the University of Oklahoma (the "University") presents this Motion for Summary Judgment and states:

INTRODUCTION

This case only concerns whether the University properly denied Plaintiffs' request for "[a]ny and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim 'Tripp' Hall," under the Oklahoma Open Records Act (the "ORA"). Petition for Relief for Violations of the Oklahoma Open Records Act at 6, ¶ 18 [hereafter the "Petition"]. The University maintains that Plaintiffs sought records subject to a privilege or exemption under the ORA. To date, Plaintiffs have not articulated why the University's determination was erroneously, except the unsupported assertion that the Jones Day Reports are *de facto* public records. That logic cannot prevail because (1) the University correctly followed the law and process, and (2) the collateral damage of granting the Plaintiffs judgment would be that the University could never promise any witness to an investigation, including purported victims of sexual harassment, that their information would remain safe.

A. Investigation Process

Both Title IX and University policies guarantee confidentiality to any person that reports claims of sexual harassment. That is the minimum representation the University makes to all student or faculty members. In fact, the release of such information can constitute retaliation by the University under Title IX. But, most importantly, witnesses being able to rely on the promise of confidentiality is what allowed the Title IX investigative process to work.

As Plaintiffs are aware from their reporting,[1] the Jones Day Report was provided to the Oklahoma State Bureau of Investigations ("OSBI") for its criminal investigation. That investigation resulted in the appointment of Pat Ryan as a Special Prosecutor to present a potential indictment to a grand jury.[2] Ultimately, the grand jury decided the information provided was apparently not sufficient for indictments, but **that entire process relied on the confidential statements provided by witnesses**.

As it is, the consequences of granting Plaintiffs judgment would be far and wide-reaching. The specific confidentiality promised for the Jones Day Reports was mutual and bilateral with each witness, Jones Day, and the University. While all of the privileges asserted by the University are valid in their own right, the policy behind the Informer's Privilege strikes at the heart of the University's concern. More specifically, if Plaintiffs succeed in undermining these protections, **the University will never again be able to represent to any witness, including purported victims, that it can protect their stories, information, and identities**. Instead, the University will have

[1] Tres Savage, *OSBI gets Jones Day report, Stitt wants OU regents to do 'the right thing'*, NONDOC (May 25, 2019) https://nondoc.com/2019/05/25/osbi-gets-jones-day-report-stitt-wants-ou-regents-to-do-the-right-thing/; *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1226 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web.").

[2] Tres Savage, *Special prosecutor designated for David Boren investigation*, NONDOC (Apr. 17, 2019) https://nondoc.com/2019/04/17/special-prosecutor-designated-for-david-boren-investigation/.

to hope it can fulfill its federal obligations under Title IX only for victims who have the fortitude to have their information shared publicly.

In summation, the ultimate irony of this case is that the Jones Day Reports only exists because of the protections promised to the witnesses that Plaintiffs seek to undermine. But for as long as Plaintiffs seek to exploit the witnesses trust in the Title IX process and the University's counsel for a story, the University will not faulty in protecting that information. The University is prepared to take all necessary action to defend the policies that protect victims regardless of whether a Washington D.C. law firm or a disgruntled former employee wants them released.

B. Disgruntled Former Employees Cannot Waive Privilege

Presumptively, Plaintiffs will argue that they need to depose Gallogly to respond to this Motion, but—as has been explained to Plaintiffs *ad nauseum* in filings and correspondence—the information relevant to their narrow ORA request that Gallogly has is privileged information that he does not possess personal knowledge of. As of January 2023, however, it became apparent that Gallogly was communicating privileged information directly to Plaintiffs. For instance, Gallogly sent a letter an eleven-page single space manifesto to counsel in this case that disclosed substantive information from within the Jones Day Reports as well as conversations with University's counsel. But Gallogly's years-old grudge cannot undermine the policies that protect witnesses here.

First and foremost, Gallogly cannot waive the University's privileges. As the University explained within its *Motion for Protective Order to Quash the Deposition of James Gallogly*: "The University, and not [its agent], holds the privilege, so [its agent] may not be compelled to provide information on these matters unless the University waives that privilege. Given Defendants' present motion, it is clear no waiver is intended." *Quoting Fryberger v. University of Arkansas-Fayetteville*. No. 5:16-CV-05224, 2019 WL 13181979 at 2 (W.D. Ark. Mar. 26, 2019). Moreover,

there is no indication the University intentional waived its privileges, as Oklahoma case law forecloses Plaintiffs' prospective argument that Gallogly had any apparent authority to breach those privileges. Okla. Stat. tit. 12, § 2502 (Preserving privilege due to inadvertent disclosure); *Franco v. State ex rel. Bd. of Regents of Univ. of Oklahoma*, 2020 OK CIV APP 64, 482 P.3d 1, 14 ("[P]ublic agents have no power to bind the State by apparent authority in excess of their actual authority." (internal quotation omitted)).

Second, the timing of Gallogly's deposition a year and a half into litigation—and Gallogly's subsequent decision to disclose privileged information in a letter to Plaintiffs' counsel—struck the University as odd. Those coincidences prompted the University to request Plaintiffs confirm they have not been in contact with Gallogly, which Plaintiffs refused to do. *Ex.* 1-A, Burrage and Gardner Ltrs. But as Plaintiffs have already promised to bring Gallogly's letter for an *in-camera* review, the University further requests that once the Court determines it is, in fact, a clear breach of the University's privileges, all copies possessed by Parties or their counsel be returned to the Court or University for destruction.

In summation, the Court should keep in mind that "while judicial records of the state should always be accessible to the people for all proper purposes, access may be restricted **where the purpose is to gratify private spite or promote public scandal**." *Collier v. Reese*, 2009 OK 86, ¶ 21, 223 P.3d 966, 976 (emphasis added). Instead of respecting the judicial process and allowing the Court to determine the efficacy of the University's privileges, Plaintiffs seek alternative methods to gather the information. This flies in the face of the law and its purpose.

UNDISPUTED MATERIAL FACTS

1. The University's investigative policy relevant to the allegations in the above-styled case represent to students and faculty that "[i]ndividuals wishing to make legally confidential

reports have the option of reporting those matters to the OU Advocates, the University Ombudsperson (for faculty/staff) licensed counselors, health professionals, clergy and attorneys to the extent the complainant engages them in such private capacity." *Ex.* 1-B, *Investigative Process for Internal Complaints under the Sexual Misconduct Discrimination and Harassment Policy*, UNIVERSITY OF OKLAHOMA (Sep. 1, 2014).

2. In 2018, the University received allegations of personnel (1) misreporting alumni information to a new media organization, and (2) engaging in sexual harassment or other misconduct. *Ex.* 2, Long Affidavit (June 28, 2022) (Filed Under Seal – Copy Provided to Judge Walkley's Chamber).

3. On July 26, 2018, the University retained the law firm Jones Day for the purpose of "conducting an internal investigation regarding OU's reporting of certain data to external publications." That Engagement Letter Regarding Data Reporting Investigation goes define the scope of relationship between the University and Jones Day as an attorney-client relationship. *Ex.* 2, Long Affidavit (June 28, 2022); *Ex.* 3, *Engagement Letter Regarding Data Reporting Investigation*, JONES DAY (July 27, 2018) (Filed Under Seal – Copy Provided to Judge Walkley's Chamber).

4. On November 15, 2018, the University retained the law firm Jones Day for the purpose of "conducting an internal investigation possible misconduct by senior University personnel." That Engagement Letter Regarding Confidential Investigation of Misconduct goes define the scope of relationship between the University and Jones Day as an attorney-client relationship. *Ex.* 2, Long Affidavit (June 28, 2022); *Ex.* 4, *Engagement Letter Regarding Confidential Investigation of Misconduct*, JONES DAY (Nov. 15, 2018) (Filed Under Seal – Copy Provided to Judge Walkley's Chamber).

5. Throughout both investigations, the University and Jones Day represented that Jones Day served as counsel to the University, the investigations were confidential, and the witnesses identifies would remain confidential to the best of the University's ability, and any witness statement or information provided would be protected by privilege from disclosure and is protected work product. The witness further relied on these representations concerning the confidentiality of their identities, statements, and information in cooperating with investigations. *Ex.* 2, Long Affidavit (June 28, 2022)

6. On February 20, 2019, the Board of Regents entered into executive session to discuss the investigations with counsel. *Ex.* 2, Long Affidavit (June 28, 2022); *Ex.* 5, *Minutes of a Special Meeting*, THE UNIVERSITY OF OKLAHOMA BOARD OF REGENTS (Feb. 20, 2019).

7. On May 1, 2019, Savage, on behalf of NonDoc, sent the University a written ORA request for "any and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim 'Tripp' Hall." *Ex.* 2, Long Affidavit (June 28, 2022); Petition at 6, ¶ 18; *Ex.* 6, Savage ORA Request (May 1, 2019).

8. On June 12, 2019, the University responded to Savage stating that it considered his Request to seek records related to a specific employee and would not undertake a search for records that would not be released even if they existed. The University further stated that "any report that legal counsel, retained by the University, provides at the conclusion of any investigation of any employee would be confidential pursuant to 51 O.S. §§ 24A.5(1)(a), 24A.7(A), and 24A.12." *Ex. 2,* Long Affidavit (June 28, 2022); Petition at 6, ¶ 19; *Ex.* 7, Open Records Eml., *OU Open Records Response – RE: Open Records Request* (June 12, 2019).

9. Plaintiffs contacted the University on May 26, 2021, asking the University reconsider its position and release the requested records to Plaintiffs, or further detail its reasons

for its denial. *Ex. 2,* Long Affidavit (June 28, 2022); Petition at 6, ¶ 20; *Ex.* 8, Garner Eml., *Re: Reconsideration of Oklahoma Open Records Act request* (May 26, 2021).

10. Without waiting for the University to reconsider Plaintiffs' ORA request as requested, Plaintiffs filed their petition on June 10, 2021. *Ex. 2,* Long Affidavit (June 28, 2022); *Compare* Petition *with Ex.* 9, Long Ltr., *Re: Your Request for Reconsideration dated May 26, 2011* (June 11, 2021) [hereafter "Final ORA Letter"].

11. On June 11, 2021, the University memorialized its reconsideration of Plaintiffs request, which Plaintiffs received and in part states:

> An investigative report from a law firm engaged by the University to investigate misconduct allegations involving an employee is confidential pursuant to 51 O.S. § 24A.5(1)(a) and may be kept confidential under 51 O.S. §§ 24A.7(A) and/or 24A.12, as outlined in the University's June 12, 2019 response to Mr. Savage. As your May 26 correspondence mentions balancing the University's withholding of any report against the public interest in the document – presumably under 51 O.S. §§ 24A.7(A) and/or 24A.12, I take this opportunity to explain the University's exercise of its discretion in maintaining the confidentiality of this (or any such similarly situated) report under those sections. Disclosure of investigatory reports of the type your client seeks would cause irreparable harm to the University's ability to conduct such investigations. The investigative report Mr. Savage seeks was the product of numerous people placing their trust in the University and participating in a voluntary process that many participants conditioned upon confidentiality. These individuals shared private details about events, and the University assumed an obligation to maintain the confidentiality of these details to the best of its ability. Release of that report would undoubtedly have a chilling effect on any future reporting of claims to the University or cooperation of witnesses. This would undermine the reporting and investigative processes and would compromise the very atmosphere of open reporting and thorough investigation the University strives to foster and is required by numerous federal regulations to which the University is subject.

Ex. 2, Long Affidavit (June 28, 2022); *Ex.* 9, Final ORA Letter; *see also* Tres Savage, *OU: Releasing reports on sexual misconduct, donor data 'serve the public's curiosity – not its interest'*,

NonDoc (June 15, 2021). The letter continues: "Additionally, the Open Records Act is inapplicable to records protected by state evidentiary privileges listed in 51 O.S. § 24A.5(1)(a), and the University maintains those privileges with respect to the report your client seeks." *Id.*

ARGUMENTS AND AUTHORITIES

I. Standard of Review.

The ORA was created to "ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." 51 O.S. § 24A.2. But the ORA also does not establish a particular procedure for accommodating such requests. 51 O.S. § 24A.18 ("[T]his act does not impose any additional recordkeeping requirements on public bodies or public officials."); *Progressive Indep., Inc. v. Oklahoma State Dep't of Health*, 2007 OK CIV APP 127, ¶ 15, 174 P.3d 1005, 1009 (citing 51 O.S. §§ 24A.2, 24A.5). Instead, the University "has authority to make the initial determination whether its records are exempt." *Merrill v. Oklahoma Tax Comm'n*, 1992 OK 53, 831 P.2d 634, 640 (citing *Tulsa Trib. Co. v. Oklahoma Horse Racing Comm'n*, 1986 OK 24, 735 P.2d 548, 552).

The University is entitled to deference on summary judgment with regard to its ORA determination. *See Ross v. City of Owasso*, 2020 OK CIV APP 66, ¶ 17, 481 P.3d 278, 284; *Tulsa Trib. Co*, 1986 OK 24, 735 P.2d at 553 ("The authority to determine the applicability of the Open Records Act to the requested materials has been initially placed by the Legislature in the public body which has possession of those materials."). And because the University can justify preventing disclosure under the ORA's privileges or exemptions, the University is entitled to summary judgment. *Oklahoma Ass'n of Broadcasters, Inc. v. City of Norman, Norman Police Dep't*, 2016 OK 119, ¶ 15, 390 P.3d 689, 694. The Court is ultimately tasked with two responsibilities concerning summary judgment under the ORA:

First, the Court must determine if the University's asserted privileges exclude the reports from disclosure. *Ross*, 2020 OK CIV APP 66, ¶ 8, 481 P.3d at 281. That validity of a privilege is "a question of law to be determined by the court." *Cf. Samson Inv. Co. v. Chevaillier*, 1999 OK 19, ¶ 5, 988 P.2d 327, 329; *Sims v. Travelers Ins. Co.*, 2000 OK CIV APP 145, ¶ 8, 16 P.3d 468, 470; *see also* 12 O.S. § 2513. If the Court determines the University properly relied on a privilege to deny Plaintiffs' ORA request, then summary judgment is appropriate. 51 O.S. § 24A.5(1)(a) (The ORA's disclocure requirement "does not apply to records specifically required by law to be kept confidential including: a. records protected by a state evidentiary privilege, such as the attorney-client privilege, the work product immunity from discovery and the identity of informer privileges.").

If, however, the Court determines the University inappropriately relied on its asserted privileges, then the Court should review the University's ORA balancing determination. Certain exemptions to the ORA require a balancing test, such as the claim to confidentiality of personnel records under 51 O.S. § 24A.5. Under the ORA balancing test, the University was required to weigh the interests against disclosure versus the inherent public interest favoring transparency.

When this Court is evaluating the University's applicable of the ORA balancing test, the Court reviews the University's decision for **abuse of discretion**. *Ross*, 2020 OK CIV APP 66, ¶ 8, 481 P.3d at 281. The abuse of discretion standard is "not mere ritualistic legal liturgy," as it "defines the permissible sweep of critical testing to be undertaken by a reviewing court." *Oklahoma City Zoological Tr. v. State ex rel. Pub. Emps. Rels. Bd.*, 2007 OK 21, ¶ 5, 158 P.3d 461, 463. **In Oklahoma, abuse of discretion occurs when there is a "clearly erroneous conclusion," which is "clearly against the logic and effect of the facts presented in support of or against the proposition in issue."** *Peters v. Am. Income Life Ins. Co.*, 2003 OK CIV APP 62,

¶ 17, 77 P.3d 1090, 1095 (citing *Oklahoma Tpk. Auth. v. Horn*, 1993 OK 123, ¶ 6, 861 P.2d 304, 306) (emphasis added). Simply put, the Court must determine the University's denial of Plaintiffs' ORA request "represents an unreasonable judgment" or summary judgment is appropriate. *Cf. Oklahoma City Zoological Tr*, 2007 OK 21, ¶ 5, 158 P.3d at 464; *see also No. Attorney General 2015-2,* 2015 WL 2151502, at 4 (Okl. A.G. May 4, 2015) (quoting *Indep. Fin. Inst. v. Clark,* 1999 OK 43, ¶ 13, 990 P.2d 845, 851).

Regardless of whether the Court determines reports created by Jones Day for the University of Oklahoma relating to David Boren or Jim 'Tripp' Hall are subject to a privilege or another exemption to the ORA, summary judgment is appropriate.

II. THE ORA DOES NOT APPLY TO "RECORDS PROTECTED BY A STATE EVIDENTIARY PRIVILEGE, SUCH AS THE ATTORNEY-CLIENT PRIVILEGE, THE WORK PRODUCT IMMUNITY FROM DISCOVERY AND THE IDENTITY OF INFORMER PRIVILEGES." 51 O.S. § 24A.5(1)(A).

a. Informer Privilege applies to the Jones Day Reports.

As Plaintiffs observe, the Oklahoma informer privilege states:

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

12 O.S. § 2510. To that point, Plaintiffs reported that "OU has provided Oklahoma State Bureau of Investigation agents with the report it received from Jones Day, a law firm hired by the university to investigate allegations against Boren. OU received a subpoena from the state's multi-county grand jury, according to unnamed sources in The Oklahoman."[3] It should be noted that the Oklahoma State Bureau of Investigation and the University are both arms of the State of

[3] Tres Savage, *OSBI gets Jones Day report, Stitt wants OU regents to do 'the right thing'*, NONDOC (May 25, 2019) https://nondoc.com/2019/05/25/osbi-gets-jones-day-report-stitt-wants-ou-regents-to-do-the-right-thing/.

Oklahoma—a fact not lost on Plaintiffs, whom styled Defendant as "State of Oklahoma." The question, consequently, of whether the University's reports utilize information given to a "law enforcement officer" is already known to Plaintiffs. 12 O.S. § 2510. But the purpose of the privilege is not limited to police officers and prosecutors. For example, the privilege has been extended to other government agencies involved in investigations.

In *Stephenson Enterprises, Inc. v. Marshall*, the Fifth Circuit Court of Appeals recognized that Occupational Safety and Health Administration inspectors were likewise covered by the informer privilege. 578 F.2d 1021, 1025 (5th Cir. 1978). *See also Film Allman, LLC v. Sec'y of Lab.*, 682 F. App'x 860, 861 (11th Cir. 2017). There, the plaintiff challenged OSHA's failure "to disclose the names of the two employees with whom the OSHA inspector spoke during this tour of the plant rendered the Commission's Decision and Order unsupported by substantial evidence." *Id.* The plaintiff maintained that it could not "adequately challenge the evidentiary basis" of an OSHA citation without the informers' information. *Id.* The Fifth Circuit, nonetheless, agreed with OSHA: "[T]he Secretary properly refused to produce the name of the employee interviewed." *Id.*

The policy behind the informer privilege is well-founded in application to the University's reports and investigations, as the United States Supreme Court observed:

> The principle laid down in that case was, that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws; and **that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government**, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. . . . It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook, and that the speaking of them to Mr. Cook was not the sole ground of action or of recovery. The evidence

> was incompetent, and it must be inferred that it affected the minds of the jury both on the main issue and on the question of damages.

Compare Vogel v. Gruaz, 110 U.S. 311, 315–17 (1884) (emphasis added) *with Roviaro v. United States,* 353 U.S. 53, 59 (1957) ("The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."). Because the information related to the identity of other witnesses is privileged, it was properly withheld by the University.

This informer's privilege is also consistent with Title IX confidentiality requirements related to witnesses providing information related to sexual misconduct:

> The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

34 C.F.R. § 106.71. As previously stated, the University will never again be able to represent it can keep victims' information private if Plaintiffs prevail. This will have a chilling effect on University investigations of misconduct. As stated in Material Fact Nos. 1, 5, 8 and 11, the witness statements are cloaked in the informers' privilege for these very reasons.

b. Attorney-Client Privilege applies to the Jones Day Reports.

This litigation centers on information conveyed to the University by its attorney, Jones Day. As such, it has never been explained why such reports, and all other related communications, would not be subject to attorney-client privilege, as the University must only show "the status

occupied by the parties was that of attorney and client and that their communications were of a confidential nature." *Chandler v. Denton*, 1987 OK 38, 741 P.2d 855, 865. The purpose of the privilege is to make clients feel "encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Thompson v. Box*, 1994 OK CIV APP 183, 889 P.2d 1282, 1285. When there is "lacking evidence" due to the attorney-client privilege, summary judgment is appropriate. *Id.*

This is not the first time Oklahoma courts have addressed a public body's right to attorney-client privilege versus the public right to information. In *Oklahoma Association of Municipal Attorneys v. State*, the Oklahoma Supreme Court had to decide if the Open Meetings Act abrogated attorney-client privilege for public bodies. 1978 OK 59, 577 P.2d 1310, 1311. The Court recognized the "two competing policy commitments, the need to have the public's business conducted in the open, and the principle of attorney-client confidentiality." *Id.* 1313-1314. As it considered the purpose of the Open Meetings Act, the Supreme Court also highlighted the argument against the erosion of public bodies use of attorney-client privilege:

> Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentions as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, supra, (Citation omitted): 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps.' * * * Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client

> conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. **If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness.**

Id. at 1313 (citation omitted) (emphasis added). Taking that argument into consideration, the Oklahoma Supreme Court determined public bodies retain attorney-client privilege.

As it stands, Plaintiffs freely acknowledge the reports sought were created by its law firm, Jones Day, and Plaintiffs are purportedly aware the reports are of a confidential nature. Through its continued reporting on the Jones Day reports, Plaintiff's received a heavily redacted and modified excerpt purportedly from the Jones Day report at issue.[4] Within that excerpt "Boren and Eddy's names are the only ones used" even though the report "alludes to other 'witnesses.'" *Id.* Moreover, the excerpt contains the phrases "Privileged and Confidential," "Attorney-Client Communication," and "Confidential Attorney Work Product." *Id.* There can be no good faith argument that the reports are not subject to attorney client privilege. See Material Fact No. 5.

Granting summary judgment due to attorney-client privilege is consistent with Oklahoma law. In *Thompson v. Box*, the Oklahoma Court of Civil Appeals affirmed summary judgment where attorney-client privilege made presenting competent evidence impossible at trial. 1994 OK CIV APP 183, 889 P.2d 1282, 1285. There, two attorneys were in a lawsuit concerning client theft—a most egregious offense. The trial court granted the defendant-attorney summary judgment because it was impossible for the plaintiff-attorney to prove the claim without a waiver of attorney-client privilege from his former client. Without making a finding concerning the substance of that summary judgment, the court concluded that attorney-client privilege applied because (1) it

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[4] Tres Savage, *Jones Day assessment: Jess Eddy 'generally credible' on Boren allegation*, NONDOC (May 18, 2019) https://nondoc.com/2019/05/28/jones-day-assessment-jess-eddy-generally-credible-on-boren-allegation/.

belongs to the client and (2) communications "made during the existence of an attorney-and-client relationship the privilege continues to protect them from disclosure even after that relationship has been terminated." *Id.* at 1284. For these reasons, the attorney-client privilege presented plaintiff from presenting "evidence sufficient" to establish his cause of action, thus "the trial court's grant of summary judgment [was] AFFIRMED." *Id.* at 1285. The same result is appropriate here. Plaintiffs' are unable to show any waiver and cannot contradict the application of attorney client privilege in this case. See Material Fact No. 5.

c. Deliberative Process Privilege applies to the Jones Day Reports.

The parties agree that Oklahoma recognizes a deliberative process privilege. More specifically, information related to a deliberative process is privileged if, "[t]he primary purpose of the deliberative process privilege is to protect the frank exchange of ideas and opinions critical to the government's decision-making processes where disclosure would discourage such discussion in the future." *Vandelay Ent., LLC v. Fallin*, 2014 OK 109, ¶ 21, 343 P.3d 1273, 1278 (internal brackets omitted). In turn, Plaintiffs are also correct that the deliberative process privilege has only been explicitly applied to the Governor in Oklahoma, as the Oklahoma Supreme Court explained: "Governor's need for confidential advice in deliberation of policy and decision making is just as important to '[the people's] protection, security, and benefit, and to promote their general welfare,' as the people's access to information." *Id.* ¶ 27. The *Fallin* Court, understandably, did not decide whether the University held the deliberative process privilege because the issue before the Court was whether the Governor held the privilege. But there is no doubt the privilege exists.

While the Governor faithfully executes the laws and regulations of the State writ-large, the Oklahoma Supreme Court has recognized that the University is a Constitutional entity, subject to its own regulation: "We find that Article XIII, § 8, of the Oklahoma Constitution establishes the

Board of Regents of the University of Oklahoma as an independent body charged with the power to govern the University." *Bd. of Regents of Univ. of Oklahoma v. Baker*, 1981 OK 160, 638 P.2d 464, 469.[5] In fact, the Constitutional duties of the University are "very broad" and mirror the Governor's duties by providing the University with "the power to pass all rules and regulations which the Board of Regents considers to be for the benefit of the health, welfare, morals and education of the students." *Pyeatte v. Bd. of Regents of Univ. of Okl.*, 102 F. Supp. 407, 413 (W.D. Okla. 1951), *aff'd per curiam*, 342 U.S. 936, 72 S. Ct. 567, 96 L. Ed. 696 (1952).

To that point, the deliberative process privilege is not limited to the governor or chief executive officer of a state. *E.g., Nat'l Labor Relations Board v. Sears, Roebuck & Co. (NLRB v. Sears)*, 421 U.S. 132, 150 (1975); *Dudman Commc'n Corp. v. Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 332 (D.D.C 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967). The Oklahoma Supreme Court has made passing reference to agencies possessing the privilege elsewhere. *State ex rel. Oklahoma State Bd. of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 77, 489 P.3d 36, 63 ("An administrative disciplinary process has the potential of possessing confidential attributes in various parts of the process, such as . . . the deliberative phase (executive session) of a public individual proceeding."). In addition, the United States Supreme Court has recognized the privilege as applied to agencies, like the National Labor Relations Board:

> The cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies,' and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'

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[5] "The Attorney General, in 1995 OK AG 12 at ¶¶ 22–24, 39(1), distinguished constitutional Boards of Regents from statutory Boards of Regents." *Morehouse v. State*, 2006 OK CIV APP 144, ¶ 14, 150 P.3d 395, 398. "We have no doubt that in elevating the status of Board from a statutory to a constitutional entity the people intended to limit legislative control over University affairs." *Baker*, 638 P.2d at 467.

N. L. R. B., 421 U.S. at 150 (internal citation omitted). The reasoning behind that privilege is the same across the country: "[T]he 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." *Id.* Because the University—through the Board of Regents—utilized its attorney to create reports concerning "legal or policy matters" for the purpose of "frank" discussions, the deliberative process privilege applies. Material Fact No. 5.

III. REGARDLESS OF PRIVILEGE, THE ORA EXEMPTIONS SUPPORT WITHHOLDING THE JONES DAY REPORTS.

As the affidavit of Heidi Long makes clear, the University did not end its inquiry after determining privileges existed. The University instead provided an ORA balancing analysis of Plaintiffs' request to demonstrate it properly considered the public interest in the records regardless of any existing privilege. Pursuant to that analysis, the University specifically relied on two (2) exemptions from ORA disclosure: 51 O.S. § 24A.7 (Personnel records) and 51 O.S. § 24A.12 (Investigative files). Because the Jones Day Reports meet both exemptions, the University denied Plaintiffs' request.

a. The University properly withheld personnel records.

According to the Oklahoma Court of Civil Appeals, the University's decision to withhold a personnel record is subject to the ORA balancing test. *Ross v. City of Owasso*, 2020 OK CIV APP 66, ¶¶ 11-15, 481 P.3d 278, 282 (citing 51 O.S. § 24A.7(A)(1)). More specifically, because § 24A.7 states that the University "may" release personnel records, the decision to withhold said records are discretionary in nature. *Id.* The University's deference in its ORA balancing determination is not "unlimited" authority but is subject to abuse of discretion. *Id.*

For its analysis, the University recognized that under the ORA it must weigh the interests against disclosure against "the policy of openness for the public good." *Id.* ¶ 15, 481 P.3d at 283. That openness, however, is not without limitation, as an ORA request must "serve the public interest," not appease the "public's curiosity." *Oklahoma Pub. Emps. Ass'n v. State ex rel. Oklahoma Off. of Pers. Mgmt.*, 2011 OK 68, ¶ 35, 267 P.3d 838, 851. Consequently, the University considered the fact that as of the filing of the lawsuit, the reports were already two (2) years old. Meanwhile, the University also considered the interests against disclosure and determined that disclosure would:

(1) Breach representations the University previously made to witnesses that the information would remain confidential in these Reports;

(2) Cause a chilling effect in future investigations by ensuring the University cannot maintain confidentiality of information gained from witnesses, informants, and potential victims; and,

(3) Undermine the University's ability to fully report and/or investigate matters mandated by law.

See *Ex. 2,* Long Affidavit (June 28, 2022); *Ex.* 9, Final ORA Letter. These reasons to prevent disclosure are also buttressed by all of the policy considerations recognized in Oklahoma law supporting the privileges discussed above. *See supra* at 7-14. Taking these interests into consideration, the University correctly determined the interests in keeping the reports confidential outweighed the public interest in disclosure.

b. The University properly withheld is investigative file.

"The Open Records Act also contains a litigation file and investigatory report provision, which allows authorized agency attorneys and the Oklahoma Attorney General to keep litigation

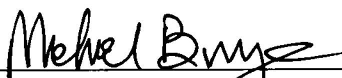
files and investigatory reports confidential." No. Attorney General 2015-2, 2015 WL 2151502, at *2 (Okl. A.G. May 4, 2015). More specifically, the University's counsel "may keep its litigation files and investigatory reports confidential." 51 O.S. § 24A.12.[6] In the context of the ORA, the Oklahoma Supreme Court has stated that "investigatory documents are documents created for an investigatory purpose." *State ex rel. Oklahoma State Bd. of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 66, 489 P.3d 36, 60 (citing 51 O.S. 24A.20). Simply put: "**<u>A document created for the purpose of an investigation, and not otherwise a public record, and placed in the Board's investigative file, is a confidential document</u>**." *Id.* (emphasis added.). To date, there is no dispute that the Jones Day Reports were investigative in nature, have not been made public in the three (3) plus years since creation, and are maintained as confidential investigative files by the University. The University correctly withheld the Jones Day Reports.

<u>CONCLUSION</u>

The University respectfully requests the Court grant it summary judgment.

[6] Although no appellate court has so held, if this Court determines the fact that § 24A.12 includes "may" subjects it to the same ORA balancing test, the University adopts by reference the analysis provided for § 24A.7. *Supra* at 16.

Respectfully submitted,



Michael Burrage, OBA No. 1350
Austin R. Vance, OBA No. 33294
J. Renley Dennis, OBA No. 33160
WHITTEN BURRAGE
512 North Broadway Ave., Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: mburrage@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com

and

Drew Neville, OBA No. 6641
MCAFEE & TAFT
10th Floor, Two Leadership Square
211 North Robinson
Oklahoma City, OK 73102-7176
Telephone: (405) 235-9621
Facsimile: (405) 0439
Email: drew.neville@mcafeetaft.com

ATTORNEYS FOR STATE OF OKLAHOMA, ex rel. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA

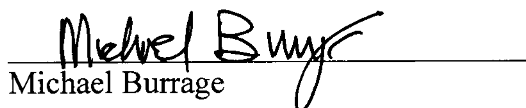
CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 2023, a true and correct copy of the foregoing was mailed to:

Kathryn E. Gardner
Reporters Committee for Freedom of the Press
110 S. Hartford Ave., Ste 2524
Tulsa, OK 74120
kgardner@rcfp.org

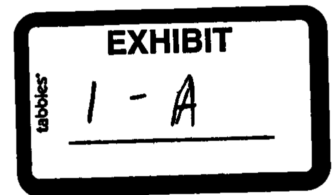
Tracy Schumacher
114 E. Main St.
Norman, OK 73069
tracy@lawgroupok.com

Lin Weeks
Reporters Committee for Freedom of the Press
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
lweeks@rcfp.org



Michael Burrage

WB
WHITTEN BURRAGE



January 25, 2023

VIA EMAIL: kgardner@rcfp.org
Ms. Kathryn Gardner
Reporters Committee for Freedom of the Press
110 S. Harford Ave., Ste. 2524
Tulsa, OK 74120

Re: *Sustainable Journalism Foundation et al. v. State of Oklahoma et al.*, CV-21-1770 (Cleveland Cnty. Dist. Ct); James Gallogly – Deposition Date, Correspondence, and Communications

Ms. Gardner:

Let this letter serve as a response to your email dated January 6, 2023. I can confirm that I am available for the deposition of James Gallogly on February 22, 2023, but I intend to file a motion for protective order to quash Mr. Gallogly's deposition subpoena.

As your clients are aware, Mr. Gallogly is the former president of the University of Oklahoma and acquired privileged and confidential information belonging to the Board of Regents of the University of Oklahoma (the "Board") in that role. Mr. Gallogly consequently is not at liberty to waive the privileged-nature or confidentiality of information in his possession by virtue of his prior role as President. More specifically, the President is a role "having a managerial responsibility on behalf of the organization." *Weeks v. Indep. Sch. Dist. No. I-89 of Oklahoma Cnty., OK., Bd. of Educ.*, 230 F.3d 1201, 1208 (10th Cir. 2000) (citing Oklahoma Rule of Professional Responsibility 4.2). Because the only information relevant to this litigation is privileged, confidential, or otherwise exempt from disclosure per the Oklahoma Open Records Act, any purportedly relevant information Mr. Gallogly has is information that belongs to the Board; alternatively stated, you cannot seek information from Mr. Gallogly for any "matter within the scope of the agency or employment, made during the existence of the relationship" that would be relevant in this litigation. *Weeks*, 230 F.3d 1209. For that reason, there is no good faith basis for deposing Mr. Gallogly as those communications remain protected at law and any attempt to solicit Mr. Gallogly's breach of those obligations is not permitted within the Oklahoma Discovery Code. As a licensed attorney, I believe Mr. Gallogly understands these obligations and I hope he would not reveal any information on his own volition.

Nonetheless, your desire to depose Mr. Gallogly a year and half into this litigation made me curious about the timing. My hope is this inquiry will reveal that neither you nor your client have inappropriately approached Mr. Gallogly about such information after you all had notice of its privileged and confidential nature. Nonetheless, I have a duty to the Board to ensure Mr. Gallogly has not already breached his ongoing legal duties. To that end, please remit to my office all correspondence with Mr. Gallogly, including his counsel or other agent(s), in your or your clients' possession. I am also requesting you and your clients identify any conversation(s) with Mr. Gallogly, including time, date, length, summary and medium (call, text, email, etc.) from

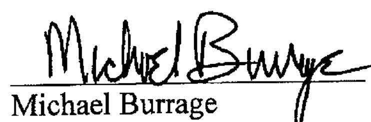
May 12, 2019, to present.

If you are unwilling to voluntarily provide this information, then treat these requests as interrogatories and requests for production with written responses due per the Oklahoma Discovery Code. If I do not receive confirmation that there were no prior correspondence or conversations with Mr. Gallogly before Friday, February 3, 2023, I will include withholding this information as another basis for the Court to grant our protective order and quash the deposition subpoena.

I look forward to hearing from you.

Sincerely,

WHITTEN BURRAGE



Michael Burrage

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300 • www.rcfp.org
Bruce D. Brown, Executive Director
bruce.brown@rcfp.org • (202) 795-9301

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TONY MAURO, *American Lawyer Media, retired*
JANE MAYER, *The New Yorker*
ANDREA MITCHELL, *NBC News*
CAROL ROSENBERG, *The New York Times*
PAUL STEIGER, *ProPublica*
SAUNDRA TORRY, *Freelance*
JUDY WOODRUFF, *The PBS NewsHour*
Affiliations appear only for purposes of identification.

February 1, 2023

Michael Burrage
Whitten Burrage
512 N. Broadway Ave., Ste. 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com

VIA EMAIL

Dear Mr. Burrage:

Thank you for confirming your availability for the deposition of James Gallogly on February 22, 2023. This letter responds to the issues and demands you raise in your letter dated January 25, 2023.

To start, you have stated no basis for the university to obtain a protective order precluding Mr. Gallogly's testimony. Mr. Gallogly, a non-party, has information relevant to several claims and defenses raised in this lawsuit and, accordingly, the deposition is proper. *See* Okla. Stat. tit. 12, § 3226(A)(1). Mr. Gallogly, who left his university position in 2019 and who is not represented by university counsel, can testify to any relevant, non-privileged topics.

Moreover, your claim that any communications between undersigned and Mr. Gallogly are improper is not well-founded. *See* OK ST RPC Rule 4.2, Comment 7 ("Consent of the organization's lawyer is not required for communication with a former constituent."); *see also Fulton v. Lane*, 1992 OK 25, 829 P.2d 959 (because former employees may not speak for or bind the corporation, ex parte communications with former corporate employees are not prohibited); *Goodeagle v. United States*, No. CIV-09-490-D, 2010 WL 3081520, at *4 (W.D. Okla. Aug. 6, 2010); *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 WL 2147463, at *2 (N.D. Okla. May 15, 2013); *Floyd v. Sonic Drive-In of Coweta, LLC*, No. CIV-07-135-SPS, 2008 WL 11513030, at *1 (E.D. Okla. Mar. 13, 2008). For these reasons, the supposed authority you cite in your letter is inapposite. *See Weeks v. Indep. Sch. Dist. No. I-89 of Okla. Cnty.*, 230 F.3d 1201 (10th Cir. 2000) (disqualifying plaintiff's attorney for engaging in ex parte communications with defendant's employees while they were still employed by defendant).

Our understanding is that there is no obstacle to Mr. Gallogly's participation in the noticed deposition. However, in an abundance of caution we have attached a courtesy copy of additional discovery requests directed to your client that we will be mailing to you today.

As for your demands that undersigned counsel and our clients respond to requests for information and documents, we note that such informal requests fail to satisfy the requirements of Okla. Stat. tit. 12, § 2005. If and when we are served, we will respond or object within the 30-day period prescribed by law. *See* Okla. Stat. tit. 12, §§ 3233, 3234.

Additionally, we received your second letter dated January 31, 2023. We have not received the referenced correspondence from Mr. Gallogly, but I presume we will discuss that matter on our call as well.

We look forward to speaking with you soon and will provide our availability for a phone call in the email attaching this letter.

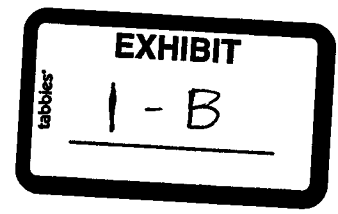
Thank you.

Sincerely,

Kathryn E. Gardner Lin Weeks

CC: J. Renley Dennis
jdennis@whittenburragelaw.com
Austin Vance
avance@whittenburragelaw.com
Whitten Burrage

Drew Neville
drew.neville@mcafeetaft.com
McAfee & Taft



INVESTIGATIVE PROCESS FOR INTERNAL COMPLAINTS UNDER THE SEXUAL MISCONDUCT DISCRIMINATION AND HARASSMENT POLICY

I. Who May Utilize this Procedure

Grievances concerning sexual harassment, sex/gender discrimination, sexual assault/misconduct or violations of the Consensual Sexual Relationship Policy should be filed with the Sexual Misconduct Officer. Additionally, such claims may also be filed with the Institutional Equity Officer-Title IX Officer or his/her designee or with the University's Equal Opportunity Officer-Associate Title IX Coordinators (collectively referred to as the "Sexual Misconduct Officer"). This procedure is available to any person who, at the time of the acts complained of was employed by the University of Oklahoma, or is or was an applicant for employment or was enrolled as a student or an applicant for admission at the University, and the University has control over either the alleged perpetrator or the facility, or context of the event (whether on or off campus). The Sexual Misconduct Officer may, in his or her discretion, dismiss a grievance if he/she determines the person filing the complaint is not entitled to use this procedure.

II. Filing of Complaint

Persons who have complaints alleging sex/gender discrimination, sexual orientation discrimination, discrimination based on gender identity or gender expression, sexual harassment, sexual assault/misconduct or under the Consensual Sexual Relationships Policy may file their complaints in writing with the Sexual Misconduct Officer or his/her designee.

Complainants who exercise their right to use this procedure agree to accept its conditions as outlined. Where multiple issues exist (i.e. sexual harassment and violation of due process or grade appeal), the complainant must specify all of the grounds of the grievance that the complainant should have reasonably known about at the time of filing. A grievance filed under this procedure may normally not be filed under any other University grievance procedure. Depending on the nature of the issues involved, the Sexual Misconduct Officer will advise the complainant about the appropriate procedure(s) to follow (e.g. applicable disciplinary policies and procedures for that campus). Parties to the complaint, including the respondent and/or the complainant may obtain the advice of any advisor/attorney at his/her own expense. Advisors and attorneys may be present during any meetings or hearings, but the witnesses and parties are to participate directly in the process, not the advisors/attorneys.

The Sexual Misconduct Officer in consultation with the Institutional Equity and Title IX Officer may modify these procedures at any time as deemed appropriate for compliance with federal, state, local law or applicable guidance.

III. Timing of Complaint

Generally, to aid in a proper investigation, complaints should be filed with the Sexual Misconduct Officer within 365 calendar days of the act of alleged sexual discrimination, harassment or misconduct to facilitate the ability to gather facts and evidence. However, complaints which exceed this time-frame will be reviewed as well. Individuals are counseled that claims filed after lengthy lapses in time may be more difficult to investigate. The Sexual Misconduct Officer may reasonably extend this and all other time periods, and may, in his or her discretion, dismiss a grievance if the person is not entitled to use this procedure. Nothing herein should be construed to extend or restrict a person's right to file charges, lawsuits or claims with any other agency, law enforcement, or court, and individuals are encouraged to ensure their rights have not expired through these other avenues. Further, to the extent the complainant's allegations involve criminal activity, the Sexual Misconduct Officer may refer such matters to local law enforcement.

IV. Administrative Action

A. The University recognizes its obligation to address incidents of sexual misconduct, discrimination and harassment on campus when it becomes aware of its existence even if no complaints are filed; therefore, the University reserves the right to take appropriate action unilaterally under this procedure, including but not limited to altering housing arrangements, issuing no-contact orders, modification of course-schedules, etc.

B. With respect to students, the University Vice President for Student Affairs and Dean of Students or other appropriate persons in authority may take immediate administrative or disciplinary action deemed necessary for the welfare or safety of the University community.

C. With respect to employees, upon a determination at any stage in the investigation or grievance procedure that the continued performance of either party's regular duties or University responsibilities would be inappropriate, the proper executive officer may suspend or reassign said duties or responsibilities, place the individual on leave of absence, or terminate employment, pending the completion of the investigation or grievance procedure.

V. Withdrawal of Complaint

The complainant may withdraw the complaint at any point during the investigation; however, the Sexual Misconduct Officer may determine in his or her discretion that the issues raised warrant further investigation despite the complainant's desire to withdraw the complaint.

VI. 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 (for faculty/staff) 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, but will maintain his or her privacy as noted herein. The University's ability to investigate may be limited if a complainant insists his or her name not be disclosed to the alleged perpetrator. The University must weigh such requests for privacy against its duty to provide a safe and nondiscriminatory environment. 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 these proceedings, and if they are University employees, failure to maintain said privacy may result in appropriate disciplinary action. Furthermore, federal law prohibits retaliation against those who file complaints, and the University will take responsive action if such retaliation occurs, up to and including termination and/or expulsion.

Except with respect to hearings before the Faculty Appeals Board or an applicable student disciplinary procedure, all records involving discrimination or harassment, upon disposition of a complaint, shall be transmitted to and maintained by the Institutional Equity Office as confidential records except to the extent disclosure is permissible or required by applicable law or University policy. It should be noted that under the Family Educational Rights to Privacy Act and the Clery Act that final disciplinary actions as well as the rationale and sanctions shall be reported to the complainant as well as reported in accordance with the Clery Act reporting requirements, where appropriate, to the extent the sanctions directly relate to the complainant. The University shall inform complainants if it is unable to ensure privacy.

VII. Proceedings

A. Investigation

Upon receipt of a complaint, the Sexual Misconduct Officer will notify complainant of the receipt of the complaint, and the officer is empowered to investigate the charge, to interview the parties and others, and to gather any evidence he or she deems pertinent. Generally, the Sexual Misconduct Officer interviews the complainant and any relevant witnesses identified by the complainant or the Sexual Misconduct Officer. Once sufficient information is gathered, the Sexual Misconduct Officer will then notify the charged individual of the allegations. With permission from the complainant, the Sexual Misconduct Officer shall advise the charged individual of the name of the complainant. Where a complainant does not wish to be identified, the extent of the investigation may

be limited; however, some form of limited investigation will be attempted while maintaining confidentiality of the complainant's identity. The Sexual Misconduct Officer will interview the charged individual and any witnesses the officer or charged individual identifies as relevant.

Additional evidence may be sought from any relevant party or witness, including but not limited to, email communications, social media postings, text messages, etc. Parties are expected to cooperate and provide this information. Failure to cooperate with an investigation may result in separate disciplinary proceedings. Parties should be aware that as members of the University community, their access to University resources has very limited privacy rights, and the University may obtain information through the University's resources and informational technology system with or without the individual's cooperation. The investigation and findings generally should be completed within 60 calendar days of receipt of the complaint, preferably sooner as practical.

Once the Sexual Misconduct Officer has gathered the information, he/she shall discuss his/her findings, where appropriate, with the Title IX Officer and/or the Equal Opportunity Officer or Associate Title IX Officer for a determination whether sufficient grounds exist to issue a finding of impropriety and/or to refer the matter to the appropriate administrative official.

At all times, through the proceedings, the original complainant shall have all rights afforded to the charged individual.

B. <u>Finding</u>

After the joint Title IX consultation, the Sexual Misconduct Officer shall render a finding based on the evidence as a whole, the totality of the circumstances, and the context in which the alleged incident(s) occurred, utilizing a preponderance of the evidence standard, i.e. the facts complained of are more likely true than not.

Upon completion of the investigation, the Sexual Misconduct Officer is authorized to take the following actions:

> **1. Satisfactory Resolution** - The matter is resolved to the satisfaction of all parties. Provided, however, there will be no direct mediation between the parties. If a resolution satisfactory to the parties is reached, the Sexual Misconduct Officer may prepare a written statement or other applicable document indicating the resolution (e.g. issuing a no contact order). At that time, the investigation and the record shall be closed.
>
> **2. Dismissal** - The Sexual Misconduct Officer finds that no policy violation occurred and dismisses the complaint, giving written notice of said dismissal to each party involved. Within five (5) University business days of the date of the notice of dismissal, the complainant may, in writing, ask the Title IX Officer or his/her designee to reconsider the finding. The request for reconsideration of the

finding must indicate how and why the finding was inaccurate. If after reconsideration, the Title IX Officer determines that additional evidence not available at the time of the report would materially alter the findings, he/she may remand the matter to the Sexual Misconduct Officer for additional investigation and report or may take appropriate action. If no appeal is filed within the five (5) University business-day period or the Title IX Officer does not act on the appeal within five (5) University business days, the case is considered closed and the Sexual Misconduct Officer's findings are final. All appropriate administrative officials and parties shall be notified in writing that the matter is closed.

3. **Determination of Impropriety** - The Sexual Misconduct Officer makes a finding of impropriety and notifies the parties and appropriate administrative officer of the finding and may recommend actions to be taken.

4. **Referral to Faculty Appeals Board** - In the case of a complaint against a faculty member, the Sexual Misconduct Officer in consultation with the Provost, may determine that the evidence is sufficiently clear and serious, warranting the immediate commencement of formal proceedings as provided in the Abrogation of Tenure, Dismissal before Expiration of a Term Appointment, and Severe Sanctions sections of the respective campuses *Faculty Handbook.*

Norman campus:

https://apps.hr.ou.edu/FacultyHandbook/

HSC campus:

http://www.ouhsc.edu/provost/documents/FacultyHandbookOUHSC.pdf.

If the President concurs with the finding of the Sexual Misconduct Officer and Provost, the case may be removed from the grievance proceedings contained herein and further action in the case shall be governed by the Abrogation of Tenure, Dismissal before Expiration of a Term Appointment, and Severe Sanctions section in the *Faculty Handbook.*

C. Appeal of the Sexual Misconduct Officer's Findings

1. Appropriate Appellate Procedures

a. Findings of Impropriety Against Students

Where the Sexual Misconduct Officer determines a student has violated the Sexual Misconduct Policy, he/she shall refer the finding and the matter to the Student Conduct process. Any appeal of the finding shall be heard through the Student Conduct process: *See* www.judicial.ou.edu.

b. Findings of Impropriety Against Faculty Members

i. Severe Sanctions

Where the Sexual Misconduct Officer determines a faculty member has violated the Sexual Misconduct Policy and based on consultations with the appropriate administrative officials, a severe sanction of abrogation of tenure, dismissal or summary suspension is imposed or recommended as noted in the respective faculty handbooks:

Norman campus:

http://www.ou.edu/content/dam/provost/documents/ouncfb.pdf

HSC campus:

http://www.ouhsc.edu/provost/documents/FacultyHandbookOUHSC.pdf.

ii. Other Than Severe Sanctions

Where the Sexual Misconduct Officer determines a faculty member has violated the Sexual Misconduct Policy and based on consultations with the appropriate administrative official, a sanction less than abrogation of tenure, summary suspension or dismissal is recommended or imposed, the faculty member only may appeal the finding and sanction through the process noted in the applicable faculty handbooks. No additional complaints or grievances regarding the same subject matter may be filed with the Faculty Appeals Board.

c. Findings of Impropriety Against Employees

Where the Sexual Misconduct Officer determines an employee has violated the Sexual Misconduct Policy, the employee may appeal the finding and recommended or imposed sanction through the process noted below.

d. Findings of Impropriety Against Third Parties

Where the Sexual Misconduct Officer determines a third party has violated the Sexual Misconduct Policy, the third party may request the Title IX Officer or his/her designee in consultation with the appropriate

executive officer over the area reconsider the findings. If after reconsideration, the officers determine a remand is warranted, the matter will be referred to the Sexual Misconduct Officer for further investigation or modification. If the officers determine the findings are appropriate, the findings shall be final and binding on the third party without further appeal.

2. Request for an Appeal Through This Process

a. Where the matter is not otherwise referred to other University procedures for review and action (e.g. Student Conduct process or Faculty Appeals Board process for severe sanctions), and if the appeal is permissible as noted above, the party accused of impropriety may appeal the finding in writing to the Equal Opportunity Office staff within five (5) University business days of the finding.

b. The request for appeal must contain the particular facts upon which the appeal is based. The Equal Opportunity Office staff or the University's designee, shall provide a copy of the request to the proper respondent(s) and the original complainant, and request a written response from the respondent.

c. Generally, the respondent will be the Sexual Misconduct Officer, and the initial complainant shall be a witness in the appellate proceedings, rather than a "respondent". In this type of appeal, all references to "respondent" in the appellate procedures shall refer to the Sexual Misconduct Officer and/or relevant members of the University administration. Provided, however, the initial complainant shall be entitled to all rights and procedures available to any party during the appellate process and shall be included in the definition of parties.

d. An appropriate University official/employee may be identified by the administration to manage the appeals process if the Equal Opportunity Office staff is also involved as the respondent along with the Sexual Misconduct Officer, where appropriate.

3. Response to Request for Appeal

If a hearing is requested, the respondent's written response to the request for a hearing must be sent to the Equal Opportunity Office's staff or the University's designee within five (5) University business days of receiving notice that a hearing has been requested. The Equal Opportunity Office's staff shall provide a copy of the response to the party requesting the hearing. The initial complainant may likewise provide a written response within this timeline if he/she desires.

4. Selection of a Hearing Panel

Within two (2) University business days following receipt of the written request for a hearing, the Equal Opportunity Office's staff or the University's designee shall contact the parties informally and initiate the process to determine the members of the Hearing Panel.

a. Panel

A five (5) member hearing panel will be chosen by the parties to the complaint from the following groups:

- on the Health Sciences Center campus and for HSC-based programs at the Tulsa campus, the 24-member Committee on Discrimination and Harassment. Provided, however, students may not sit on these hearing panels.

- on the Norman campus and for Norman-based programs on the Tulsa campus, from the 16-member Committee on Discrimination and Harassment with faculty representation from the 50-member Faculty Appeals Board. Provided, however, students may not sit on these hearing panels.

b. Process of Panel Selection

The Equal Opportunity Office's staff or University designee shall contact the parties informally to select the panel. The appellant and the respondent (in conjunction with the original complaint) will select five (5) names each from the pool, excluding students. The names will be listed in rank order with name number one (1) on each list being the preferred panelist.

The Equal Opportunity Office's staff or the University's designee will contact the individuals in the order selected. The first two (2) names on each list of who is available to serve will comprise the hearing panel.

Those individuals selected will choose a fifth name from the entire pool to serve as a panel member and who will serve as chair. If the individuals forming the hearing panel cannot agree on the fifth name and/or his or her service as chair, the Equal Opportunity Office's staff or University designee shall appoint the fifth name and the chair.

Any party to the complaint may ask the Equal Opportunity Office's staff or the University's designee to disqualify any member of the hearing

panel. Such requests will be in writing and show sufficient grounds for removal. Furthermore, no panelist shall be expected to serve if he or she feels that a conflict of interest exists. Replacements shall be selected in the same manner as the original panel.

D. Orientation Conference/Pre-hearing

Within ten (10) University business days of receiving notice of service on the Hearing Panel, or sooner if feasible, the chair shall attend an orientation and review the finding and response to determine whether there exist adequate grounds for a formal hearing.

1. Orientation

A member of the Equal Opportunity Office and/or the University's designee shall be present during the orientation, where he or she will provide the chair with a copy of the hearing guidelines, the written complaint, the request for a hearing, the written responses, and the Sexual Misconduct Officer's report.

2. Prehearing

Once the orientation is concluded, the chair shall review the materials, in private, to determine whether a formal hearing should be held. This is known as the prehearing. During the prehearing, the chair shall review the Sexual Misconduct Officer's report and the response documents and all relevant materials, and shall determine whether a formal hearing is warranted.

3. Determination of Formal Hearing

Whether a formal hearing is warranted shall be within the chair's discretion and based on the appellant's written appeal. To determine whether a formal hearing is warranted, the chair shall base his/her decision on whether (a) there was insufficient evidence, utilizing a preponderance of the evidence standard, to support the Sexual Misconduct Officer's finding; or (b) additional evidence not previously available exists that substantially would have altered the Sexual Misconduct Officer's findings. Based on this review and analysis, the chair within its reasonable discretion shall determine whether a formal hearing is warranted, and shall immediately notify the parties in writing and the Equal Opportunity Office staff or University designee of its decision. A determination that a formal hearing is warranted does not necessarily imply the Sexual Misconduct Officer's finding was erroneous.

4. Determination Not to Hold a Formal Hearing

If the chair determines that adequate grounds for a hearing do not exist in his/her reasonable discretion, then he/she immediately shall notify the Equal Opportunity

Office staff, who in turn, immediately shall notify the parties and appropriate executive officers in writing. The Hearing Panel's services shall be concluded and the Sexual Misconduct Officer's findings shall be final.

The appropriate executive officer shall render his or her decision and notify the parties and the Equal Opportunity Office staff and Title IX Officer within five (5) University business days of the chair's notification to the executive officer of his/her decision. Any party may appeal the executive officer's decision in writing to the President within five (5) University business days of notice of the decision. If the President does not act within five (5) University business days of the request, the executive officer's decision is final.

E. Formal Hearing

1. Scheduling

If the chair determines a formal hearing is warranted, the chair will schedule the formal hearing to be held within 30 calendar days of his/her decision to hold a formal hearing, preferably sooner. The chair shall immediately notify the Equal Opportunity Office staff and Title IX Office in writing, who in turn, shall notify the parties in writing of the date, time and location of the formal hearing.

The Equal Opportunity Office staff or University designees shall notify the parties in writing of the date, time, and location of the hearing, along with other relevant information concerning the hearing process. Parties are responsible for giving such notice to their witnesses. The hearing shall be scheduled to reasonably ensure that the appellant, respondent, original complainant and essential witnesses are able to participate. However, the chair may ultimately schedule all relevant deadlines and hearings.

2. Procedures

The Hearing Panel procedures shall be established with reference to the Hearing Guidelines provided by the Equal Opportunity Office staff or the University's designee at the orientation conference, and as determined by the chair in consultation with the University Legal Counsel, where appropriate. All parties shall be provided with a copy of the Hearing Guidelines simultaneously with the notice of formal hearing. Any party shall be entitled to present relevant evidence as determined by the chair of the Hearing Panel.

The parties shall present their own cases. Again, where the Sexual Misconduct Officer has found a policy violation, the Sexual Misconduct Officer presents the case on behalf of the original complainant and the original complainant is simply a witness. Should a complainant wish to present his/her case as well, they may do so and have equal rights under this policy.

Advisors and counsel may be present during the hearings and meetings, but may not directly participate. The parties reasonably may request a recess to consult with his or her advisor outside of the hearing.

The parties may call relevant witnesses to testify. However, the parties may not cross-examine one another. Alternate testimonial methods may be permitted, e.g. Skype, testifying behind a screen, etc. in the chair's discretion. The parties may submit questions to the hearing panel for the panel to ask each party, if relevant, as determined in the panel's discretion. The hearing shall be closed. Audiotape recordings of the proceedings shall be arranged by the chair and paid for by the University. Copies of the recording will not be provided. Transcripts may be charged to the requesting party; the original version of the recording shall remain the property of the University.

3. Standard of Review

At the formal hearing, the appropriate standard of review is whether by a preponderance of the evidence, the report, or its result

(a) is supported by any evidence, or

(b) substantially would have been altered by the new evidence that was not previously available.

The chair acts as a monitor of the process and as a non-voting member except in cases of a tie vote. In such cases, the chair will act as the tie-breaker.

4. Resolution Prior to Conclusion of Hearing

If the matter is resolved to the satisfaction of all parties prior to completion of the hearing, a written statement shall indicate the agreement recommended by the parties and the statement shall be signed and dated by each party and by the chair. The recommendation will be referred immediately to the Institutional Equity and Title IX Officer and/or Equal Opportunity Office staff, who in turn, shall immediately notify, in writing, the appropriate executive officer for final determination.

The executive officer shall notify the parties of his/her final determination within three (3) University business days of notification of the agreed resolution. Assuming the executive officer agrees with the resolution, the matter shall be closed. To the extent the executive officer disagrees with the resolution, he/she may render his/her decision and immediately notify the parties.

Any party may appeal the executive officer's decision in writing to the President with a copy to the Institutional Equity and Title IX Officer, and/or Equal Opportunity Office staff and all other parties. The President shall render a

decision within five (5) University business days of notice of the appeal. If the President does not act within five (5) University business days of notice of the appeal, the executive officer's decision shall be final.

5. Findings and Recommendations

In the event that no solution satisfactory to the parties is reached prior to the completion of the hearing, the Hearing Panel shall determine by majority vote, in writing, whether the finding should be upheld or modified or remanded for further action, and shall notify the Equal Opportunity Office staff of its findings and recommendations within three (3) University business days of the hearing (unless the Hearing Panel determines that because of unforeseen circumstances additional time is needed). The Equal Opportunity Office staff will immediately notify the proper executive officer, in writing, of the decision with copies to the President.

6. Executive Officer's Decision

a. Appellate Times

Within three (3) University business days of receipt of the Hearing Panel's findings and recommendations, the appropriate executive officer shall inform the complainant and the respondent of the findings of the Hearing Panel and the executive officer's decision as permitted by applicable law. A copy of the executive officer's decision shall be immediately transmitted to the chair of the Hearing Panel, with copies to the President and the Equal Opportunity Office staff.

b. Appeal to the President

Any party (including the original complainant) may appeal the executive officer's decision to the President within three (3) University business days of the decision. If the President does not act to change the decision within three (3) University business days of receiving the appeal, the executive officer's decision shall be final under the executive authority of the President.

EXHIBITS 2, 3, & 4
to

DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

FILED UNDER SEAL
PURSUANT TO COURT'S ORDER
DATED JULY 29, 2022

MINUTES OF A SPECIAL MEETING
THE UNIVERSITY OF OKLAHOMA BOARD OF REGENTS
FEBRUARY 20, 2019

A special meeting of the Board of Regents governing The University of Oklahoma, Cameron University and Rogers State University was called to order in the Robert M. Bird Library on the Health Sciences Center Campus in Oklahoma City, Oklahoma, at 9:33 a.m. on February 20, 2019.

The following Regents were present: Leslie J. Rainbolt-Forbes, M.D., Chairman of the Board, presiding; Regents Renzi Stone, Phil Albert and Frank Keating.

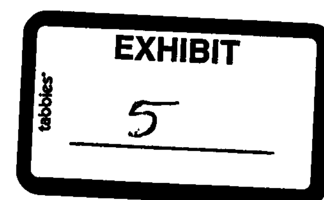
Others attending all or a part of the meeting included Chief Legal Counsel Anil Gollahalli; Executive Secretary of the Board of Regents, Dr. Chris A. Purcell; Vice President for Marketing and Communications Lauren Brookey; and Drew Neville, Board Counsel.

Notice of the time, date and place of this meeting was submitted to the Secretary of State, and the agenda was posted in the Office of the Board of Regents on or before 8:00 a.m. on February 19, 2019, both as required by 25 O.S. 1981, Section 301-314.

Regent Stone moved the Board enter executive session to discuss personnel investigation(s) as stated on the agenda at 9:34 a.m. The executive session was held in the same location, with Drew Neville attending. Regent Natalie Shirley joined the meeting during executive session at 9:46 a.m. Regent Frank Keating departed at 11:27 a.m.

The Regents exited executive session at 11:58 a.m. and the meeting was adjourned for the day at 12:01 p.m.

Chris A. Purcell, Ph.D.
Executive Secretary of the
Board of Regents



Attention: Lauren Brookey
University of Oklahoma
660 Parrington Oval
Norman, OK, 73109

Wednesday, May 1, 2019

To: Ms. Brookey or the subsequent party in charge,

My name is William W. Savage III (Tres), editor in chief of NonDoc.com. We are a news organization in Oklahoma, and I am hereby requesting the following public records under the Oklahoma Open Records Act:

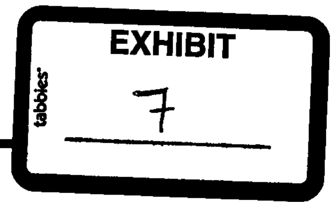
- Any and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim "Tripp" Hall.

If possible, I request digital copies of this information in PDF or Excell format. Please contact me at (405) 808-0308 with any questions regarding this request. You may also reach me by e-mail at Savage@nondoc.com. Any estimate you can provide as to the timeframe for completion would be greatly appreciated.

Thank you very much for your time and effort.

Sincerely,

William W. Savage III



Austin R. Vance

From: Open Records <openrecords@ou.edu>
Sent: Wednesday, June 12, 2019 10:00 AM
To: savage@nondoc.com; Open Records
Subject: OU Open Records Response - RE: Open Records Request

Good morning Tres,

This University is in receipt of your Open Records Act request below. Your request seeks records related to a specific employee. The University will not undertake a search for records that would not be released even if they exist. Any report that legal counsel, retained by the University, provides at the conclusion of any investigation of any employee would be confidential pursuant to 51 O.S. §§ 24A.5(1)(a), 24A.7(A), and 24A.12. Please feel free to contact this office if you would like to clarify your request or have any questions or concerns.

(19-0583)

Thank you,

Open Records Office
University of Oklahoma
905 Asp Ave, Rm 114
Norman, OK 73019
(405) 325-0202
(405) 325-9034 (fax)
openrecords@ou.edu

From: Tres Savage <savage@nondoc.com>
Sent: Wednesday, May 1, 2019 2:14 PM
To: Open Records <openrecords@ou.edu>; Brookey, Lauren F. <lbrookey@ou.edu>
Subject: Open Records Request

Lauren, I apologize for continuing to loop you here, but I never received confirmation of my last request submission, so I just wanted to include a human on the this email along with the Open Records email address.

Please do not hesitate for anyone to reach out to me at any time if there are any questions. Sincerely,

- Tres Savage / 405-808-0308

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HONORARY LEADERSHIP COUNCIL
CHIP BOK *Creators Syndicate*
DAHLIA LITHWICK *Slate*
TONY MAURO *American Lawyer Media, ret*
ANDREA MITCHELL *NBC News*
CAROL ROSENBERG *The New York Times*
PAUL STEIGER *ProPublica*

Affiliations appear only for purposes of identification.

EXHIBIT 8

May 26, 2021

The University of Oklahoma
Delivered via email to: regentspurcell@ou.edu, regentkeating@ou.edu, regentcawley@ou.edu, regentalbert@ou.edu, regentshirley@ou.edu, regentstevenson@ou.edu, regentnagel@ou.edu, regentholloway@ou.edu, agollahalli@ou.edu, openrecords@ou.edu

Re: Reconsideration of Oklahoma Open Records Act request

To the University of Oklahoma Board of Regents and Open Records Office:

I represent NonDoc Media in connection with a request for public records sought by Tres Savage under the Oklahoma Open Records Act ("ORA"), Okla. Stat. tit. 51, §§ 24A.1-24A.32. NonDoc Media is a non-profit, award-winning media outlet in Oklahoma that works on behalf of the public interest. Mr. Savage is the Editor in Chief and a seasoned reporter at NonDoc Media, where he covers a variety of topics including education.

On May 1, 2019, Mr. Savage submitted an ORA request (a copy of which follows at page two) to the University of Oklahoma for "[a]ny and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim 'Tripp' Hall."

The Open Records Office denied Mr. Savage's ORA request on June 12, 2019, citing Okla. Stat. tit. 51, §§ 24A.5(1)(a), 24A.7(A), and 24A.12. I respectfully ask you to reconsider your decision and release the requested records to Mr. Savage. If you remain firm in your original decision, please further detail your reasons for denial so that we may intelligently balance them against the public interest in these records.

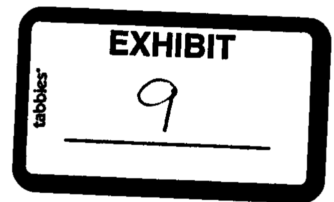
Do not hesitate to reach out with any questions. Otherwise, I look forward to a response from you within ten days from the date of this letter. If we do not receive the requested records or a written response from you within ten days, we will accept this as a willful decision to withhold the requested public records. NonDoc Media and Mr. Savage reserve all rights in relation to this matter.

Thank you for your time and attention.

Respectfully,

Kathryn E. Gardner

Kathryn E. Gardner
Attorney | Local Legal Initiative Oklahoma
Reporters Committee for Freedom of the Press
110 S. Hartford Ave., Ste. 2524
Tulsa, OK 74120
(918) 255-0060
kgardner@rcfp.org



The UNIVERSITY *of* OKLAHOMA®

OFFICE OF LEGAL COUNSEL

June 11, 2021

Ms. Kathryn Gardner
Reporters Committee for Freedom of the Press
110 S. Harford Ave., Ste. 2524
Tulsa, OK 74120

Re: Your Request for Reconsideration dated May 26, 2021

Dear Ms. Gardner:

This letter is in response to your correspondence dated May 26, 2021. The University has reconsidered Mr. Savage's May 1, 2019, request for:

> Any and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim "Tripp" Hall.

The University's response remains unchanged. An investigative report from a law firm engaged by the University to investigate misconduct allegations involving an employee is confidential pursuant to 51 O.S. § 24A.5(1)(a) and may be kept confidential under 51 O.S. §§ 24A.7(A) and/or 24A.12, as outlined in the University's June 12, 2019 response to Mr. Savage.

As your May 26 correspondence mentions balancing the University's withholding of any report against the public interest in the document – presumably under 51 O.S. §§ 24A.7(A) and/or 24A.12, I take this opportunity to explain the University's exercise of its discretion in maintaining the confidentiality of this (or any such similarly situated) report under those sections.

Disclosure of investigatory reports of the type your client seeks would cause irreparable harm to the University's ability to conduct such investigations. The investigative report Mr. Savage seeks was the product of numerous people placing their trust in the University and participating in a voluntary process that many participants conditioned upon confidentiality. These individuals shared private details about events, and the University assumed an obligation to maintain the confidentiality of these details to the best of its ability. Release of that report would undoubtedly have a chilling effect on any future reporting of claims to the University or cooperation of witnesses. This would undermine the reporting and investigative processes and would compromise the very atmosphere of open reporting and thorough investigation the University strives to foster and is required by numerous federal regulations to which the University is subject.

Additionally, Mr. Boren has disassociated himself from the University. The University did not

660 Parrington Oval, Suite 213, Norman, Oklahoma 73019
PHONE: (405) 325-4124 FAX: (405) 325-7681

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pay any funds – public or otherwise – to Mr. Boren in connection with his disassociation from the University. The University has fully complied with both its policies and those regulations governing its response and the matter has been closed for more than two years.

To the extent exercise of discretion to disclose is even applicable in this instance – and given the detrimental impact to the University's future investigatory efforts – disclosure appears only to serve the public's curiosity – not its interest.

Additionally, the Open Records Act is inapplicable to records protected by state evidentiary privileges listed in 51 O.S. § 24A.5(1)(a), and the University maintains those privileges with respect to the report your client seeks.

Please feel free to contact this office if you have further facts or authority, you believe the University needs to consider with respect to our withholding of the report requested by Mr. Savage.

Very truly yours,

Heidi Long

Heidi J. Long
Associate General Counsel

660 Parrington Oval, Suite 213, Norman, Oklahoma 73019
PHONE: (405) 325-4124 FAX: (405) 325-7681