



FILED

JUN 16 2023

IN THE DISTRICT COURT IN AND FOR CLEVELAND COUNTY  
STATE OF OKLAHOMA

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

In the office of the  
Court Clerk MARILYN WILLIAMS

Case No. CV-2021-1770  
Judge Walkley

**PLAINTIFFS' MOTION FOR *IN CAMERA* REVIEW  
AND MEMORANDUM IN SUPPORT THEROF**

Plaintiffs NonDoc Media and William W. Savage III (“Plaintiffs”) respectfully move the Court for an order requiring Defendant the Board of Regents (“Defendant”) to furnish unredacted copies of two reports withheld in full from Plaintiffs to the Court for *in camera* inspection and determination as to whether Defendant’s Motion for Summary Judgment must be denied. In particular, and as noted in their concurrently-filed Response in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiffs’ Response”), Plaintiffs move herein for the Court to review the two reports compiled by the law firm Jones Day for the University of Oklahoma that are the subject of the instant litigation (the “Jones Day Reports”). This Motion is based on Plaintiffs’ concurrently filed Response, the Declaration of Jess Eddy filed in support of Plaintiffs’ Response, all pleadings, records, and files in the above-captioned case, and on such argument as may be presented by counsel at any hearing on this Motion.

**ARGUMENT**

“Because of the strong public policy allowing public access to governmental records,” the burden is on the public agency seeking to deny access to show that a record should not be made

available.” *Okla. Ass’n of Broadcasters, Inc. v. City of Norman*, 2016 OK 119, ¶ 15; *see also* 51 O.S. § 24A.2. As “there are often no clear answers to privilege issues due to the fact-dependent case by case analysis that is required,” *Lindley v. Life Invs. Ins. Co. of Am.*, 267 F.R.D. 382, 398 (N.D. Okla. 2010), *aff’d in part as modified*, No. 08-CV-0379-CVE-PJC, 2010 WL 1741407 (N.D. Okla. Apr. 28, 2010), use of *in camera* review to determine the appropriateness of exemptions to disclosure is a valuable tool for the trial court. *See, e.g., Vandelay Ent., LLC v. Fallin*, 2014 OK 109, ¶ 28 (“[I]n camera review and judicial balancing of competing public interests provide a[n] . . . accommodation when there is a question over whether the privilege exists or should be enforced. These safeguards fully protect the public from abuse of the privilege, while shielding communications ultimately found to warrant protection from public disclosure.”).

This Court has the authority to conduct an *in camera* review of the Jones Day Reports. *See, e.g., Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶ 5 (referencing district court’s *in camera* review of records to determine compliance with Open Records Act); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1493 (10th Cir. 1990). A key criterion for conducting *in camera* review is whether the court believes that *in camera* inspection is needed to make a responsible determination on the claims of exemption. *See B.H. through Holder v. Gold Fields Mining Corp.*, No. 04-CV-564-JOE-PJC, 2005 WL 8175527, at \*1 (N.D. Okla. Aug. 18, 2005) (granting motion for *in camera* review in order to determine propriety of privilege claims to records); *In re Stewart*, No. 15-12215-JDL, 2021 WL 1157928, at \*4 (Bankr. W.D. Okla. Mar. 25, 2021) (ordering *in camera* review of documents; noting that the U.S. Supreme Court “has approved the practice of requiring parties who seek to avoid disclosure of documents to make documents available for *in camera* inspection”) (citing *United States v. Zolin*, 491 U.S. 554, 569 (1989)).

Here, as further detailed in Plaintiffs' Response, *see* Pls.' Response, Defendant has proffered strained and contradictory claims in support of its invocation of, *inter alia*, the attorney-client privilege, informer's privilege, deliberative process privilege, personnel records exemption, investigatory records exemption, Title IX, and privately made contractual agreements. Given the under-developed factual record, *see id.*, and the variety of asserted exemptions to public disclosure, *in camera* review is necessary and appropriate.

**I. The Court should take *in camera* review of the Jones Day Reports because Defendant has presented inadequate justification and evidence for withholding those public records.**

*In camera* review is particularly appropriate when a government party withholding public records submits affidavits insufficiently detailed to permit meaningful review of their claimed exemptions or when the dispute turns on the contents of the withheld documents and not the parties' interpretations of those documents. *See, e.g., Hale v. Dep't of Justice*, 99 F.3d 1025, 1033 (10th Cir. 1996) (court employed *in camera* review of records where it was "unpersuaded from the . . . affidavit that the government has established an adequate justification to withhold information"); *see also Cantu Servs., Inc. v. Worley*, No. CIV-12-129-R, 2021 WL 2323721, at \*6 (W.D. Okla. June 7, 2021) ("District Courts have found showings of deception, or potential deception, sufficient to support taking on *in camera* review."). If the government's "affidavits provide specific information sufficient to place the documents within the exemption category[ and] if the information is not contradicted in the record . . . then summary judgment is appropriate without *in camera* review of the documents." *Hull v. IRS*, 656 F.3d 1174, 1177-78 (10th Cir. 2011) (citation omitted). And finally, when there is a "strong public interest" in disclosure of documents, it further counsels in support of an *in camera* review. *Wyoming v. Dep't of the Interior*, No. 04-CV-213-J, 2005 WL 8156819, at \*3 (D. Wyo. Mar. 28, 2005).

**A. Defendant's representations in support of summary judgment as to each of the Jones Day Reports are insufficient.**

*In camera* inspection is particularly warranted where the documents and justifications for withholding are not described in sufficient detail to demonstrate that the claimed exemption applies; in such circumstances, *in camera* review is an appropriate tool for courts to evaluate an agency's claim that withheld material is exempt from disclosure. *See, e.g., DocuFreedom Inc. v. Dep't of Justice*, No. 17-2706-DDC-TJJ, 2019 WL 3858166, at \*3 (D. Kan. Aug. 16, 2019); *AKH Co. v. Universal Underwriters Ins. Co.*, No. 13-2003-JAR-KGG, 2015 WL 6473477, at \*2 (D. Kan. Oct. 27, 2015) (ordering *in camera* review of documents for which party was asserting attorney-client privilege).

Here, Defendant's Motion for Summary Judgment consists of rote recitations of legal standards with little or no description of why the specific documents at issue qualify for protection under the exemptions invoked. *See* Def.'s Mot. Summ. J. 10–12. For instance, as detailed in Plaintiffs' Response, Defendant has invoked the informer's privilege as to both Jones Day Reports, but it has provided wholly insufficient evidence that the entirety of both Reports should be withheld to vitiate that privilege (if applicable at all), as opposed to only the identities of confidential informers (if any). *See* Pls.' Response at 16–20. And with respect to the attorney-client privilege, which is limited in scope to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" between a client and their counsel, 12 Okla. Stat. § 2502, Defendant has not even attempted to demonstrate whether any portions of the Jones Day Reports fall outside of these cabined parameters—*e.g.*, business advice or communications made between employees of the University prior to Jones Day's hiring, *even* if those communications were later attached to the Jones Day Reports as appendices or exhibits or incorporated therein—and thus must be disclosed. *See* Pls.' Response at 8 (citing Leo H. Whinery,

Oklahoma Evidence—Commentary on the Law of Evidence, 3 OKPRAC § 36.14 (Apr. 2023)). Thus, because the dispute turns on the contents of the withheld documents—and not the parties’ interpretations of those documents—*in camera* review is appropriate.

And the affidavit Defendant submitted in support of summary judgment provides no further information on the alleged scope of asserted privileges. The sole affidavit submitted by Defendant is that of Heidi Long, a former member of the University’s Office of Counsel, whose two-page affidavit has been contradicted in several ways since she wrote it in July 2022, as detailed in Plaintiffs’ concurrently submitted Statement of Material Facts. *See* Pls.’ Statement of Material Facts pp. 2–8. Courts regularly employ *in camera* review where, as here, the government submits an unpersuasive affidavit that has been both contradicted and lacks detail necessary to permit meaningful review. *See Hale*, 99 F.3d at 1033; *Cantu Servs., Inc.*, 2021 WL 2323721, at \*6. For these reasons, *in camera* review of the Jones Day Reports is warranted.

**B. Contradictory evidence in the record provides further support for *in camera* review.**

“If the affidavits provide specific information sufficient to place the documents within the exemption category, *if the information is not contradicted in the record*, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.” *DocuFreedom Inc. v. Dep’t of Justice*, No. 17-2706-DDC-TJJ, 2019 WL 3858166, at \*3 (D. Kan. Aug. 16, 2019) (emphasis added). Here, the materials submitted by Defendant in support of withholding the Jones Day Reports from disclosure are unsupported by and/or contradict the record before the Court.

For instance, despite Defendant’s assertion that the Jones Day Reports should be withheld pursuant to the informer’s privilege—which encompasses *only* (i) the identity of an informant who (ii) furnishes information to a law-enforcement agency actively investigating a violation of law,

12 Okla. Stat. § 2510—it has nevertheless attempted to *prohibit* its former President from voluntarily sharing his knowledge related to the Reports with law enforcement. *See* Ex. 100 at 3 (warning former University President Gallogly against “going public” by “commenting on confidential information to state and federal officials”). Such contradictions warrant further inspection by this Court. Additionally, while Defendant has argued that the Alumni Donor Report is entirely protected by the attorney-client privilege, Plaintiffs have submitted evidence that the report did not reflect legal advice but instead constituted a review of what data was incorrectly reported, what the correct data was, how long misreporting had occurred for, who was involved with the misreporting, and whether anyone was compensated for participating in the misreporting or in a coverup of the misreporting. Pls.’ SMF ¶ 8. Because the attorney-client privilege does not apply when “an attorney is simply acting as a conduit for factual information or business advice,” Defendant’s privilege claim is wholly inconsistent with the record evidence and warrants close scrutiny. *See Atoka Precision Mach. Shop, LLC v. Peerless Ins. Co.*, 2013 WL 817279, \*1 (E.D. Okla. 2013). In light of these material discrepancies, *in camera* review is further warranted with respect to the Jones Day Reports.

**C. The public interest in the records sought by Plaintiffs further supports *in camera* review.**

Finally, the “strong public interest” in disclosure of the Jones Day Reports supports an *in camera* review in this case. *Wyoming*, 2005 WL 8156819, at \*3. As described in Plaintiffs’ Response, *see* Pls.’ Response at 30–32, the Jones Day Reports bear directly on the appropriateness, or lack thereof, of a public institution’s response to serious claims of misconduct. Given that the principal subject matter of these Reports is a public institution, and given the public’s keen interest in understanding and evaluating oversight mechanisms of such institutions, *in camera* review of the Jones Day Reports is especially warranted. *See id.*

**II. Plaintiffs and Defendant have conferred regarding the relief sought in this Motion.**

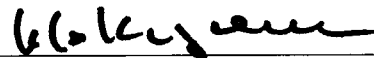
Undersigned counsel for Plaintiffs (Lin Weeks, along with prior counsel Kathryn Gardner) conferred via conference call with counsel for Defendant (Michael Burrage and Austin Vance) on April 20, 2023 regarding Defendant's position on providing the court with the Jones Day Reports for *in camera* review. Defendant opposes the relief sought in this Motion.

Dated: June 15, 2023

Respectfully submitted,

/s/ Lin Weeks

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## CERTIFICATE OF SERVICE

I hereby certify that the above document was mailed on June 15, 2023, by depositing it in the U.S. Mail, postage prepaid to counsel of record for Defendant:

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