STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

vs.

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

Case No. CV-2021-1770
Judge Tupper

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER *IN CAMERA* DISCLOSURE OR, ALTERNATIVELY, FOR CLARIFICATION OF PROCESS AND MOTION FOR HEARING

Petitioners respectfully submit this response to Defendant's February 2, 2024 "Motion to Reconsider *In Camera* Disclosure or, Alternatively, for Clarification of Process and Motion for Hearing" (Defendant's "Motion"). In the absence of new controlling law or newly uncovered facts there is no reason for the Court to amend its January 23, 2024, Order Granting Plaintiffs' Motion for *In Camera* Review (the "Order"). To the extent Defendant's Motion submits new argument, that argument is both waived and unavailing.[1] As the Court has already held, it has the authority to review the two reports (and their exhibits and attachments) at issue, and its review is necessary at this stage of the case.

[1] Nor should the Court grant Defendant's request for a hearing on this matter. During the October 2, 2023, status conference, the parties agreed that no hearings were necessary on the outstanding discovery issues before the Court, including Plaintiffs' now-resolved Motion for *In Camera Review*. The parties did advise the Court that a hearing should be held on Defendant's pending Motion for Summary Judgment, and Plaintiffs plan to present argument at the summary judgment hearing contemplated by the Court in its October 3, 2023 Summary Order. **The Court's *in camera* review of the reports should precede argument on summary judgment.**

STANDARD OF REVIEW

A. *In Camera* review is the Oklahoma Supreme Court's preferred method of adjudicating privilege issues.

The Court's Order granting *in camera* review was proper and should not be amended. 12 Okla. Stat. Ann. § 3237 ("The court may conduct an *in camera* review of the documents for which the privilege or other protection from discovery is claimed."); *accord Scott v. Peterson*, 2005 OK 84, ¶ 17. Indeed, "[*i*]*n camera* inspection of the documents sought to be withheld from . . . public disclosure is the preferred way to protect the interests of both parties." *YWCA of Oklahoma City v. Melson*, 1997 OK 81, ¶ 21; *see Skinner v. John Deere Ins. Co.*, 2000 OK 18, ¶ 12 (ordering trial court to conduct *in camera* review to "determine if . . . [documents sought] were subject to an attorney-client or work-product privilege.").

In contrast to the above-cited cases, *U.S. v. Zolin* is not controlling—it addresses the Federal Rules of Evidence crime-fraud exception—but the U.S. Supreme Court's decision ordering the district court to conduct *in camera* review confirms the need for such review in this case. 491 U.S. 554, 563–64 (1989) As the Supreme Court explained, "*in camera* review does not destroy the privileged nature of the contested communications," and "the question of the propriety of that review turns on whether the policies underlying the privilege and its exceptions are better fostered by permitting such review or by prohibiting it." 491 U.S. at 569. Both parties discussed *Zolin* in their earlier briefing,[2] and its reasoning squares with this Court's decision that it "has the authority to conduct an *in camera* review," that use of *in camera* review "is a valuable tool," which "provides an accommodation when there is a question over whether a privilege exists or should be enforced," and that it "is needed to make a responsible determination on [Defendant's] claims of privilege

[2] *See* Pls. Mot. for *In Camera Review* at 2; Def. Resp. to Mot. for *In Camera* Review at 2; Pls. Reply in Support of Mot. for *In Camera* Review at 2.

and exemption." Order, Jan. 24, 2023. *Zolin* confirms the propriety of *in camera* review in this case.

B. Defendant has waived any new arguments advanced in its motion.

Defendant provides no statutory basis for its submission because none exists. *See Smith v. City of Stillwater*, 2014 OK 42, ¶ 10 ("A 'motion to reconsider' does not technically exist within the statutory nomenclature of Oklahoma practice and procedure."). Instead, Defendant relies on a holding that intermediate orders are within a trial court's control to modify or alter. *See* Def. Mot. at 3 (citing *Snow v. TravelCenters of Am. LLC*, 2023 OK CIV APP 8). In any event, Defendant cannot skirt the normal rule that "[i]ssues not briefed are waived." *Shero v. Grand Sav. Bank*, 2007 OK 24, ¶ 3 n.2. Even in *Snow*, the district court overruled the motion to revisit an intermediate order; the appellate court reviewed only the final judgment. 2023 OK CIV APP. 8 ¶ 8. Defendant has waived its opportunity to raise arguments and authorities that it did not raise in its June 30, 2023, Response to Plaintiffs' Motion for *In Camera* Review. *Burrows v. Burrows*, 1994 OK 129, ¶ 3 n.4 ("Parties waive issues by failing to brief them. . . . Consequently, we do not address the issue.") (citation omitted). The Court may not consider these belated arguments, nor Defendant's request for alternative relief. Defendant has asked the Court to change its mind; it cannot submit new argument to do so.

C. Defendant once again misstates the applicable standard of law for resolution of its summary judgment motion.

At this stage of the case, where Defendant has moved for summary judgment, "all inferences and conclusions to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," here, Petitioners. *Northrip v. Montgomery Ward & Co.*, 1974 OK 142. This Court is not conducting an "administrative review" into whether the University "abuse[d] its discretion." *See* Def. Mot at 6. Rather, as the University's own cited

authority explains in no uncertain terms, the "clear public purpose" of the ORA "would be inherently undermined" if a public body's initial determination to disclose or withhold a document were afforded deference. *Ross v. City of Owasso* (*Ross II*), 2020 OK CIV APP 66, ¶ 9. The court "must construe the [Open Records] Act's provisions to allow access unless an exemption clearly applies; 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*, 2016 OK 119, ¶ 15.

ARGUMENT

I. There are two Jones Day Reports and *in camera* review of both is necessary.

At significant expense to Oklahoma taxpayers,[3] Defendant commissioned and received two reports from the law firm Jones Day. The first involved a review of financial data reported to outside organizations, including data provided to U.S. News and World Report (the "Alumni Donor Report").[4] The second involved an investigation into whether the University's former president, David Boren, abused his position by making sexual advances toward or engaging in sexual misconduct with students and employee subordinates (the "Sexual Misconduct Report").[5]

The parties contest the contents of both reports. Defendant asserts without citation or evidence that both reports consist entirely of "advice from legal counsel." Def. Mot. at 5. But, the University is a public entity, and "there is no [attorney-client] privilege" for public entities "unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the . . . [public entity] to process the

---

[3] *See* Pls. Statement of Additional Material Facts ("Pls. SMF") ¶ 39, Ex. M ($1.5 million collectively for two reports).

[4] *See* Pls. SMF ¶¶ 7–9, Ex. G.

[5] *See* Pls. SMF ¶¶ 23–24.

claim." 12 Okla. Stat. § 2502(D)(7).[6] Even setting aside that likely dispositive statutory limitation, Plaintiffs have shown that the reports and their attachments include information that was ***never*** a confidential attorney-client communication.[7] For instance, Plaintiffs have demonstrated that the Alumni Donor Report contains business advice and a summary or attachment of communications between non-attorney employees of the University that were made prior to Jones Day being hired.[8] Likewise, Plaintiffs have demonstrated that the Sexual Misconduct Report was an information gathering exercise, and that it included interviews with non-attorney witnesses not employed by the University.[9] Jones Day thus (correctly) told at least some witnesses that it could ***not*** promise confidentiality.[10] Similarly, though Defendant continues to assert without citation or evidence that the Sexual Misconduct Report was, itself, a Title IX proceeding, Def. Mot. at 2, 3, 9, 10, available facts discredit that notion.[11] On top of those discrediting facts, when Jess Eddy invoked his Title

---

[6] *McMurtry v. Aetna Life Ins. Co.*, 2006 WL 8436510, at *1-2 (W.D. Okla. July 18, 2006) ("Oklahoma law provides narrower protection for attorney-client communications than federal law.").

[7] *See, e.g.*, Pls. SMF ¶¶ 1–2, 9, 25, 27, 36. *See also* Leo H. Whinery, Oklahoma Evidence—Commentary on the Law of Evidence 3 OKPRAC § 36.14 (Apr. 2023) ("a pre-existing document or writing . . . does not become privileged simply through its transfer to an attorney"); *McMurtry*, 2006 WL 8436510, at *2 ("the attorney-client privilege attaches to confidential communications between an attorney and client for the purpose of seeking legal advice; it does not attach to underlying facts.") (citation omitted).

[8] *See, e.g.*, Pls. SMF ¶¶ 6, 8–9. Supporting this conclusion is the fact that information likely included in the Alumni Donor was freely shared with the U.S. News & World Report, the press, and in public meeting minutes. Pls. SMF ¶¶ 10–14.

[9] *See, e.g.*, Pls. SMF ¶¶ 23, 27.

[10] *See, e.g.*, Pls. SMF ¶ 28.

[11] Pls. Resp. in Opposition to Def. Mot. for Summ. Judgment at 35 (Citing Pls. SMF ¶ 16–18, Eddy Aff. ¶ 8–9, 17, 19, 26); Def. SMJ Ex. 4 (engagement letter describes "internal investigation," makes no mention of Title IX proceeding). In addition, Plaintiffs have argued that the disclosure of the report to Boren, Eddy, "other witnesses," and OSBI would constitute waiver (if there is an applicable privilege). *See, e.g.*, Pls. SMF ¶¶ 30–32, 35; Pls. Resp. to Def. Mot Summ. J. at 11–16, 20, 24. But viewed in another light, these disclosures may simply show Defendant never believed that there was any privilege to protect in the first place.

IX rights with the University to review the Jones Day Sexual Misconduct Report, he was told on May 10, 2019, that the University had not initiated a Title IX investigation based on the information he had provided to Jones Day.[12] Indeed, the University apparently did not initiate a Title IX investigation on behalf of Jess Eddy until May 21, ***well after Jones Day's work concluded in April 2019***.[13] Yet, information about Eddy's allegations appears in the Sexual Misconduct Report, casting even more doubt on the University's assertion that Jones Day's work was conducted pursuant to Title IX regulations.[14] These contested issues of fact cannot be adjudicated without *in camera* review of the requested reports, including the "**April 1, 2029 Jones Day Final Confidential Report Prepared for the University of Oklahoma**."[15]

---

[12] Eddy Aff. ¶ 28, Exs. B, C.

[13] *Compare* Eddy Aff. ¶¶ 28–29, 32, Ex. C (Title IX investigation initiated May 21, 2021), *with* Pls. SMJ Ex. P at UNIVERSITY_NONDOC 000775 (describing "cover page of April 1, 2019 Jones Day Final Confidential Report Prepared for The University of Oklahoma"), Pls. SMF ¶ 30 (Report provided to Boren in April 2019), *and* Long Tr. 121:25–122:2.

[14] *See, e.g.*, Pls. SMF ¶ 31.

[15] As Petitioners previously argued, *in camera* inspection is particularly warranted where, as here, 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 a 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).

Indeed, as it has done throughout this case, Defendant intentionally conflates the two reports, using the singular "Report," interchangeably with the plural "Jones Day Reports." *See* Def. Mot. at 4. This obfuscation appears throughout Defendant's filings. *See, e.g.*, Def. Mot. Summ. J. at 2 (describing a singular "Jones Day Report," then using the plural "Jones Day Reports" one paragraph later); Def. Reply in Support of Mot. Quash Dep. of Gallogly at 1 (using "Jones Day reports" and "Jones Day report" interchangeably in the same paragraph); Def. Ans. at 5 (using, without clarification, the terms "Jones Day report" and "Jones Day reports" in its affirmative defenses).

Defendant's motion also ignores the many other contested issues that cannot be resolved without the Court's examination of the contents of both reports. For instance, Defendant has asserted that the informer's privilege, 12 Okla. Stat. § 2510, applies to both reports and thus exempts them from disclosure under the ORA. *See* Def. Mot. Summ. J. at 10–11. Again, there is a threshold issue that Defendant cannot overcome as a matter of law—the privilege does not apply to information gathered by non-law enforcement agencies like the University and Jones Day. 12 Okla. Stat. § 2510 (limiting scope of privilege to identities those providing information "to a law enforcement officer or member of a legislative committee or its staff").[16] But moreover, "the informer's privilege ends where information unrelated to the informer's identity begins." *Cofield v. City of LaGrange*, 913 F. Supp. 608, 617–18 (D.D.C. 1996). Defendant has done nothing to demonstrate how the entireties of both reports fit under this exemption plainly intended to protect only "identit[ies]"—especially given Plaintiffs' demonstration that, other than Jess Eddy, "there is a genuine issue of fact as to whether the Sexual Misconduct Report names purported victims or witnesses."[17]

Similar issues of fact arise with the University's assertion of the personnel information exemption, 51 Okla. Stat. § 24A.7, which in turn relies on Defendant's claim that disclosure of both reports would "constitute a clearly unwarranted invasion of personal privacy" related to the disclosure of items like "employee evaluations, payroll deductions, employment applications . . . and transcripts." *Id.*; *see* Def. Mot. Summ. J. at 17–18. Once again there are threshold issues of

---

[16] Plaintiffs have demonstrated that the Alumni Donor Report did not involve "an investigation of a possible violation of a law to a law enforcement officer." *See* Pls. SMF ¶ 8, 12, Ex. G. Plaintiffs have also demonstrated that during compilation of the Sexual Misconduct Report Jones Day denied affiliation with or a duty to report to law enforcement, Eddy Aff. ¶ 24, and that the University attempted to ***prohibit*** its former president James Gallogly from volunteering information from the Sexual Misconduct Report. Pls. SMF ¶ 34, Ex. P at 3.

[17] *See* Pls. SMF ¶ 29, Ex. G at 6.

law precluding this exemption, *see* Pls. Statement of Arg. & Auth. In Response to Def. Mot. Summ. J. at 30–31. But despite the University's assertion of this exemption, it has set forth no evidence that any portion of either report falls within the statutory limitations of 51 Okla. Stat. § 24A.7.[18] Although Defendant carries the ultimate burden of proof as to this and all exemptions to the Open Records Act, *in camera* review is warranted to assist the Court in assessing this defense.

Defendant has waived its argument relying on *Doe I v. Baylor University*, 320 F.R.D 430 (W.D. Tex. 2017), which was not made in its June 30, 2023 response to Plaintiffs' June 16 motion. *Shero v. Grand Sav. Bank*, 2007 OK 24, ¶ 3 n.2 ("Issues not briefed are waived."). In any event, that case has little to do with *in camera* review. The decision in *Baylor* was issued under the Federal Rules of Evidence about the attorney-client privilege held by a private university, rather than the "narrower" standard for public entities under 12 Okla. Stat. § 2502(D)(7), *see McMurtry v. Aetna Life Ins. Co.*, 2006 WL 8436510, at *1-2 (W.D. Okla. July 18, 2006). Moreover, the court in that case found that Baylor had intentionally disclosed the contested record, *Baylor Univ.*, 320 F.R.D at 434; just as Petitioner has demonstrated that Defendant made disclosures of the Alumni Donor Report to (at least) U.S. News & World Report and other members of the press,[19] and of the Sexual Misconduct Report to (at least) Boren and Jess Eddy.[20] The University may also have

[18] Indeed, Boren's personnel file, which did not include the Sexual Misconduct Report, was released to a (non-party) news organization in 2019, produced to Plaintiffs in discovery in this case, and included as an attachment to Plaintiffs' summary judgment response. *See* Weeks Aff. In Support of Pls. Resp. to Summ J. ¶ 11, Ex. N.

[19] *See* Pls. SMF ¶ 10–11, 13–14, Ex. H, K, Q.

[20] *See* Pls. SMF 30–32.

intentionally made disclosures to OSBI.[21] Either way, *in camera* review is not discussed in the decision. *See Baylor Univ.*, 320 F.R.D. 430.

Defendant re-asserts an unavailing argument relying on *Anderson v. Blake* that Plaintiffs have already addressed and this Court has already considered. *See* Pls. Reply in Supp. of Mot. for *In Camera* Review at 4–5. As Plaintiffs previously argued, *Anderson v. Blake* has nothing to do with ***procedural*** due process rights, such as the "opportunity to object to *in camera* disclosure," *see* Def. Mot. at 2. Rather, it involves a ***substantive*** constitutional right of privacy not implicated in this case. *Anderson v. Blake*, 469 F.3d 910, 915 (10th Cir. 2006). The panel in *Anderson* carefully noted that its holding did not contemplate disclosure in or to a court. *Anderson v. Blake*, 469 F.3d 910, 916 (10th Cir. 2006) (holding did not encompass "[d]isclosing private information at a possible criminal trial"). *In camera* review is even further from the facts in *Anderson* than the hypothetical use of private information as a trial exhibit discussed in that case.

II. Defendant's alternative relief is an attempt to delay and impede the court's review.

Defendant's request for a 60-day notice period, *see* Def. Mot at 12, is a transparent delay tactic. If Defendant truly believed it had an obligation to inform certain individuals of this proceeding pursuant to its idiosyncratic constitutional analysis and/or its own handbook, *see* Def. Mot. at 9–11, 13–14, it would already have taken that step. Nothing is stopping it from doing so now, just as nothing has been stopping it from doing so since it raised this purported concern in its Response to Plaintiffs' Motion for *In Camera* Review in June 2023. This is not a situation analogous to *Carroll v. President and Commissioners of Princess of Anne County*, 339 U.S. 175 (1968), because the Court did not proceed *ex parte* on Plaintiffs' Motion for *In Camera* Review, nor did the Court grant Plaintiff's motion immediately. Instead, for eight months since Plaintiffs'

[21] *See* Pls. SMF 35; *see also* Pls. Statement of Arg. & Auth. In Resp. to Def. Mot. Summ. J. at 15.

served their Motion for *In Camera* Review and filed it on the publicly-available docket in this case, Defendant apparently took no steps to provide notice to any individual. Defendant's request for an additional 60 days has also been waived since it was not raised in the June 30, 2023 Response.

Finally, Defendant's suggestion that it be permitted to retrieve the reports from the Court after its review is untenable (and similarly waived). As a leading case makes clear, *in camera* review results in the reviewed documents becoming part of the record in the case. They must be kept with the case file to facilitate review, as needed, by a future or appellate court. *YWCA of Oklahoma City v. Melson*, 1997 OK 81 n.42 (describing procedure for submitting material for in camera review and noting that the "material should be filed with the clerk so that it may be later available for appellate review.").

CONCLUSION

Because the issues in Defendant's motion have already been determined by the Court through its January 23, 2024 Order, the motion should be denied without hearing. Defendant must comply with the Court's order to file unredacted copies of the Jones Day Reports for the Court's *in camera* inspection. *See* Order Granting Plaintiffs' Motion for *In Camera* Review, Jan. 23, 2024.

Dated: February 20, 2024

Respectfully submitted,

/s/ Lin Weeks
Lin Weeks, *admitted pro hac vice*
Denver Nicks, OBA No. 35187
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20009
lweeks@rcfp.org

Blake Johnson, OBA No. 32433
Ryan Kiesel, OBA No. 21254
Wyatt McGuire, OBA No. 34720
OVERMAN LEGAL GROUP, PLLC
809 NW 36th Street
Oklahoma City, OK 73118
T: (405) 605-6718
blakejohnson@overmanlegal.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above document was mailed on February 20, 2024, by depositing it in the U.S. Mail, postage prepaid, to counsel of record for Defendant:

Michael Burrage, OBA No. 1350
J. Renley Dennis, OBA No. 33160
Austin Vance, OBA No. 33294
WHITTEN BURRAGE
512 N. Broadway Ave., Ste. 300
Oklahoma City, OK 73102
T: (405) 516-7800
mburrage@whittenburragelaw.com
jdennis@whittenburragelaw.com
avance@whittenburragelaw.com

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

OVERMAN LEGAL GROUP, PLLC
809 NW 36th Street
Oklahoma City, OK 73118