

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff-Intervenor,	)	
v.	)	CASE NO. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**UNITED STATES’ MOTION TO COMPEL PRODUCTION OF  
ESI WITHHELD ON THE BASIS OF PRIVILEGE**

**I. Introduction**

Pursuant to Rule 37(a)(3)(B)(i) of the Federal Rules of Civil Procedure, Plaintiff, the United States of America (“United States”), requests that the Court overrule attorney-client privilege and attorney work product objections that Defendants asserted over certain items of electronically stored information (ESI) produced pursuant to the FRE 502

Order in this case, and order production of the ESI.<sup>1,2</sup> The United States also believes that Defendants previously waived privilege as to some of the ESI, that some files are not privileged by virtue of the sender and/or recipient, that some items are only partially privileged and thus should otherwise be produced, and that some ESI was never privileged because of its content.

Because the files addressed in this Motion are subject to privilege assertions that have not been resolved, the United States is not filing the items themselves with this brief. However, the United States requests permission to file the items in dispute under seal to allow an *in camera* inspection of those documents so that the Court may assess the merits of Defendants' privilege assertions.<sup>3</sup>

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<sup>1</sup> The United States does not believe that Local Rule 37.1 governs this dispute because the underlying process is dictated by separate Court order (ECF No. 66), but the United States memorialized its concerns by letter to Defendants on August 17, 2016 and August 19, 2016 to allow Defendants an opportunity to address these issues without Court intervention. Defendants declined to do so until well after the stay was lifted in this case. Then, on August 11, 2017, Defendants sent a letter narrowing some of the issues in dispute (Ex. 4). The United States narrowed this Motion where possible, but the items addressed here remain in dispute.

<sup>2</sup> Most of the information that is the subject of this Motion is in the form of native files, some of which are e-mail messages and a few of which are native files that were attached to the e-mails. Defendants produced files which contained both e-mail messages and in some cases, a file contained both an e-mail message (which was sometimes a thread of e-mails) and the attachment that went with the e-mail message. In most cases, the United States sought to retain entire files, with their associated attachments, but in others, the United States sought to retain only the attachments. Defendants asserted privileges as to entire files, not separating out e-mails and attachments, or e-mails within threads. As a result, the United States believes that some of Defendants' privilege claims may be valid as to e-mails, but not their attachments, or to some e-mails in a thread, but not all of them. The file references in this document correspond to files produced, with the Document ID number Defendants used in their initial production. The United States is attaching a chart listing all of the items in dispute to assist the Court in its review. (Ex. 6.)

<sup>3</sup> The United States is including citations to the items in dispute in the event that the

## II. Background

Pursuant to this Court's Order (ECF No. 65) granting the United States' Motion to Compel Production of ESI, Plaintiff United States and Defendants negotiated an agreed order, pursuant to FRE 502(d), that would allow Defendants to produce ESI without reviewing it for privilege or relevance. ECF No. 66. The United States was to review the documents and indicate which items it wished to retain for use in litigation. *Id.* at ¶ 2. Defendants were then required to tell the United States which of those documents Defendants wanted to assert privilege over within fourteen days. *Id.* at ¶ 3.

Defendants produced the documents to the United States, and the United States timely completed its review and informed Defendants which specific files it wished to retain. Initially, on Thursday, August 11, 2016, Defendants requested an extension on their time to assert privilege objections (ECF No. 97), which the United States opposed due to anticipated prejudice (ECF No. 100), but the following Monday, the Court struck Defendants' Motion for an Extension of Time as moot because the Defendants had advised the Court that they wished to withdraw it (ECF No. 103). Thus, the United States understands that Defendants' privilege assertions, which were provided to the United States on August 12, 2016 and reiterated without elaboration as to the basis for privileges on August 11, 2017, are final. In August 2016, Defendants asserted privilege by producing back to the United States the entire list of ESI that it had identified for retention, and stating that fields on the list shaded in red were "attorney-client/attorney

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Court allows the United States to file some or all of the items under seal.

work product privileged documents.”<sup>4</sup> (Ex. 1.) Of the approximately 472 ESI items over which Defendants originally asserted privilege, the United States now seeks production of just ten through this Motion. The United States memorialized its disagreements with the privilege assertions by letter sent August 17, 2016 (Ex. 2), and provided Defendants with a list of documents for which privilege is disputed on August 19, 2016. (Ex. 3.) As discussed above in Footnote 1, Defendants abandoned some claims of privilege and shortened the list of disputed documents by letter on August 11, 2017, but disputes remain as to several items. (Ex. 4.)

### **III. Argument**

#### **A. Legal Standards**

##### **1. Attorney-Client Privilege and Work Product**

The attorney-client privilege “protects ‘confidential communications by a client to an attorney made in order to obtain legal assistance’ from the attorney in his or her capacity as a legal advisor.” *United Food & Comm. Workers Union v. Chesapeake Energy Corp.*, No. CIV-09-1114-D, 2012 WL 2370637, at \*7 (W.D. Okla. June 22, 2012) (citing *United States v. Phelan*, 3 Fed. App’x 716, 718 (10th Cir. 2001). “To be protected by the attorney-client privilege, a communication between a lawyer and client must relate to legal advice or strategy.” *Id.* (internal citation omitted).

Federal Rule of Civil Procedure 26(b)(3)(A)(ii) sets forth the attorney work

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<sup>4</sup> The list did not distinguish between attorney-client privilege assertions and attorney work product assertions. However, it is clear that many of these items do not contain attorney work product.

product doctrine. The Rule provides that “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” are ordinarily not discoverable. A party may discover these “work-product” materials only upon a showing of (1) a substantial need for the materials and (2) an inability to obtain their substantial equivalent by other means without undue hardship. *Davis v. PMA Companies, Inc.*, No. CIV-11-359-C, 2012 WL 3922967, at \*1 (W.D. Okla. Sept. 7, 2012) (Cauthron, J.) (citing Fed. R. Civ. P. 26(b)(3)(A)(ii)).

## **2. In Camera Review**

Requiring parties “who seek to avoid disclosure of documents to make the documents available for in camera inspection” has been approved by courts in this Circuit as well as the Supreme Court. *See Mounger v. Goodyear Tire & Rubber Co.*, No. 99-2230-JWL, 2000 WL 33712198, at \*1 (D. Kan. Sept. 22, 2000) (quoting *United States v. Zolin*, 491 U.S. 554, 569 (1989)). Whether to review documents *in camera* is a decision within the sound discretion of the trial court.” *Mounger*, 2000 WL 33712198, at \*1 (quoting *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1493 (10th Cir. 1990)).

The circumstances in the instant case are unusual in that the allegedly privileged documents themselves have already been produced to the United States, and at this time, no privilege log has been provided by Defendants. Therefore, the United States respectfully submits that *in camera* review is necessary because, in the absence of a privilege log, there is no other way for the Court to evaluate the merits of Defendants’

privilege assertions.<sup>5</sup> The United States notes that it does not seek *in camera* review of all materials over which Defendants assert privilege, but rather over a relatively small subset of those documents that are at issue in this Motion.

**B. The Court’s Ruling on Waived Privilege with Respect to Charles Babb Applies to Some of Defendants’ Assertions Here.**

At least one set of e-mails over which Defendants have asserted attorney-client privilege or have claimed is attorney work product may have been protected when the e-mails were created but is not anymore. This item includes RUSO General Counsel Charles Babb’s communications with Charles Weiner about interpretation of a particular academic policy. *See* RUSO000479. Because the Court’s August 10, 2016 ruling found that Defendants waived attorney-client privilege over these subject matters, Defendants can no longer justifiably assert that privilege over e-mails on those same topics. ECF No. 96 at 2. *See also Kovacs v. Hershey Co.*, 04-CV-1881, 2006 WL 2781591, at \*6 (D. Colo. Sep. 26, 2006) (waiver opens up discovery to all privileged communications regarding the same “subject matter” as the disclosed privileged communications); *see also United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997). These e-mails should be produced.

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<sup>5</sup> While the case law normally requires some sort of factual showing, based on a privilege log, that *in camera* review should be undertaken, *see, e.g., Ressler v. United States*, Civil Action No. 10-cv-03050, 2012 WL 3231002, at \*2-3 (D. Colo. Aug. 6, 2012), the United States respectfully submits that those requirements cannot be applicable here where there is no privilege log. Further, because the United States has the documents, rather than putting allegedly privileged information into the record, the more cautious approach here is for the Court to assess the contents of the items themselves.

There are also disputed items that contain communications about Dr. Claire Stubblefield's consultation with Jana Legako, who appears to be an attorney at another RUSO institution. Defendants produced at least one document containing legal communications between these particular individuals in the regular course of discovery (Ex. 5 [Dep. Ex. 111]), and Dr. Stubblefield was examined on multiple occasions about the exhibit during her deposition with no objection interposed by counsel. Therefore, these communications are no longer privileged. *See* SEOSUmail03597, SEOSUmail04056 and SEOSUmail04107. Indeed, by their August 11, 2017 letter, Defendants agreed that SEOSUmail03195, which is on the same topic, is not privileged. (*See* Ex. 4.) These items also should be produced.

**C. An Assertion of Attorney-Client Privilege is Unwarranted Where the Communications Do Not Seek or Include Legal Advice.**

This Court has found that “[w]here a document has no explicit request for legal advice or reference to an attorneys’ review, and to which there is no legal advice or strategic response from an attorney,” attorney-client privilege does not apply. *Ponca Tribe of Indians of Okla. v. Cont’l Carbon Co.*, No. CIV-05-445-C, 2008 WL 4372802, at \*3 (W.D. Okla. Sept. 18, 2008) (Cauthron, J.) (applying state law and finding materials not privileged). The same analysis and conclusion apply to many of the items disputed here. As General Counsel for RUSO, it is clear that Charles Babb acted not only as an attorney but also interpreted academic policies for Defendants’ employees, some of whom were not administrators. As a result, there are many communications in which Southeastern employees seek information from Babb about how a policy works or

whether he agrees with their interpretation of policy, and in some instances, Babb asks follow-up questions about how policies were interpreted or carried out. This is not legal advice, and is therefore not covered by attorney-client privilege. This is even true where the policies are being interpreted as applied to Dr. Tudor, or where counsel is reviewing a faculty committee's recommendation interpreting an academic policy. *See* RUSO000275, RUSO001352, RUSO001750, and RUSO001764.

Similarly, exchanges between Babb and others are not privileged simply because Babb transmitted or received them if the content (or attachments to e-mails) is not privileged. *See Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, No. CIV-05-445-C, 2008 WL 4372802, at \*3 (W.D. Okla. Sept. 18, 2008) (Cauthron, J.) (communications containing discoverable facts are discoverable as well unless they were made for the purpose of facilitating the rendition of legal advice). Specifically, there is one item where a RUSO Regent is asking questions about the events underlying this case. Although it is the United States' understanding that the (now former) Regent is an attorney, the content of the e-mail does not suggest that he is acting as an attorney, but, as a client, he is asking questions and expressing his views. That does not reflect the mental impressions of counsel; it reflects the mental impressions of the client, who, the e-mail demonstrates, is not seeking legal advice but facts, though he does mention Babb. *See* RUSO001362. This item is not privileged.

**D. Some Messages are Not Privileged Based on the Sender or Recipient.**

Where an e-mail message is sent from one Southeastern employee to another, and no attorney work product is included but the e-mail is later forwarded to an attorney, it

should be self-evident that the earlier portion of the e-mail thread is not privileged. This applies to one item in dispute. *See* RUSO000604. Defendants may assert privilege only as to those portions of the e-mails that are actually privileged, but they seem to have asserted it as to the entire e-mail thread, and the United States disputes the privilege assertions to that extent. These materials should be produced.

### **III. Conclusion**

The United States respectfully asks the Court to overrule Defendants' privilege assertions and to order Defendants to produce the ESI in dispute. To the extent the Court believes it will assist review, the United States also requests permission to file the disputed documents under seal to allow for *in camera* review. An order granting the requested relief is attached to this Motion.

Date: August 14, 2017

GREGORY B. FRIEL  
Deputy Assistant Attorney General  
Civil Rights Division

DELORA L. KENNEBREW  
Chief  
Employment Litigation Section

MEREDITH L. BURRELL (MD, no number issued)  
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/s/ Shayna Bloom  
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Attorneys for Plaintiff United States

**CERTIFICATE OF SERVICE**

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

Date: August 14, 2017

/s/ Shayna Bloom

**Meyer, Valerie (CRT)**

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**From:** Jeb Joseph <jeb.joseph@oag.ok.gov>  
**Sent:** Friday, August 12, 2016 8:10 PM  
**To:** Meyer, Valerie (CRT); Dixie Coffey; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny  
**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT); Lori Cornell  
**Subject:** RE: US v. SOSU et al. - email search results and review  
**Attachments:** Final Privilege Emails Spreadsheet.pdf

Dear Counsel,

Please extend our thanks to your IT staff for performing the additional filtering. Unfortunately we were not able to compare and confirm today's manually reviewed results against the newly-filtered results generated by your technology assisted review late this afternoon. Please consider this a preliminary review and assertion of privileges and confidentialities. Certainly as to any copies of any emails to/from/cc/bcc attorneys with the Oklahoma Attorney General's Office (or descriptions of such Assistant Attorneys General's communications) we assert ongoing privilege. Attached you will find a copy of your initial spreadsheet, overlaid with red fields and blue fields as to certain entries. The red entries indicate attorney-client/attorney work product privileged documents. The blue fields indicate messages containing confidential medical information. There may be other instances of persons' medical information and we reserve the right to assert related confidentialities if those matters come up as we all move forward together. Although it is not likely the United States of America actually wants to disclose non-parties' personal health information, (or perhaps anyone's health information for that matter), to the extent Plaintiff or Intervenor attempts to do so, we will re-urge our ongoing objection to such needless disclosures.

Setting aside the fact that there appear to be many files selected which are wholly irrelevant, or at best tangentially related to this litigation, and despite the previously-described multiplicity of certain email messages produced by Plaintiff in the 2,000+ email files (and related attachments) selected by Plaintiff for use in this litigation, and the inability of Plaintiff to de-duplicate email message during this selection/review process, we have endeavored to manually mark the privilege for each iteration of each email message. In the event that two identical messages bear different privilege designations please consider both to have the privilege asserted. If and when we determine additional privileges or confidentialities should apply, we will update you accordingly.

Thank you,  
Jeb

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**From:** Meyer, Valerie (CRT) [mailto:Valerie.Meyer@usdoj.gov]  
**Sent:** Friday, August 12, 2016 4:38 PM  
**To:** Jeb Joseph; Dixie Coffey; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny  
**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT); Lori Cornell  
**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Jeb and Dixie:

As you requested, attached is a list of the 433 emails that list Charles Babb, Kindanne Jones, Dixie Coffey, or Jeb Joseph (the OAG attorneys of which we are aware) in the to/from/cc/bcc fields. Please note that it does not include attachments where we did not select the "parent" email in addition to the attachment.

Sincerely,  
Valerie

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**From:** Jeb Joseph [<mailto:jeb.joseph@oag.ok.gov>]

**Sent:** Thursday, August 11, 2016 12:13 PM

**To:** Meyer, Valerie (CRT) <[Valerie.Meyer@crt.usdoj.gov](mailto:Valerie.Meyer@crt.usdoj.gov)>; Dixie Coffey <[dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)>; Jillian T. Weiss, Esq. <[jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)>; Ezra Young <[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)>; Brittany Novotny <[BNovotny@nationlit.com](mailto:BNovotny@nationlit.com)>

**Cc:** Townsend, Allan (CRT) <[Allan.Townsend@crt.usdoj.gov](mailto:Allan.Townsend@crt.usdoj.gov)>; Bloom, Shayna (CRT) <[Shayna.Bloom@crt.usdoj.gov](mailto:Shayna.Bloom@crt.usdoj.gov)>; Lori Cornell <[lori.cornell@oag.ok.gov](mailto:lori.cornell@oag.ok.gov)>

**Subject:** RE: US v. SOSU et al. - email search results and review

Valerie,

Under the deluge of email correspondence both in this case, as well as from the rest of my regular caseload, I am just now seeing your email at 11:12 a.m. Central Daylight Time. I wish you had simply called me or Dixie on the telephone if time were of the essence to you. Regardless, yes, as I requested in person earlier, please have your IT staff perform the filter so as to allow a more expedient and focused review of the 2,000 + email message files.

Thank you,  
Jeb

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**From:** Meyer, Valerie (CRT) [<mailto:Valerie.Meyer@usdoj.gov>]

**Sent:** Wednesday, August 10, 2016 9:06 PM

**To:** Jeb Joseph; Dixie Coffey; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny

**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT); Lori Cornell

**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Jeb:

I am writing to memorialize our in-person conversations today during breaks in the deposition of Dr. McMillan.

After I sent my email this morning at 9:25 am, you asked if we would be willing to at least filter out messages sent to or from Charlie Babb (and members of OAG staff), not so that you could make a blanket assertion of privilege, but so that your review of documents could be more targeted. We agreed to consider this proposal.

At a subsequent deposition break, you asked if we would, in the alternative, be willing to agree to a two-week extension of time for you to review the ESI we produced back to you. I indicated that I believed it was unlikely that we would agree, as a two-week extension would mean that we would not receive your assertions of privilege under the 502(d) order until almost the close of discovery. I stated, however, that we would consider this proposal as well and provide you with a response as soon as possible.

After the conclusion of Dr. McMillan's deposition, I let you know that we would not be able to agree to a two-week extension of your time to review the ESI we produced back to you, both because we need to know whether you will object to our use of some of those documents during upcoming depositions and because our exhibit list is due to the Court next Friday, August 19. I also noted that you agreed to the timeframes set forth in the 502(d) Order (ECF No. 66), we complied with these timeframes, and also, as expected, we produced back to you only a small portion of the documents you initially provided to us.

With respect to your request for the United States to further filter out emails sent to or from Babb in order to speed your review, in consulting with our litigation support group today I learned that it would take a couple of hours for them to apply such a filter, but that it could not begin until sometime tomorrow due to their existing workload and that the filtering might be finished either tomorrow or Friday. I indicated that it was not clear to me whether that would address your concerns.

If you still wish us to perform the filter and provide to you a separate list of the messages sent to or from Babb or members of the OAG staff (which we could not promise to get to you before Friday), please let us know by tomorrow morning at 10 am Eastern.

Sincerely,

Valerie

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**From:** Meyer, Valerie (CRT)  
**Sent:** Wednesday, August 10, 2016 9:25 AM  
**To:** 'Jeb Joseph' <[jeb.joseph@oag.ok.gov](mailto:jeb.joseph@oag.ok.gov)>; Dixie Coffey <[dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)>; Jillian T. Weiss, Esq. <[jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)>; Ezra Young <[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)>; Brittany Novotny <[BNovotny@nationlit.com](mailto:BNovotny@nationlit.com)>  
**Cc:** Townsend, Allan (CRT) <[Allan.Townsend@crt.usdoj.gov](mailto:Allan.Townsend@crt.usdoj.gov)>; Bloom, Shayna (CRT) <[Shayna.Bloom@crt.usdoj.gov](mailto:Shayna.Bloom@crt.usdoj.gov)>; Lori Cornell <[lori.cornell@oag.ok.gov](mailto:lori.cornell@oag.ok.gov)>  
**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Jeb:

Your assumption is incorrect. Allan, Shayna, and I selected all of the documents we produced back to you after reviewing them. With respect to identical versions of emails with multiple recipients, we did not necessarily review each copy of the email, but we reiterate that we may use multiple versions of one email to demonstrate its receipt by different recipients. Otherwise, all documents selected by the United States were reviewed by one or more of its attorneys (in addition to the thousands of others reviewed by the United States that were not selected).

Sincerely,

Valerie

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**From:** Jeb Joseph [<mailto:jeb.joseph@oag.ok.gov>]  
**Sent:** Wednesday, August 10, 2016 9:05 AM  
**To:** Meyer, Valerie (CRT) <[Valerie.Meyer@crt.usdoj.gov](mailto:Valerie.Meyer@crt.usdoj.gov)>; Dixie Coffey <[dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)>; Jillian T. Weiss, Esq. <[jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)>; Ezra Young <[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)>; Brittany Novotny <[BNovotny@nationlit.com](mailto:BNovotny@nationlit.com)>  
**Cc:** Townsend, Allan (CRT) <[Allan.Townsend@crt.usdoj.gov](mailto:Allan.Townsend@crt.usdoj.gov)>; Bloom, Shayna (CRT) <[Shayna.Bloom@crt.usdoj.gov](mailto:Shayna.Bloom@crt.usdoj.gov)>; Lori Cornell <[lori.cornell@oag.ok.gov](mailto:lori.cornell@oag.ok.gov)>  
**Subject:** RE: US v. SOSU et al. - email search results and review

Valerie,

I take from your omission that actual human beings have not reviewed these documents (as inquired about in my email below, highlighted in **yellow**). When we ask the Court for relief we will note the United States' objections, including the lack of available Department of Justice resources.

Thank you for your time,

Jeb

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**From:** Meyer, Valerie (CRT) [<mailto:Valerie.Meyer@usdoj.gov>]  
**Sent:** Tuesday, August 09, 2016 10:49 PM  
**To:** Jeb Joseph; Dixie Coffey; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny  
**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT); Lori Cornell  
**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Jeb:

As you know, Allan and I have been in a deposition all day today and spent much of the day yesterday en route to Oklahoma City for this week's depositions. We do not agree with your premise that the Department of Justice is required to relieve Defendants of all burden with respect to reviewing these emails; we already have undertaken the burden of reviewing in excess of 48,000 native documents produced by Defendants and narrowing those documents to the approximately 2,000 documents we wish to use in this litigation. We did so by the Court's deadline despite delays in receiving the production that Defendants caused when you refused to mail the discs in the manner that the United States requested.

With respect to your request for the Department of Justice to de-duplicate the documents we produced back to you, we note that we produced duplicate native files in order to demonstrate that emails addressed to multiple recipients were, in fact, received by each of those recipients. Therefore, removing the duplicate files would prevent you from reviewing each version of a document that we might use.

With respect to your request to filter out all messages on which Charlie Babb was a recipient or sender after October 12, 2010, we note that any assertions of privilege as to these emails necessarily require Defendants to have reviewed each email to verify that it is privileged. It would be inappropriate for Defendants to make a blanket assertion without having reviewed each email to ascertain that it was not, for example, also sent to a third party (thereby waiving the privilege). We also remind Defendants of their obligation to place any message over which they assert privilege on a sufficiently-detailed privilege log. Filtering out emails sent to or by Babb serves no apparent purpose other than to permit Defendants to assert privilege without having verified that each document actually meets the criteria to be privileged.

As for emails on which members of the Oklahoma Attorney General's Office are copied, we believe that there are very few, if any, messages that we produced that meet this criteria and that it would not be burdensome to review any that may have been produced.

We are also unwilling to do the work you have requested because of the added burden it would impose on the United States. Our litigation support group would need to perform the work you are proposing. The litigation support group must support cases throughout the Civil Rights Division. We are unwilling to ask them to assist the OAG in performing its review of these emails at the expense of taking them away from other time sensitive tasks they are working on to support the Division's work on other cases and matters.

We believe that we have complied with both the letter and the spirit of the Court's orders on this subject and decline to apply the filters requested by Defendants for the reasons above. Should Defendants have additional reasons that they believe these filters should be applied, please let us know.

Sincerely,

Valerie

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**From:** Jeb Joseph [<mailto:jeb.joseph@oag.ok.gov>]

**Sent:** Tuesday, August 09, 2016 7:43 PM

**To:** Meyer, Valerie (CRT) <[Valerie.Meyer@crt.usdoj.gov](mailto:Valerie.Meyer@crt.usdoj.gov)>; Dixie Coffey <[dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)>; Jillian T. Weiss, Esq. <[jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)>; Ezra Young <[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)>; Brittany Novotny <[BNovotny@nationlit.com](mailto:BNovotny@nationlit.com)>

**Cc:** Townsend, Allan (CRT) <[Allan.Townsend@crt.usdoj.gov](mailto:Allan.Townsend@crt.usdoj.gov)>; Bloom, Shayna (CRT) <[Shayna.Bloom@crt.usdoj.gov](mailto:Shayna.Bloom@crt.usdoj.gov)>; Lori Cornell <[lori.cornell@oag.ok.gov](mailto:lori.cornell@oag.ok.gov)>

**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Department of Justice Counsel,

We have not yet heard back from you about the email below, sent to you on Monday morning. As you will recall, the stated purpose of the Judge's Order [Doc. No. 66] regarding production of ESI "is to shift the burdens of review . . ." from

Defendants and their counsel to the Department of Justice because the Department sought significant and broad searches of emails, and represented to the Defendants and to the Court that the Department of Justice had the technology and IT personnel to do meaningful searches. During my telephone calls with you and your IT staff, the IT personnel represented that they could do de-duplications and combining of email threads to avoid duplicative production. However, the 2,000+ email files you presented to us include examples of duplicative files, as well as emails whose substance appears to have no bearing on the claims and defenses in this case. **Have actual human beings at the Department of Justice actually reviewed each of these emails and determined that they were relevant, and not duplicative? If the Department is unable or unwilling to discuss further technology-assisted filtering of these search results then the Defendants will be forced to seek relief from the Court.** Please advise accordingly.

Thank you for your time and consideration,  
Jeb

Jeb E. Joseph  
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(405) 522-8940 - Office  
(405) 521-4518 - Fax

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**From:** Jeb Joseph  
**Sent:** Monday, August 08, 2016 11:49 AM  
**To:** 'Meyer, Valerie (CRT)'; Dixie Coffey; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny  
**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT); Lori Cornell  
**Subject:** RE: US v. SOSU et al. - email search results and review

Dear Department of Justice Counsel,

We are in the process of reviewing the multiple thousands of pages of email message files (and their attachments) which you seek to retain for use in this litigation. However, there are multiple copies of multiple emails. It was our understanding that part of your IT review process would include de-duplication of files. This does not appear to have been performed, and it creates a significant and unnecessary delay in this process.

**\*\*Can you please ask your IT staff to re-run the searches or at least apply a filter on the current results for duplicates?**

Also, although our review is ongoing, it looks like we would withhold all messages "to/from/cc/bcc/fw" Charlie Babb, (and any attorneys at the Oklahoma Attorney General's Office), on and after the date of October 12, 2010.

**\*\*Can you please have your IT staff apply both date and sender/receiver filters according to those parameters? If it helps you I am happy to speak with your IT staff.**

Thank you for your attention to this matter.

-Jeb

Jeb E. Joseph  
Assistant Attorney General  
Litigation Division  
Office of the Attorney General  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
(405) 522-8940 - Office  
(405) 521-4518 - Fax

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**From:** Meyer, Valerie (CRT) [<mailto:Valerie.Meyer@usdoj.gov>]  
**Sent:** Friday, July 29, 2016 3:45 PM  
**To:** Dixie Coffey; Jeb Joseph; Jillian T. Weiss, Esq.; Ezra Young; Brittany Novotny  
**Cc:** Townsend, Allan (CRT); Bloom, Shayna (CRT)  
**Subject:** US v. SOSU et al.

Dear Counsel:

Today we have mailed to you a disc containing copies of the documents that Defendants produced as ESI and that the United States wishes to retain for use in this litigation. Attached is a PDF of the cover letter that accompanied that disc. The password for the disc is:

[REDACTED]

Also attached to this email is a list of the documents that we wish to retain for use in this litigation. This list also serves as a key to the different document IDs assigned by the Defendants and the United States to each document. Please note that email attachments generally are not identified separately on this list because the attachments are part of the email file as produced by Defendants. Nevertheless, email attachments are on the disc (again, as part of the email file).

Sincerely,

Valerie Meyer  
Senior Trial Attorney  
U.S. Department of Justice  
Civil Rights Division, Employment Litigation Section  
Phone: (202) 305-3179  
Fax: (202) 514-1005



Civil Rights Division

DLK:MLB:AT:SB:VM  
DJ 170-59N-31

Employment Litigation Section - PHB  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
[www.usdoj.gov/crt/emp](http://www.usdoj.gov/crt/emp)

Via E-Mail and U.S. Mail

Dixie Coffey  
Jeb Joseph  
Oklahoma Attorney General's Office  
313 N.E. 21st Street  
Oklahoma City, Oklahoma 73105

August 17, 2016

Re: *United States & Tudor v. Southeastern Okla. State Univ. & Reg. Univ. Sys. of Okla.*,  
5:15-CV-00324-C (W.D. Okla.)

Dixie and Jeb:

I am writing with respect to Jeb's August 12, 2016 email ("August 12 email"). Jeb attached to the August 12 email a PDF copy of a spreadsheet that the United States produced pursuant to the Court's ESI production order (ECF No. 66). The United States' version of the spreadsheet, which was provided in Excel, identified various emails and attachments that the United States wants to use for purposes of this litigation. On the version of the spreadsheet attached to the August 12 email, the Defendants identified, with red shading, certain emails that they contend are protected by attorney-client and/or work product privilege. *See* August 12 email (identifying the privileges that Defendants are claiming).

The United States will likely challenge some of the Defendants' privilege assertions but is still in the process of determining which privilege assertions to challenge. The United States will inform you in a separate letter, after it determines which privilege assertions it intends to challenge, which red-shaded emails it contends are not privileged. However, there are some preliminary matters, discussed below, that the United States wanted to raise now.

First, the spreadsheet attached to the August 12 email does not provide sufficient information for the United States to assess all of the Defendants' privilege claims, and it does not contain sufficient information for the Court to assess *any* of the Defendants' privilege claims. The spreadsheet does not state which privilege applies to each red-shaded email. It is impossible to determine whether the Defendants contend that attorney-client privilege, work product privilege, or both protect each red-shaded email. Furthermore, the spreadsheet does not provide any information to support the claims of privilege. If the Court were to review the spreadsheet, without any further information, it would not know when the red-shaded emails were sent, who the senders/recipients were, and why the Defendants claim they are privileged. Some of these issues can be addressed by filing the emails in dispute with the Court for an *in camera* inspection, which the United States plans to request if it must file a motion to compel, but, even using that approach, the Court still would not understand why the Defendants have claimed privilege over many of the emails. For many of the emails themselves, it is not even clear who the recipients and senders are; whether they are attorneys; and why the content of the emails supposedly renders them privileged. Indeed, the United States, which has more knowledge about who the senders and recipients are than the Court, does not even recognize some of the senders

or recipients to these emails. Without more information to support the privilege claims, the Court will not be able to assess whether the Defendants have shown that attorney-client and/or work product privileges should apply.<sup>1</sup>

The spreadsheet attached to Jeb's August 12 email also contained some blue-shaded emails that Jeb said contained confidential medical information. If the Defendants want these emails to be kept confidential, they should mark the blue-shaded emails as "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" in accordance with the Confidentiality Order entered in this case (ECF No. 41).

The August 12 email also stated that the spreadsheet attached to it constituted a "preliminary review" and that the Defendants might update that spreadsheet in the future. Because the Defendants advised the Court that their motion to extend the deadline to complete their privilege review was moot, and the Court struck the motion specifically on that basis (ECF No. 103), the United States will consider any additional assertions of privilege over emails that are not already shaded red in the spreadsheet that Defendants attached to the August 12 email to be untimely.

Finally, I want to reiterate the United States' request for an Excel version of the spreadsheet that Jeb attached to the August 12 email. The United States requested this Excel version of the spreadsheet in an email dated August 15, 2016.

Thank you for your attention to this matter.

Sincerely,

Delora L. Kennebrew  
Chief  
Employment Litigation Section

By:



Allan K. Townsend  
Shayna Bloom  
Valerie L. Meyer  
Trial Attorneys  
Employment Litigation Section

cc: Jillian Weiss  
Ezra Young  
Brittany Novotny

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<sup>1</sup> The United States discussed the issues raised in this paragraph with Kindanne Jones during a teleconference on August 16, 2016, but the United States wanted to alert you to these issues in writing as well so that you have a clear understanding of our concerns.



Civil Rights Division

DLK:MLB:AT:SB:SJ  
DJ 170-59N-31

Employment Litigation Section - PHB  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
[www.usdoj.gov/crt/emp](http://www.usdoj.gov/crt/emp)

August 19, 2016

**Via E-Mail and U.S. Mail**

Dixie Coffey  
Jeb Joseph  
Oklahoma Attorney General's Office  
313 N.E. 21st Street  
Oklahoma City, Oklahoma 73105

Re: United States & Tudor v. Southeastern Okla. State Univ. & Reg. Univ. Sys. of Okla.,  
5:15-CV-00324-C (W.D. Okla.)

Dixie and Jeb:

I am writing to follow up on our August 17, 2016 letter. In that letter, we explained that we would provide a list of items for which we plan to contest assertions of privilege. Please see the attached list and let us know if you wish to discuss. Thank you.

Sincerely,

Delora L. Kennebrew  
Chief  
Employment Litigation Section

By: /s/ Shayna Bloom

Allan K. Townsend  
Shayna Bloom  
Valerie L. Meyer  
Trial Attorneys  
Employment Litigation Section

Enclosure

cc: Jillian Weiss  
Ezra Young  
Brittany Novotny

**Items for Which the United States Intends to Challenge Privilege Assertions**  
*U.S. & Tudor v. SEOSU & RUSO*

RUSO000328.0001  
RUSO002109  
SEOSUmail01884  
RUSO000271  
RUSO000275  
RUSO000479  
RUSO000604  
RUSO001352  
RUSO001362  
RUSO001750  
RUSO001764  
RUSO003140  
RUSO003451  
RUSO004382  
RUSO004602  
RUSO004880  
RUSO005433  
RUSO005436  
RUSO005545  
RUSO005744  
RUSO006203  
RUSO006580  
RUSO006686  
RUSO006735  
RUSO010719  
RUSO010543  
RUSO010978  
RUSO011137  
RUSO011195  
RUSO011196  
RUSO011197  
RUSO011190  
RUSO011191  
RUSO011192  
RUSO011294  
RUSO010920  
RUSO011314  
RUSO011555  
RUSO013866  
RUSO013867  
RUSO013868  
RUSO013892  
RUSO014235

RUSO015116  
RUSO015236  
RUSO015897  
SEOSUmail02370  
SEOSUmail03195  
SEOSUmail03597  
SEOSUmail04045  
SEOSUmail04056  
SEOSUmail04106  
SEOSUmail04107  
SEOSUmail04108  
SEOSUmail04109  
SEOSUmail04116  
SEOSUmail04117  
SEOSUmail04152  
SEOSUmail04479  
SEOSUmail04480  
SEOSUmail05899



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

August 11, 2017

***Via Email: [allan.townsend@usdoj.gov](mailto:allan.townsend@usdoj.gov)***

***Via Email: [shayna.bloom@usdoj.gov](mailto:shayna.bloom@usdoj.gov)***

***Via Email: [valerie.meyer@usdoj.gov](mailto:valerie.meyer@usdoj.gov)***

Allan Townsend

Shayna Bloom

Valerie Meyer

Trial Attorneys

U.S. Department of Justice

Civil Rights Division

Employment Litigation Section–PHB

950 Pennsylvania Avenue, NW

Washington, D.C. 20530

Re: *United States of America v. Southeastern Oklahoma State University and  
the Regional University System of Oklahoma*  
Case No. 15-CV-324-C (Western District)

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Dear Counsel:

In response to your letter dated August 19, 2016 regarding disputed assertions of privilege over certain electronic mail messages, and in light of the Court's Order regarding privilege [Doc. 66], as well as Rule 26's admonitions regarding the scope of Discovery and the proportionality of the contemplated costs versus the meaningfulness of Discovery, we have re-reviewed the electronic mail messages as to which you contest assertions of privilege. We have grouped those messages into three categories, and labeled them on the chart enclosed with this letter. Those categories are: (1) Not privileged; (2) Privileged but Defendants will agree to allow these documents to be used in this litigation with the Plaintiff's and Intervenor's agreement that their use constitutes no waiver of privilege; and (3) Privileged and Defendants do not agree to allow the document's use in this litigation.

U.S. Department of Justice

August 11, 2017

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It appears that the costs of a briefing fight which might result from the Plaintiff's refusal to agree to these designations would not be proportional to the needs of the case, and therefore not consistent with Fed. R. Civ. P. 26(b)(1). Please review these categorizations and let us know if you agree. If you cannot agree, please let me know when you would be available to conduct a good faith meet and confer as required by the rules.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jeb E. Joseph', is written over the typed name.

Jeb E. Joseph  
Assistant Attorney General

cc: Ezra Young *Via Email: ezraiyoung@gmail.com*

**Items for which the United States intends to challenge privilege assertions, and Defendants' proposed compromises:**

Filename	Categorization
RUSO000328.0001	1
RUSO002109	1
SEOSUmail01884	1
RUSO000271	1* - Why are there 2 copies of this?
RUSO000275	2
RUSO000479	2
RUSO000604	2
RUSO001352	2
RUSO001362	3
RUSO001750	2
RUSO001764	2
RUSO003140	1
RUSO003451	1
RUSO004382	1
RUSO004602	1* - Why are there 10 copies of this?
RUSO004880	1
RUSO005433	1
RUSO005436	1* - Why are there 10 copies of this?
RUSO005545	1* - Why are there 2 copies of this?
RUSO005744	1
RUSO006203	1
RUSO006580	1* - Why are there 10 copies of this?
RUSO006686	1* Why are there 2 copies of this?
RUSO006735	1* - Why are there 10 copies of this?
RUSO010719	1

U.S. Department of Justice

August 11, 2017

Page | 4

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RUSO010543	1
RUSO010920	1
RUSO010978	1
RUSO011137	1
RUSO011190	1
RUSO011191	1
RUSO011192	1
RUSO011195	1
RUSO011196	1
RUSO011197	1
RUSO011294	1
RUSO011314	1* - Why are there 10 copies of this?
RUSO011555	1* - Why are there 10 copies of this?
RUSO013866	1* - Why are there 10 copies of this?
RUSO013867	1
RUSO013868	1* - Why are there 10 copies of this?
RUSO013892	1* - Why are there 10 copies of this?
RUSO014235	1
RUSO015116	1* - Why are there 10 copies of this?
RUSO015236	1
RUSO015897	1
SEOSUmail02370	1
SEOSUmail03195	1
SEOSUmail03597	3
SEOSUmail04045	1
SEOSUmail04056	3

SEOSUmail04106	1
SEOSUmail04107	3
SEOSUmail04108	1
SEOSUmail04109	1
SEOSUmail04116	1
SEOSUmail04117	1
SEOSUmail04152	1
SEOSUmail04479	1
SEOSUmail04480	1
SEOSUmail05899	3

**Claire Stubblefield**

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**From:** Legako, Jana K. <jlegako@rose.edu>  
**Sent:** Sunday, January 09, 2011 1:48 AM  
**To:** Claire Stubblefield  
**Subject:** FW: Tudor-Discrimination Case  
**Attachments:** Tudor(timeline).docx; TudorConfidential (2).docx; Discrimination complaint-Tudor.docx; Tudor129.docx

Claire,

Please accept my apology for the delay in getting to you my conclusions. [REDACTED]

[REDACTED] It has been a very hectic and stressful December and January.

The documents provided above have been reviewed. In addition, the policies and procedure relevant to this issue have been studied.

The policies and procedures support that a written statement of the action taken be submitted to the previous decision makers and faculty member by each decision maker (i.e. department chair, dean, vice president and president) after the Promotion and Tenure Review Committee's secret ballot. The policy is silent as to the content of the statement and one could reasonably assume a general statement such as "I do not concur with the decision of the Promotion and Tenure Review Committee and Department Chair" would suffice.

The policy only requires the President to state in detail the reasons he/she does not concur with the Promotion and Tenure Review Committee's decision. And, provide this written explanation to the Vice President for AA, the department chair, the Promotion and Tenure Review Committee, and the faculty member.

From our conversation, it is my understanding the Professor was provided this written notification by the President or his designee. In addition, since the Professor did request a hearing before the Faculty Appellate Committee, it is assumed the Professor received written notification from the Vice President for Academic Affairs. You may want to substantiate that the Dean and Department Chair forwarded their statements to the listed parties -- if they omitted this step in the policy, confirm that they omitted this step for all tenure applicants. This consistent omission will show that at this step in the process all were treated the same.

Normally with a race discrimination claim I run this query. In addition, with a little tweaking, this query will work with sex discrimination claims.

- (1) Does the claimant belong to the racial minority; (2) She/he applied for tenure and was qualified for tenure; (3) Despite qualifications she was rejected; and, (4) Similar qualifications got tenure.

Your request to have a qualified, unbiased, and objective third party review the portfolios of all tenure applicants was "textbook perfect." The third party's comments as to how the Professor's portfolio lacked in the required areas as outlined in the President's letter should assist in showing how the Professor does not meet #2 and #4 of her prima facie case. Focus on the legitimate nondiscriminatory reason for the Professor's rejection listed in the President's letter and bolstered the reasons by the third party review of the portfolios.

In addition, being transgender is not a protected status. However, harassment due to a person's sexual orientation would be a violation of the sexual harassment policy. You may want to take into consideration drafting a paragraph that states, "The University takes all claims of alleged sexually harassing behaviors as serious. And, after a thorough investigations you found the Professor's description of the alleged comments regarding transgender individuals to be substantiated. Therefore, the sexual harassment policy has not been violated."



Please remember that in most sexual harassment claims and race/sex discrimination claims the claimant may have additional internal processes to request if he/she does not agree with your findings. For example, at the College that I am employed, the claimant may request a hearing in front of a panel of her peers. I always include this right in the letter that is mailed to them of my findings.

Furthermore, you may want to address that retaliation from any of the parties involved will not be tolerated.

Please do not hesitate to call. It was a pleasure reviewing your documents and discussing this case with you.

Best regards,

Jana Legako, J.D., PHR

Office: (405) 733-7933

Fax: (405) 733-7443

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**From:** Claire Stubblefield [mailto:CStubblefield@se.edu]

**Sent:** Wednesday, December 15, 2010 11:25 AM

**To:** Legako, Jana K.

**Subject:** Tudor-Discrimination Case

Thank you so much for agreeing to lend a legal eye to a very interesting case. My mobile number is 580-504-0050. I will take the case and documentation home for the holiday. Please give me a call at your earliest convenience. Thanks again.

## Index of United States Privilege Challenges

<b>Doc ID Tudor</b>	<b>Scope of US Challenge</b>	<b>Basis of US Challenge</b>
RUSO000275	Entire e-mail thread	Content is not legal advice or AWP
RUSO000479	Entire e-mail thread	Privilege was waived
RUSO000604	Part of thread (e-mails marked Tuesday, October 04, 2011 1:50 PM and Monday, October 03, 2011 5:54 PM)	Part of thread not privileged; Sender/recipient breaks privilege or doesn't justify it
RUSO001352	Entire e-mail thread	Content is not legal advice or AWP
RUSO001362	Entire e-mail thread	Content is not legal advice or AWP
RUSO001750	Entire e-mail thread	Content is not legal advice or AWP
RUSO001764	Entire e-mail thread	Content is not legal advice or AWP
SEOSUmail03597	Entire e-mail thread	Privilege was waived
SEOSUmail04056	Entire e-mail thread	Privilege was waived
SEOSUmail04107	Entire e-mail thread	Privilege was waived