

IN THE COURT OF CLAIMS OF OHIO

FARNAZ MALEKY	Case No. 2023-00637PQ
Requester	Special Master Todd Marti
v.	<u>REPORT AND RECOMMENDATION</u>
OHIO STATE UNIVERSITY, OFFICE OF COMPLIMENT AND INTEGRITY	
Respondent	

{¶1} This matter is before the special master for a R.C. 2743.75(F)(1) report and recommendation. He recommends that (1) Respondent be ordered to produce unredacted copies of most of the records filed for in camera review, (2) Respondent be ordered to either produce copies of the records described in Table 1 or certify that no such records exist, (3) Requester recover her filing fee and costs, (4) Respondent bear the balance of the costs of this case and (5) that all other relief be denied.

I. Background.

{¶2} Requester Farnaz Maleky was a faculty member of the Respondent Ohio State University (“OSU”). She was accused of misconduct, triggering an investigation and sanctions by OSU.

{¶3} Dr. Maleky made several public records requests regarding the accusations and investigations. OSU produced a number of records, some redacted, but withheld others. Dr. Maleky filed this case to challenge the redactions and withholdings. She is proceeding pro se. *Complaint*, filed September 28, 2023.

{¶4} This case was not referred to mediation because that would delay the already protracted resolution of Dr. Maleky’s requests. A schedule was set for OSU to file all responsive records for in camera review and for both parties to file evidence and memoranda supporting their positions. That schedule included a time for OSU to file a

motion to dismiss or to otherwise respond to Dr. Maleky's complaint. *Scheduling Order*, entered October 10, 2023; *Order*, entered November 9, 2023.

{¶5} Before the time for OSU to respond to the original complaint had expired Dr. Maleky, still proceeding pro se, filed a pleading detailing her assertions that OSU has not produced all records responsive to her requests and that some of the records produced here improperly redacted. *PQ Miscellaneous*, filed October 30, 2023 (“*Oct. 30 Submission*”). Given Dr. Maleky's pro se status, the substance of that filing, the fact that it was made before the time that OSU had or was required to respond to the original complaint, and that OSU has not objected to the filing, the special master considers that submission to be an amended complaint. See Civ. R. 15(A).

{¶6} OSU has filed copies of what it asserts are the universe of responsive records for in camera review. *PQ Sealed Documents Filed*, November 29, 2023 (“*In Camera Records*”). Dr. Maleky and OSU have made all the submissions allowed under the case schedule. *The Ohio State University's Motion to Dismiss*, filed November 7, 2023 (“*MTD*”); *Requester's Reply to Respondent's Motion to Dismiss the Complaint*, filed December 13, 2023 (“*Reply*”). The case is therefore ripe for decision.

II. Analysis.

A. Redactions and withholdings.

{¶7} OSU bases its redactions and withholdings on two grounds: the attorney-client privilege and 20 U.C.C. § 1232g, the Family Educational Rights and Privacy Act (“FERPA”). Both are sufficient grounds for redacting or withholding public records—if proven. *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 542, 721 N.E.2d 1044 (2000) (attorney-client privilege); *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 25 (FERPA). The question here is whether OSU has proven those grounds.

1. OSU has not met its burden of proving that the attorney-client privilege applies.

{¶8} OSU must carry a heavy burden to sustain its claim of privilege. That is established by cases construing both the Public Records Act and the attorney-client privilege itself.

{¶9} A public office asserting an exemption from its general duty to provide access to public records must “prove facts clearly establishing the applicability of the exemption.” *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 27. See also, *Id.* at ¶¶ 35, 54. That burden must be carried with “competent, admissible evidence[.]” *Id.* at ¶¶ 53, 77. The public office must produce extrinsic evidence if the applicability of the exemption is “not obviously apparent and manifest just from the content of the record itself[.]” *Id.* at, ¶ 35. See also *id.* at ¶¶ 30, 50, 53. The office must make a strong showing. It “does not meet this burden if it has not proven that the requested records fall *squarely* within the exception,” and the courts “resolve any doubt in favor of disclosure.” *Id.* at ¶¶ 27, 63 (Emphasis added). See also *id.* at ¶¶ 50, 63. Given that, “it is not enough to say that a record is *probably* within a statutorily prescribed exemption[.]” *Id.* at ¶ 63 (Emphasis sic.).

{¶10} Similar standards control the attorney-client privilege. Because the privilege hinders the pursuit of the truth, claims of privilege are examined “with the primary assumption that there is a general duty to give what [information] one is capable of giving, and that any exemptions *** are distinctly exceptional[.]” *In re Story*, 159 Ohio St. 144, 148, 111 N.E.2d 385 (1953). “The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges,” so the privilege “should be recognized only within the narrowest limits required by principle.” *Id.* at 149. Accord, *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003- Ohio-3358, 790 N.E.2d 817, ¶ 26 (8th Dist.) (“The privilege *** should be strictly confined within the narrowest possible limits underlying its purposes”). In short, there

“must be good reason, plainly shown” for recognizing a privilege. *In re Story*, 159 Ohio St. at 149.

{¶11} Because of those principles, “the party claiming the privilege has the burden of proving that the privilege applies[.]” *Westfield Ins. Group v. Silco Fire & Sec.*, 5th Dist. Stark No. 2018CA00122, 2019-Ohio-2697, ¶ 47 (authorities and internal punctuation omitted); *MA Equip. Leasing I, LLC v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072 (10th Dist.), ¶ 21. That requires proof of every element of the privilege. *Cincinnati Enquirer v. Hamilton Cty. Bd. of Commrs.*, Ct. of Cl. No. 2019-00789PQ, 2020-Ohio-4856, ¶ 20, adopted 2020-Ohio-5281. The privilege applies:

“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.” *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 27.

{¶12} OSU’s submissions do not address any of those elements. It has submitted no evidence beyond the disputed records themselves. The *MTD* does not address those elements, let alone explain how any of the records establish any of those elements, apparently expecting the court to figure that out for itself. Not only does that fall well short of a “good reason, plainly stated,” *In re Story*, 159 Ohio State at 149, it misconceives the court’s function. It “is not the role of [a] court to search the record or formulate arguments on behalf of the parties[.]” *State ex rel. Stevenson v. King*, 169 Ohio St.3d 61, 2022-Ohio-3093, 201 N.E.3d 873, ¶ 18 (internal punctuation omitted, quoting *State ex rel. McKenney v. Jones*, 168 Ohio St. 3d 180, 2022-Ohio-583, 197 N.E.3d 520, ¶ 28).

{¶13} In short, OSU has presented nothing more than conclusory assertions of privilege, and that is not sufficient to carry its heavy burden. See *Cincinnati Enquirer v.*

Hamilton Cty. Bd. of Commrs., Ct. of Cl. No. 2019-00789PQ, 2020-Ohio-4856, ¶¶ 20- 28, adopted, 2020-Ohio-5281. See also, *In re Guardianship of Marcia S. Clark*, 10th Dist. Franklin No. 09AP-871, 2009-Ohio-6577, ¶ 9 (conclusory assertions are insufficient, even if some the material is arguably privileged). The special master therefore recommends that the court hold that OSU’s redactions and withholdings are not supported by the attorney-client privilege.

2. Some of the redactions are supported by FERPA, but most of the disputed records are outside FERPA’s scope.

{¶14} 20 U.S.C. §1232g(b) prohibits federally funded educational institutions from releasing “education records” without students’ consent. The public record and the record in this case establish that FERPA supports some of the redactions at issue, but that most of the disputed records are not protected by FERPA.

{¶15} The public record establishes that OSU is covered by FERPA. Its most recent state audit reflects that OSU receives federal funding. Ohio Auditor of State, *Financial Statements as of and for the years ended June 30, 2022 and 2021 and Report on Federal Financial Assistance Programs in Accordance with the OMB Uniform Guidance for the year ended June 30, 2022*, (May 23, 2023), https://ohioauditor.gov/auditsearch/Reports/2023/Ohio_State_University_Franklin_22-Franklin_FINAL.pdf (accessed December 20, 2023), p. 28. The special master takes judicial notice of that fact pursuant to *State ex rel. Pike Cty. Convention & Visitor’s Bur. v. Pike Cty. Bd. of Commrs.*, 165 Ohio St.3d 590, 2021-Ohio-4031, 180 N.E.3d 1135, ¶ 3, n. 2. OSU must therefore comply with FERPA.

{¶16} The record establishes that portions of the materials at issue here—those concerning changes to graduate students’ advisors and teaching duties—are “education records.” “For purposes of FERPA, the term ‘education records’ means ‘those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person

acting for such agency or institution.” *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 27 (quoting 20 U.S.C. § 1232g(a)(4)(A)). A review of the *In Camera Records* reveals that the disputed materials are “records, files, documents, and other materials[.]” That is evident from the materials themselves; no extrinsic evidence of this element is needed. See *Welsh-Huggins*, 163 Ohio St.3d 337, at ¶¶ 30, 35, 50, 53. A comparison of the records Requester filed as “Appendix A” to her *Reply* (and that OSU filed as pp. 1-28 of the *In Camera Records*) to the unredacted versions (*id.* at pp. 258-285) reveals that those records contained “information directly related to” several graduate students: who would advise them and what teaching would be required of them. The fact that OSU was able to produce those records shows that they were “maintained” by that “educational *** Institution.” The redactions were limited to personally identifiable information about those students. Those redactions were therefore supported by FERPA.

{¶17} Most of the other records at issue are not education records and hence should be produced. Although FERPA broadly protects information about students, it expressly excludes certain types of records from the category of “education records,” even though they contain such information. One category of records excluded are those generated in proceedings addressing the actions of non-student employees:

“the term ‘education records’ does not include—in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose.” 20 USCS § 1232g(a)(4)(B)(iii).

{¶18} Consistent with that, courts in Ohio have held that records generated in connection with proceedings addressing educator misconduct are not “education records” protected by FERPA. *Baker v. Mitchell-Waters*, 160 Ohio App.3d 250, 2005-

Ohio-1572, 826 N.E.2d 894 (2d Dist.), ¶¶ 26, 27, 29; *Ellis v. Cleveland Mun. School Dist.*, 309 F.Supp.2d 1019, 1022-1023 (N.D. Ohio 2004); *Briggs v. Bd. of Trustees Columbus State Community College*, S.D. Ohio No. 2:08-CV-644, 2009 U.S. Dist. LEXIS 92950 (July 8, 2009), **14-15. They have done so even though the records contained students' personally identifiable information. *Ellis*, 309 F. Supp.2d at 1022; *Briggs*, 2009 U.S. Dist. LEXIS 92950 at **14-15. Those decisions are in accord with the overwhelming weight of precedent from elsewhere. *Wallace v. Cranbrook Educational Community*, E.D.Mich. No. 05-73446, 2006 U.S. Dist. LEXIS 71251 (Sep. 27, 2006), **2, 12-13; *Brouillet v. Cowles Pub. Co.*, 114 Wash.2d 788, 790-791, 800, 791 P.2d 526 (1990); *City of Boston Sch. Commt. v. Boston Teachers Union, Local 66*, 22 Mass.L.Rep. 15 (2006); *Matter of Hampton Bays Union Free School Dist. v. Pub. Emp. Relations Bd.*, 62 A.D.3d 1066, 1069, 2009 NY Slip Op 3656, 878 N.Y.S.2d 485; *Bd. Of Edn. v. Colonial Edn. Assn.*, Ch. Civil Action No. 14383, 1996 Del. Ch. LEXIS 27, at **17-18 (Feb. 28, 1996). See also *Klein Indep. School Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir.1987). But see contra, *Rhea v. Dist. Bd. of Trustees of Santa Fe College*, 109 So.3d 851, 857-858 (Fla.App.2013).

{¶19} A review of the *In Camera Records* reveals that the bulk of those records were generated in connection with proceedings focused on an employee, Dr. Malek. *Id.*, at pp. 45-257, 286-301, 317-331, 410-487, 495-501, 507-511, 516-519, and 520. There is no evidence that Dr. Maleky is also a student at OSU. Those records are therefore outside the scope of FERPA and should be produced in unredacted form.

{¶20} That result is not changed by the broad, general, definition of "education records" announced in *ESPN*, 132 Ohio St.3d 212, ¶¶ 27-31. That definition was based on FERPA's overall definition of the term, and did not consider the specific exclusion made by § 1232g(a)(4)(B)(iii).

{¶21} Based on the foregoing, the special master recommends that OSU not be required to take any action regarding the records filed as pp. 1-28 of the *In Camera*

Records, but that it be ordered to produce the records filed as pp. 45-257, 286-301, 317-331, 410-487, 495-501, 507-511, 516-519, and 520 of the *In Camera Records*.

B. Additional records.

{¶22} Dr. Maleky asserts that OSU failed to provide several dozen records responsive to her requests. *Oct. 30 Submission*, pp. 1-9; *Reply*, pp. 2, 3, 5, 6, 7. She is entitled to most, but not all, of those records or a certification that no such records exist.

{¶23} If there is sufficient evidence that a public office has failed to produce all responsive public records the office must either produce the remaining responsive records or certify that none exist. *State ex rel. Sultaana v. Mansfield Corr. Inst.*, __Ohio St.3d __, 2023-Ohio-1177, ___ N.E.2d __, ¶¶ 37-43, 50; *State ex rel. Harris v. Pureval*, 155 Ohio St.3d 343, 2018-Ohio-4718, 121 N.E.3d 337, ¶¶ 15, 18. The sufficiency of evidence to trigger that obligation varies depending on the office's response. Clear and convincing evidence is required if the office provides affidavit testimony or its equivalent that no additional records exist. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶¶ 22-26. However, "some evidence" is sufficient if the office does not provide affidavit testimony negating the existence of additional responsive records. *Sultaana*, 2023-Ohio-1177, ¶¶ 37-43. Some evidence exists if the requester establishes facts that would usually result in the existence of the additional records. *Id.* at. ¶¶ 41-43; *Mattis v Toledo Police Dept.*, Ct. of Cl. No. 2023-00600PQ, 2023-Ohio-4878, ¶¶ 31-33, 35-36. Some evidence also exists if other records refer to or otherwise suggest the existence of the additional records. *Id.* at ¶¶ 17, 24.

{¶24} OSU did not provide affidavit testimony negating the existence of other records. Dr. Maleky is therefore entitled to the additional records she seeks, or a certification that no such records exist, if there is some evidence that the additional records exist.

{¶25} There is some evidence of the existence of most of the additional records Dr. Maleky seeks. Those additional records and the evidence supporting their existence are described in Table 1. The special master therefore recommends that OSU be required to either produce any additional responsive records that existed as of the date of the last

public records request Dr. Maleky has sued on (January 13, 2023) or certify that they do not exist. See *Taxpayers Coalition v. City of Lakewood*, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the public records request). Some of those additional records are likely among those improperly withheld on FERPA grounds, as discussed above. If they are, OSU should be required to identify which of those records correspond to the specific assertions summarized in Table 1 when it produces those records.

{¶26} There is either no evidence supporting the existence of the other records Dr. Makely claims are responsive to her requests or there are legal barriers preventing this court from ordering action on those claims. Dr. Maleky's claims regarding such records and the reasons for rejecting those claims are set out in Table 2. The special master therefore recommends that OSU not be required to take any further action in connection with those assertions.

C. Requester is entitled to recover her filing fee and costs.

{¶27} R.C. 2743.75(F)(3)(b) provides that the "aggrieved person shall be entitled to recover from the public office or person responsible for the public records the amount of the filing fee of twenty-five dollars and any other costs associated with the action[.]" Requester was aggrieved by OSU's failure to produce or negate the existence of some responsive records. She is therefore entitled to recover her filing fee and costs. OSU should bear the balance of the costs of this case.

III. Conclusion.

{¶28} Considering the foregoing, the special master recommends that:

- Respondent be ordered to produce unredacted copies of pp. 45-257, 286-301, 317-331, 410-487, 495-501, 507-511, 516-519, and 520 of the *In Camera Records*.

- Respondent be ordered to either produce unredacted copies of the records described in Table 1 or certify that no such records exist.
- Requester recover her filing fee and costs and that Respondent bear the balance of the costs of this case.
- All other relief be denied.

{¶29} Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).

TODD MARTI
Special Master

Filed January 5, 2024
Sent to S.C. Reporter 2/15/24

Table 1
Evidence of additional records

Additional Record (<i>submission asserting its existence</i>)	pp. in Oct. 30 Submissions supporting existence	pp. in <i>In Camera</i> Records supporting existence
A.1 Emails from Dr. Jimenez-Flores on Aug 16, 2022, to Dr. Belury and Mrs. India Fuller that reported the allegations. (<i>Oct. 30 Submission; Reply, p. 3</i>)	10	
A.2 Dr. Belury emails to CFAES HR and ELR HR on Aug 16-19, 2022. (<i>Oct. 30 Submission</i>)	10	
A.3 CFAES HR emails (and their attachments) to ELR HR in August 2022. (<i>Oct. 30 Submission</i>)	12, 13	
A.4 Files submitted by Brandie Gilbert-Hammett to OSU OIE on Aug 19, 2022. (<i>Oct. 30 Submission</i>)	13	
A.5 Any meeting notes, emails, documents, and correspondence related to the “Emerging Case Meeting”, that ELR HR and OIE investigators and OSU administrators attended in late August 2022 and/or September 2022. (<i>Oct. 30 Submission</i>)	14	
A.6 Meeting notes from the meeting between ELR HR investigators and OIE investigators on Aug 29, 2022. (<i>Oct. 30 Submission</i>)	15	
A.8 All drafts and versions of the ELR HR summary of investigation and final report submitted to the investigators’ supervisors for their review, in addition to the versions that the supervisors sent back to the investigators. (<i>Oct. 30 Submission; Reply, p. 2</i>)		495 et seq, 516 et seq
A.9 The recording, transcript, and notes (all drafts) of the Zoom meeting of the ELR HR Interview with Shoshana Ginsburg on Aug 22, 2022, as well as the documents of any other meetings/phone calls between these people. (<i>Oct. 30 Submission; Reply, pp. 2-3, 5, 6</i>)		495-496

A.10 Any correspondence between the ELR HR and/or other offices and administrators in OSU with Shoshana Ginsburg regarding text messages that Shoshana Ginsburg submitted [including a copy of the original version of the text document, the date, and how it was submitted to ELR HR]. (Oct. 30 Submission)		317-321, 492
A.11 Any correspondence between the ELR HR and/or other OSU offices and Shoshana Ginsburg regarding Shoshana Ginsburg's statement that ELR HR submitted to Dr. Maleky on September 8, 2022, [including the date, and how it was submitted to ELR HR]. (Oct. 30 Submission)	17	
A.12 Shoshana Ginsburg's response to the ELR HR summary of investigation (in October 2022), as well as any other emails or comments from Shoshana Ginsburg related to the ELR HR summary of Investigations. (Oct. 30 Submission)		507-511
A.14 Emails, notes, and documents of any communications between the ELR HR investigators and the case witness from August 2022 to January 30, 2023. (Oct. 30 Submission, Reply, pp. 2-3, 5, 6)		495-497
A.16 Meetings notes from meeting/s between ELR HR investigators and the OIE Investigator/people on September 27 or 28 2022. The meeting/s attendees were Allyson Howard, Christina Cunningham, Meagan Johnson-Myers. (Oct. 30 Submission)	19	
A.18 The drafts and copies of the ELR HR summary of investigation and the final reports shared with FSTD Chair, the CFAES HR, and CFAES administrators in November 2022, and December 2022. (Oct. 30 Submission; Reply, p. 2)		495 et seq, 516 et seq
A.19 All emails and correspondence between the ELR HR and FSTD Chair, the CFAES HR, and CFAES administrators between October 2022 to January 15, 2023, including the correspondence related to transfer of Maleky's graduate students and their projects to another lab. (Oct. 30 Submission)		1-28, 260 -285
A.20 Email from Christina Cunningham to Nadia Hague, Kendar Wiechart, Keesha Mitchell on September 2, 2022, at 12:49 pm, including its attachments and any correspondence related to this email. (Oct. 30 Submission)	25	
B.1 Emails From Dr. Jimenez-Flores on Aug 16, 2022, to Dr. Belury and Mrs. India Fuller. (Oct. 30 Submission; Reply, p.3)	10	
B.2 Meeting notes from India Fuller related to the conversation between Mrs. Fuller and Drs. Belury and Jimenez-Flores on Aug 17, 2022. (Oct. 30 Submission)	10	

B.3 Dr. Belury's email to OSU HR (CFAES HR and ELR HR) on Aug 16-19, 2022. (Oct. 30 Submission)	10	
B.4 All CFAES HR meetings notes (including CAT meeting on August 22), and emails (with their attachments) to ELR HR. (Oct. 30 Submission)	12	
B.5 Files submitted by Brandie Gilbert-Hammett to OSU OIE on Aug 19, 2022 (Potential custodians: Brandie Gilbert-Hammett, Nicole Wakeley). <input type="checkbox"/> faesrecurrenceoffacultystudentissuemaleky.pdf <input type="checkbox"/> rereportingincident...shoshanaginsburg.pdf <input type="checkbox"/> reurgentneedforstudentreportingracismandabusebyadvisor.msg (Oct. 30 Submission)	13	
C.7 Any emails or correspondence between Becca Reed and Shoshana Ginsburg regarding this case and her allegations. (Oct. 30 Submission)	17	
C.8 Email from Christina Cunningham to Nadia Hague, Kendar Wiechart, Keesha Mitchell on September 2, 2022, at 12:49 pm, including its attachments and any correspondence related to this email. (Oct. 30 Submission)	25	
C.9 Meetings notes from meeting/s between ELR HR investigators and the OIE Investigator/people on September 27 or 28, 2022. The meeting/s attendees were Allyson Howard, Christina Cunningham, Meagan Johnson-Myers. (Oct. 30 Submission)	19	
C.10 Any meeting notes, emails, shared documents, and correspondence related to the "Emerging Case Meeting", that ELR HR and OIE investigators and OSU administrators attended in late August and/or September 2022. (Oct. 30 Submission)	14	
C.11 Notes from the meeting between ELR HR, OIE investigators and administrators on Aug 29, 2022 (Oct. 30 Submission)	15	
C.12 Becca Reed's email to Allyson Howard, Christina Cunningham, Meghan Ninneman, Nadia Hague, on Aug 29, 5:11 pm. and all the replies and forwarding of that email, as well as any other correspondence based on that email. (Oct. 30 Submission)	14-15	
C.13 The recording, transcript, and notes (all drafts) of the meetings/calls between Becca Reed and OSU police department on August 25, 2022, at 2:15 pm and 2:23 pm. (Oct. 30 Submission)	26, 27	

C.14 Report P2022-02368 which was shared with Becca Reed on Aug 25 at 3:23 pm. (<i>Oct. 30 Submission</i>)	27	
C.15 Becca Reed's notes about P2022-02368 and the necessary fields that she updated in the case on Aug 26, 2022, at 9:09 am. (<i>Oct. 30 Submission</i>)	27	
C.16 Becca Reed's report (R00065134) added to the case on Aug 19, 5:41 pm 2022. (<i>Oct. 30 Submission</i>)	27	
C.17 All the documents and correspondence related to OIE-2142 Case, including the case itself. (<i>Oct. 30 Submission</i>)	26	
C.18 All notes and reports from Becca Reed related to these allegations from August 17, 2022, until June 30, 2023. (<i>Oct. 30 Submission</i>)	29 & passim	
-- Through January 13, 2023, only		
C.19 All notes and reports from Meagan Johnson-Myers related to these allegations from August 17, 2022, until June 30, 2023. (<i>Oct. 30 Submission</i>)	36 & passim	
-- Through January 13, 2023, only		
E.1 All emails and correspondence between CFAES Dean (Dr. Kress) and: Provost Gilliam, OSU HR. (<i>Oct. 30 Submission</i>)		22, passim (Kress)
FSTD Chair, CFAES administrators, and OSU administrators including Dr., from August 16, 2022, to July 2023. (<i>Oct. 30 Submission</i>)		22, passim (Gilliam)
		45, passim (Malone)
-- Through January 13, 2023, only		
E.2 CFAES Dean's correspondence with Shoshana Ginsburg (Potential custodians: Cathann Kress). Exhibit 10 confirms this meeting took place. (<i>Oct. 30 Submission</i>)	33-34	
E.4 All the emails and correspondence between OSU HR and FSTD and the CFAES administrators from October 2022 to January 15, 2023, including correspondence related to transfer of Dr. Maleky's graduate		1-28, 260-285

students and their projects to another lab. (<i>Oct. 30 Submission</i>)		
E.5 All emails, meetings notes, and correspondence among CFAES administrators and faculty of FSTD, FSTD chair, and OSU Grad study regarding the transfer of Dr. Maleky's graduate students and projects to another lab. (<i>Oct. 30 Submission</i>)		1-28, 258-285
F.1 All emails and correspondence between Provost Gilliam and ELR HR, OSU administrators, CFAES administrators, and FSTD chair from August 2022 to July 2023. (<i>Oct. 30 Submission</i>)		22, passim (Gilliam)
-- Through January 13, 2023, only		
F.2 All emails and correspondence involving Vice President Gates Garrity-Rokous. (<i>Oct. 30 Submission</i>)	35	83
F.4 All emails and correspondence between Vice Provost Malone and ELR HR, CFAES administrators regarding the allegations from Aug 16, 2022, to August 30, 2023 [Excluding emails just focused on Dr. Maleky's Fall 2022 teaching and the emails that Dr. Maleky was among their custodians. (<i>Oct. 30 Submission</i>)		45, passim (Malone)
-- Through January 13, 2023, only		
F.5 Meeting notes, correspondence and emails between Drs. Malone, Kress, Kitchel, and Belury. (<i>Oct. 30 Submission</i>) regarding the allegations report, its investigations and decision making from August 29, 2022, to August 15, 2023 [Excluding emails just focused on Dr. Maleky's Fall 2022 teaching and the emails that Dr. Maleky was among their custodians] (<i>Oct. 30 Submission</i>)		45 & passim (Malone)
-- Through January 13, 2023, only		89 & passim, (Kress)
		89 & passim, (Kitchel)
		89 & passim, (Belury)
F.6 All emails, meeting notes, and correspondence between OSU Grad Study and FSTD chair, CFAES administrators, regarding the transfer of Dr. Maleky's graduate students and projects to another lab. (<i>Oct. 30 Submission</i>)		1-28, 258-285
G.1 Emails From Dr. Jimenez-Flores on August, 2022, to Dr. Belury and Mrs. India Fuller that reported the allegation. (<i>Oct. 30 Submission; Reply, p. 3</i>)	10, 12	
G.2 Dr. Belury's email/s to CFAES HR and ELR HR on Aug 16-19, 2022, as well as any other	10, 12	

correspondence. (<i>Oct. 30 Submission; Reply</i> , p. 3)		
G.3 Dr. Belury's meeting notes from the conversation between Mrs. Fuller and Drs. Belury and Jimenez-Flores on Aug 17, 2022. (<i>Oct. 30 Submission; Reply</i> , p. 3)	10	
G.4 Meetings notes, correspondence, and emails between Dr. Belury and Drs. Malone, Kress, Kitchel regarding the allegations report, its investigations and decision making [excluding emails that just focused on Dr. Maleky's Fall 2022 course teaching and the emails that Dr. Maleky was among their custodians]. (<i>Oct. 30 Submission</i>)	10	
G.5 All drafts and copies of the ELR HR summary of investigation and final reports shared with the FSTD chair in November 2022, and December 2022. (<i>Oct. 30 Submission</i>)		495 et seq, 516 et seq
G.6 All emails and correspondence between FSTD Chair and: ELR HR and the CFAES administrators from October 1, 2022, to January 15, 2022, including the correspondence related to transfer of Dr. Maleky graduate students and their projects to another lab. (<i>Oct. 30 Submission</i>)		1-28, 258-285
G.7 All emails, meeting notes, and correspondence between FSTD chair and FSTD faculty regarding the transfer of Dr. Maleky's graduate students and projects to another lab. (<i>Oct. 30 Submission</i>)		1-28, 258-285
G.9 Emails and correspondence between Dr. Campanella and Shoshana Ginsburg on October 5-7, 2021(<i>Oct. 30 Submission</i>)	39	84, 151, 164, 170,
G.10 All emails, notes, and correspondence between Dr. Simons and one FSTD Teaching Assistant (Stephanie Almquist) about teaching assistant positions in Fall 2022 (including the materials for the Dr. Maleky's course in fall 2022), as well as the exact dates of the notes and communications. (<i>Oct. 30 Submission</i>)		40
G.11 All emails and notes from communications between Dr. Simons and Shoshana Ginsburg about changing her assignments and assigning/removing Shoshana Ginsburg as the teaching assistant for Dr. Maleky's course in fall 2022, as well as the exact dates of the notes and communications. (<i>Oct. 30 Submission</i>)		325, 327, 328, 329, 474, 476,
G.12 All Emails and correspondence between one FSTD Teaching Assistant (Stephanie Almquist) and Dr. Simons about teaching assistant positions in Fall 2022. (<i>Oct. 30 Submission</i>)	40	

G.13 From Stephanie Almquist: All emails between Stephanie Almquist and Shoshana Ginsburg regarding the TA assignment for Fall 2022, as well as the exact dates of the communications. (<i>Oct. 30 Submission</i>)	40	
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Table 2

Insufficient claims of additional records

Additional Record (<i>submission asserting its existence</i>)	Reason for Insufficiency of Showing
A.13 The recording, transcript, and notes (all drafts) of the Zoom meeting of the ELR HR interview with the witness on Aug 30, 2022, as well as the documents of any other meetings. (<i>Oct. 30 Submission</i>)	Evidence of substantive dispute, not the existence of the recording, notes, etc.
A.15 The recording of the Zoom meeting, its transcript, and the meeting notes (all drafts) from ELR HR interviews with Dr. Maleky on September 9 and 21, 2022, as well as the documents of any other meetings. (<i>Oct. 30 Submission</i>)	No evidence identified, only unsworn statements in memorandum
A.17 Correspondence, emails, meeting notes from the communications between ELR HR investigators and the sanctioning committee. (<i>Oct. 30 Submission; Reply</i> , p. 6)	After the final last public records request. See <i>In Camera Records</i> , pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i> , 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)
C.1 Any correspondence among OIE and other OSU offices and Shoshana Ginsburg regarding the statement that ELR HR submitted to Dr. Maleky on September 8, 2022. (<i>Oct. 30 Submission</i>)	No evidence identified or located
C.2 The recording, transcript, and notes (all drafts) of the Zoom meeting of OIE interview(s) with Shoshana Ginsburg on September 13, 2022, as well as similar documents from any other meetings. (<i>Oct. 30 Submission</i>)	Evidence of substantive dispute, not the existence of the recording, notes, etc.
C.3 The recording, transcript, and notes (all drafts) of the Zoom meeting of the OIE interview with the two witnesses of the case on December 16 and 21, 2022, as well as similar documents from any other meetings. (<i>Oct. 30 Submission</i>)	No evidence identified or located

<p>C.4 The recording, transcript, and notes (all drafts) of the Zoom meeting of the OIE interview with Dr. Maleky on November 30, 2022. (<i>Oct. 30 Submission</i>)</p>	<p>Evidence identified goes to the underlying substantive dispute, not the existence of the recording, notes, etc.</p>
<p>C.5 The recording, transcript, and notes (all drafts) of the Zoom meeting from Mrs. Becca Reed with Shoshana Ginsburg on Aug 24 and/or 25, 2022 Evidence of substantive dispute, not the existence of the recording, notes, etc. (<i>Oct. 30 Submission</i>)</p>	<p>No evidence identified or located</p>
<p>C.6 Emails, correspondence, and notes from any Zoom/phone meetings between Becca Reed and Shoshana Ginsburg which asked Shoshana Ginsburg to submit a statement on Sunday Aug 28, 2022. (<i>Oct. 30 Submission</i>)</p>	<p>Evidence identified does not support the existence of the record</p>
<p>D1. Correspondence, emails, meeting notes from the communications between ELR HR and the sanctioning committee. (<i>Oct. 30 Submission; Reply, p. 6</i>)</p>	<p>After the final last public records request. See <i>In Camera Records</i>, pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i>, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)</p>
<p>D2. All emails, meetings notes, and correspondence between the members of the sanctioning committee about the allegations, including emails from Dr. Vodovotz to Dr. Basso and Dr. Stephan Niewiesk. (<i>Oct. 30 Submission; Reply, p. 6</i>)</p>	<p>After the final last public records request. See <i>In Camera Records</i>, pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i>, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)</p>

<p>D3. The recording, transcript, and notes (all drafts) of the meeting of the Sanctioning committee with Shoshana Ginsburg on March 7, 2023, in addition to all emails or documents. (<i>Oct. 30 Submission; Reply</i>, p. 6)</p>	<p>After the final last public records request. See <i>In Camera Records</i>, pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i>, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)</p>
<p>D4. Any recordings, transcripts, and notes (all drafts) of the meetings of the Sanctioning committee with the CFAES Dean, CFAES Associate Dean, and FSTD chair, in addition to all the emails and documents among these people. (<i>Oct. 30 Submission; Reply</i>, p. 6)</p>	<p>After the final last public records request. See <i>In Camera Records</i>, pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i>, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)</p>
<p>E.3 CFAES Dean's correspondence with the Sanctioning Committee. (<i>Oct. 30 Submission; Reply</i>, p. 6)</p>	<p>After the final last public records request. See <i>In Camera Records</i>, pp. 488-493, 494-501. See <i>State ex rel. Taxpayers Coalition v. City of Lakewood</i>, 86 Ohio St.3d 385, 392, 715 N.E.2d 179 (1999) (office has no duty to produce records generated after the date of the request)</p>
<p>E.6 In one of our meetings, Dr. Kitchel referred to a workplace violation case where the OSU faculty was sanctioned by being barred from being in the same room with the person who made the allegation for that case. All public information and sanctions placed in that case are requested. (<i>Oct. 30 Submission</i>)</p>	<p>Beyond the scope of the underlying public records request. See <i>State ex rel. Strothers v. Keenon</i>, 2016-Ohio-405, 59 N.E.3d 556 (8th Dist.), ¶¶ 10, 34 (requester cannot obtain records not requested in request initially sued upon)</p>
<p>G.8 All emails, meeting notes, and correspondence between FST chair and CFAES and OSU administrators related to moving the Dr. Maleky' office and lab out of FSTD. (<i>Oct.</i></p>	<p>No evidence identified or located</p>

30 Submission)	
Supposed omission of materials from the October 22, 2022 Summary of Evidence. (<i>Reply</i> , p. 2)	A review of the unredacted version of these documents reveals that there was no omission. The extra materials at PDF p. 64 of the <i>Reply</i> is simply a larger version of the comments in the right margin of PDF p. 63 of the <i>Reply</i> .
Supposed failure to account for Requester's evidence/rebuttal in final report on underlying proceeding. (<i>Reply</i> , p. 5)	There is no evidence that additional records existed. This is simply Requester's dispute with the substance of the report in the underlying proceeding.
Reports submitted against Requester in August, 2022. (<i>Reply</i> , p. 5)	No evidence that the correspondence was reduced to writing or any other form of "document, device, or item, *** [or] electronic record" per R.C. 149.011(G).
August, 2022, correspondence between complainant and Becca Reed. (<i>Reply</i> , p. 6)	No evidence that the correspondence was reduced to writing or any other form of "document, device, or item, *** [or] electronic record" per R.C. 149.011(G).
Materials due faculty member under Faculty rule 3335-5-04.3.C.2c. (<i>Reply</i> , p. 7)	Beyond the scope this court's R.C. 2743.75(A) jurisdiction; the court can only enforce R.C. 149.43(B), not other legal mandates.