

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JOHN SOLOSKI,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 1:06cv03043-MHS-CCH
THE BOARD OF REGENTS OF THE)	
UNIVERSITY SYSTEM OF GEORGIA,)	
et al.,)	
)	
Defendants.)	
_____)	

**OBJECTIONS TO MAGISTRATE COURT’S ORDER RELATING TO
SUBPOENA ISSUED TO REPORTER KELLY SIMMONS**

Pursuant to Fed.R.Civ.P. 72(a), 28 U.S.C. § 636, and the First Amendment to the United States Constitution, non-parties The Atlanta Journal-Constitution and reporter Kelly Simmons hereby file their Objections to the Magistrate Court’s January 30, 2009 Order denying Movants’ motion to quash a subpoena issued by plaintiff John Soloski, which subpoena demands that Ms. Simmons appear to testify in deposition regarding her newsgathering activities.

INTRODUCTION

This is an action brought by John Soloski, the former Dean of the University of Georgia’s Grady College of Journalism and Mass Communication.

He is seeking to compel a working journalist, Kelly Simmons, to disclose the identity of the confidential source or sources who alerted her that the Dean was the subject of an ongoing University investigation examining claims of sexual harassment. The putative basis for the subpoena is Dean Soloski's claim that he needs the information to support a purported common law invasion of privacy claim against the University, a claim which he belatedly added to this case after its removal.

In its January 30 Order, the Magistrate Court reached a novel and unsupportable interpretation of Georgia law, concluding that despite the fact that the investigation of a sitting dean is clearly a matter of public concern and despite the fact that this investigation was known to the journalism school community and required by law to be disclosed to the public at the conclusion of the investigation, Dean Soloski nevertheless could state an actionable privacy claim based on the alleged disclosure of information from the investigation. In an effort to find a basis for the claim where none exists, the Magistrate Court endorsed Plaintiff's strained effort to articulate a new and bizarre kind of "here today, gone tomorrow" privacy claim under which Dean Soloski purportedly had an actionable, *temporary* "expectation of privacy" until the completion of the investigation, at which time it is undisputed that all information about the investigation had to be released to the

public, including the University's finding that Dean Soloski violated the University's anti-harassment policy.

In defining the legal source of this momentary right of privacy, the Magistrate Court ignored well-established Georgia law that precludes *any* privacy claim based on speech about a matter of public concern. Similarly, he ignored well-established Georgia law that precludes *any* privacy claim under circumstances where there is not a *reasonable* expectation of privacy. Instead, the Magistrate Court premised its opinion entirely on the internal rules of the University of Georgia, thereby employing the constitutionally flawed logic that government institutions themselves can render speech on matters of public concern actionable as a tort claim simply by passing internal rules that such speech – and thus reporting on such topics – should not occur.

Based on this misreading of Georgia law, the Magistrate Court's Order then held that O.C.G.A. § 24-9-30 – a statutory privilege that has never been overcome in connection with a confidential source since its passage more than 15 years ago – should be put aside in this case and Ms. Simmons should be compelled to testify. The Order, if accepted by the Court, would authorize a constitutional collision with First Amendment-based rights so that the Plaintiff can pursue a legally unsupported privacy claim that even the Magistrate Court's Order recognizes is so

flimsy that Plaintiff will “have difficulty in establishing any damages.” Order at 16, n.2.

The Magistrate Court’s Order is contrary to law and should be set aside by this Court. In the alternative, the Court should decline to exercise pendant jurisdiction over Plaintiff’s novel and unsupportable state law privacy claim and should instead remand the alleged claim to the Georgia courts for resolution in that forum.

RELEVANT FACTS

Plaintiff John Soloski is currently a professor of journalism at the University of Georgia and formerly the dean of the Grady College of Journalism and Mass Communication. The Grady College of Journalism is the largest journalism school in the State of Georgia.

As the record establishes, there is no dispute that in June of 2005 then-Dean Soloski was the subject of a sexual harassment investigation. There is also no dispute that, as a result of that investigation, the University concluded that Dean Soloski violated the University’s Nondiscrimination and Anti-Harassment Policy.

Dean Soloski acknowledges that he made the comments that led to the investigation. Specifically, he admits he told the employee at issue that her evening gown “showed off her assets.” Complaint at ¶ 33. Likewise, on another occasion, he admits he commented on her “brown eyes.” Complaint at ¶ 35.

Dean Soloski alleges that he learned of the sexual harassment claims against him by receiving a letter from the complainant on May 18, 2005. Complaint at ¶ 38. After he forwarded the letter to the University's legal department, an investigation was launched that concluded that he had violated University policy. Complaint at ¶ 45. Just prior to the official issuance of a letter stating this conclusion, Plaintiff announced his resignation from the position of Dean of Grady College effective June 30, 2005. Complaint at ¶ 46.

While the University's investigation was ongoing, numerous people in the journalism school community were interviewed concerning Dean Soloski's behavior. University Associate Director of Legal Affairs Kimberly Ballard-Washington, who conducted the investigation, testified that in addition to Soloski himself, persons interviewed included at least the following:

- Janet Jones-Kendall (Plaintiff's accuser)
- Michele Head (event planning)
- Sherrie Whaley (public relations director)
- Len Reid (faculty)
- Sige Burden (human resources)
- Margaret Weston (external affairs)
- Diane Murray (public service/outreach)
- Richard Riley (external affairs)
- Brooke Rooks (business manager)
- Cindy Johnson (Dean Soloski's assistant)
- Karen King (faculty)
- Sandy Mayfield (alumni relations)
- Pam Kahn (friend of plaintiff's accuser)
- Peggy Kreschel (faculty)

See Ballard-Washington Dep. at 6, 76-77, 128, 138, 191-92, 214, 219, 226, 231-34, 240, 247, 250, 255. As Ms. Ballard-Washington testified, the University did not, and could not, restrict these persons from disclosing the existence of the investigation. See Ballard-Washington Dep. at 183 (“There’s nothing to stop individuals such as Dr. Soloski, Janet Jones-Kendall, or other individuals who are aware of the investigation from speaking to the media or anyone else.”). See also E. Neely Dep. at 69 (noting that ongoing investigations do not always remain confidential “because there’s always people at the institution that know something is going on and, you know, may tell somebody about it”).

At the time of the University’s investigation into the harassment allegations, Kelly Simmons was a reporter for The Atlanta Journal-Constitution.¹ She was not a witness to the alleged harassment that gave rise to this action, nor did she have any involvement in the investigation. Ms. Simmons reported on the investigation solely in her capacity as a reporter. True and accurate copies of her articles on the investigation are attached hereto, for the convenience of the Court, as Exhibit 1.

¹ Ms. Simmons was a reporter with The Atlanta Journal-Constitution at all times relevant to this litigation. She is currently the Editor of Georgia Magazine, a University of Georgia publication.

As the attached articles demonstrate, Ms. Simmons authored, and the Journal-Constitution published, one article on the investigation prior to its conclusion.

That June 17, 2005 article is reproduced in its entirety below:

Harassment claim probed, UGA journalism dean accused

By Kelly Simmons

Athens -- The University of Georgia is investigating allegations of sexual harassment against the dean of the Grady College of Journalism & Mass Communication.

Provost Arnett Mace confirmed Thursday that the dean, John Soloski, was being investigated.

"There has been a complaint filed, and legal affairs is concluding their investigation," Mace said. "I can't comment because the investigation is not complete."

Soloski said he was aware of the investigation but denied he had acted inappropriately toward an employee.

"I am very careful to keep things professional," Soloski said from Ponte Vedra Beach, Fla., where he is attending a Georgia Press Association meeting. "I don't engage in harassment."

Soloski said he believed the employee filed the complaint because she had been criticized for her job performance.

"We were having some problems with the employee," Soloski said. "She had received a verbal reprimand."

He said he was shocked by the allegation.

"I literally remarked aloud with astonishment," he said.

Soloski, who is considered an authority on libel and media law, became dean of the Grady college in July 2001. Before that, he

was director of the School of Journalism and Mass Communication at the University of Iowa.

He has co-written books on libel law and the newspaper industry.²

Dean Soloski does not (and truthfully cannot) claim that the article is inaccurate, nor does he claim that the article itself contains any information that invaded his privacy. He makes no allegation – nor could he given the undisputed content of the articles – that any information from the unidentified source or sources appeared in the June 17, 2005 article or thereafter. Indeed, Dean Soloski cannot genuinely dispute that in response to Ms. Simmons’ inquiry it was appropriate for the University to publicly confirm in the article – as did Dean Soloski himself! – that a sexual harassment investigation was underway. What he nevertheless claims is that he is entitled to forcibly require Ms. Simmons to disclose what led her to make the inquiry in the first place. His inquiry is solely to identify Ms. Simmons’ initial source or sources.

² Other news organizations promptly published similar news reports regarding the ongoing investigation, including confirmations from University officials. See, e.g., http://onlineathens.com/stories/061805/uga_20050618037.shtml (June 18, 2007 report by the *Athens Banner Herald*: “Provost Arnett Mace and Steve Shewmaker, executive director of legal affairs, both said an investigation was ongoing into the woman’s complaint against Dean John Soloski but said they couldn’t comment.”); <http://media.www.redandblack.com/media/storage/paper871/news/2005/06/23/News/Dean-Of.Grady.College.Accused.Of.Sexual.Harassment-2571589.shtml> (June 23, 2007 report by *The Red & Black*: “University Provost Arnett Mace, speaking through a spokeswoman, confirmed the investigation Monday but declined further comment.”).

Plaintiff issued a subpoena to Ms. Simmons on July 9, 2008. See Doc. No. 72. The Atlanta Journal-Constitution and Ms. Simmons filed a motion to quash the deposition on July 28, 2008. See Doc. No. 72. The Magistrate Court issued its Order denying the motion to quash on January 30, 2009. See Doc. No. 134.

ARGUMENT

I. The Magistrate Court Erred in Concluding Plaintiff Had Established a Legal Basis to Overcome the Georgia Reporter's Privilege.

The subpoena issued to Ms. Simmons should be quashed pursuant to the Georgia reporter's privilege established by O.C.G.A. § 24-9-30.³ The Magistrate Court's Order is contrary to Georgia law.

In 1990, the Georgia legislature unanimously enacted the reporters' privilege, or "shield law," expressly recognizing by statute the long-standing First Amendment principles favoring the protection and cultivation of a vigorous and independent press. The Georgia qualified reporters' privilege provides in pertinent part as follows:

³ It is undisputed that Plaintiff issued his subpoena to Ms. Simmons in connection with his state law invasion of privacy claim, so that Georgia's statutory privilege therefore applies to this matter. See Fed. R. Evid. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.").

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper . . . shall have a qualified privilege against disclosure of any information, document or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

- (1) Is material and relevant;
- (2) Cannot be reasonably obtained by alternative means; and
- (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

O.C.G.A. § 24-9-30.

The Georgia courts have consistently applied this privilege with rigor. See, e.g., In re Paul, 270 Ga. 680, 687 (1999) (“[W]e hold that the reporter’s privilege protects Paul from disclosing the confidential sources and undisclosed information that the State seeks.”); Stripling v. State, 261 Ga. 1 (1991) (affirming the trial court’s refusal to require news reporter to reveal source in death penalty case); Nobles v. State, 201 Ga. App 483 (1991) (affirming quashing of subpoena issued to reporter covering murder trial).⁴

⁴ The Eleventh Circuit United States Court of Appeals has applied the federally-recognized privilege in a similarly rigorous fashion. See Price v. Time, 416 F.3d 1327, 1343 (11th Cir. 2005) (applying federal constitutional privilege and vacating trial court order compelling information from reporter pending further non-privileged depositions).

In connection with the privilege, the Georgia Supreme Court has recognized that “[n]ews stories based on confidential sources and information enable citizens to make more informed decisions about the conduct of government and its respect for individual rights; at times the stories have aided the investigation and prosecution of organized crime and government corruption.” Paul, 270 Ga. at 682. Not surprisingly, the Georgia Supreme Court has made clear that that the burden falls squarely on the party seeking discovery to “overcome the privilege.” Paul, 270 Ga. at 685 (“To overcome the privilege, the party seeking the information must show that the privilege is either waived or that the information meets a three-part test.”).

The record in this case established that Dean Soloski cannot overcome the privilege for multiple, independent reasons.

First, Plaintiff cannot establish that his subpoena to Ms. Simmons seeks information that is relevant to a viable claim. Indeed, the Magistrate Court’s Order compelling Ms. Simmons to testify is built on a false legal premise: Plaintiff’s claim that he has a privacy right that allows him to prevent the release of information concerning his alleged misconduct. Under well-established Georgia law, there is no such privacy right. In the absence of such a privacy right, even the Magistrate Court recognized that the subpoena must be quashed. See generally Magistrate Court’s Scheduling Order [Doc. No. 77] (acknowledging that “[i]f

Plaintiff cannot prove invasion of privacy as a matter of law, the information he seeks is not relevant to any claim and he will be unable to overcome the statutory privilege protecting the information obtained by Ms. Simmons”). See also Paul, *supra*, 270 Ga. at 686-87 (reversing order enforcing reporter’s privilege where the party’s questions to the reporter “all stem from the [party’s] erroneous premise”).

Second, even if there were such a privacy right (and there is not), Dean Soloski has failed to overcome the privilege because he has failed to establish that Ms. Simmons initial source is “necessary” to proving this claim and that he has exhausted “alternative” sources. The information Dean Soloski seeks is not necessary because there is no dispute that the University confirmed the investigation was ongoing to the press. The source of the original tip is, thus, at best, redundant and unnecessary evidence. Similarly, Plaintiff has also failed to exhaust alternative sources given that numerous individuals who were interviewed in the investigation and were admittedly free to talk to the media were nevertheless never even deposed or questioned in this action. Given this record, even if Dean Soloski’s purported privacy claim had a legitimate legal foundation, Plaintiff has failed to demonstrate a sufficient basis to overcome the privilege.

For these reasons, the Magistrate Court’s Order is contrary to law.

II. The Magistrate Court's Order Is Contrary to Law Because the Record Demonstrates Plaintiff Has Not Established a Legal Basis to Overcome the Reporter's Privilege

A. Ms. Simmons Testimony Is Not Relevant Because Georgia Recognizes No Privacy Right That Allows Public Officials to Keep Information About Their Alleged Misconduct Secret, Even Temporarily.

The University of Georgia is, of course, Georgia's largest public university, and Plaintiff held the senior administrative position in its journalism school. By accepting the deanship, Plaintiff voluntarily assumed the responsibility to manage Georgia's leading public journalism school. His performance in carrying out that public function – including allegations concerning his misconduct that prompted a University investigation – was clearly a matter of legitimate public interest.

In stark contrast to the conclusion of the Magistrate Court's Order, there is a well-established body of case law in Georgia that information about government investigations into alleged wrongdoing by public officials – whether ongoing or not – cannot support an invasion of privacy claim. Indeed, even from its initial recognition of the right of privacy, the Georgia Supreme Court has consistently emphasized that this right is, to a significant degree, waived with respect to public officials. See Pavesich v. New England Life Ins., 122 Ga. 190, 200 (1905) (“One who holds public office makes a waiver of a similar character, that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands.”). The Court has reiterated the

position on numerous occasions. See generally Waters v. Fleetwood, 212 Ga. 161, 167 (1956) (“[W]here an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one’s legal right of privacy.”); Athens Observer v. Anderson, 245 Ga. 63, 65-66, n.4 (1980) (“The right of privacy . . . does not protect legitimate inquiry into the operation of a government institution and those employed by it”). See also Meyer v. Ledford, 170 Ga. App. 245, 247 (1984) (dismissing privacy claim brought by public employee claiming that statements by co-workers in the context of the investigation of a fire department official suggested she had adulterous affair: “[W]here an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one’s legal right of privacy.”).⁵

In fact, the Georgia appellate courts have emphasized that our state constitution precludes privacy claims even by *private persons* who unwillingly become caught up in government investigations. For example, in Ramsey v. Georgia Gazette Publishing Co., 164 Ga. App. 693, 695 (1982), the Georgia Court

⁵ This body of law has its roots in the Georgia Constitution, which states that “Public officers are the trustees and servants of the people and are at all times amenable to them.” Ga. Const. § 2, ¶ 1.

of Appeals rejected an invasion of privacy claim brought by a private individual who had been identified as the “primary suspect” in an ongoing murder case. See also Waters, supra, 212 Ga. at 167-68 (rejecting privacy claim based on disclosure of crime scene photographs of juvenile murder victim); Macon Telegraph Publishing Co. v. Tatum, 263 Ga. 678, 679 (1993) (rejecting privacy claim by crime victim disclosed in the context of an ongoing sexual assault investigation, finding that she “became the object of a legitimate public interest.”).⁶ Given this well-established law, the Magistrate Court’s Order effectively reaches the illogical conclusion that Georgia law does not permit a privacy claim based on the disclosure of information revealing that a private individual is a suspect in an ongoing murder investigation, but does authorize such a claim based on the disclosure of information revealing that a public official is being investigated for sexual harassment. This is simply an incoherent reading of Georgia law.⁷

⁶ See also Cox Communications, Inc. v. Lowe, 173 Ga. App. 812, 813 (1985) (inmate depicted in broadcast examining GBI’s ongoing investigation has no privacy claim: “[W]here an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one’s legal right of privacy”); Reece v. Grissom, 154 Ga. App. 194 (1980) (father referenced in news report on arrest of son has no claim for invasion of privacy because matter was subject of public investigation).

⁷ See also Alexander v. News Corp., 2004 U.S. Dist. Lexis 27990 (S.D. Ga. 2004) (dismissing invasion of privacy claim under Georgia law because disclosure of plaintiff’s activities as DEA confidential informant were a matter of public concern: “The First Amendment requires that an incident that is a matter of public interest cannot form the basis of a claim for invasion of privacy.”).

1. **Under Settled Georgia Law, A Privacy Claim Cannot Be Based on Speech About an Ongoing Government Investigation.**

Neither Plaintiff in his briefing nor the Magistrate Court in its Order cites even a single case that supports the conclusion that a public official is entitled to a “temporary” right of privacy into allegations of misconduct in his official capacity. Rather, the Magistrate Court’s Order effectively develops this principle out of whole cloth based on what is apparently the Magistrate Court’s personally held view that “the nature of sexual harassment allegations weighs in favor of protecting them from disclosure while they are still merely the un-investigated allegations of the complainant.” Order at 13.

However, Georgia law clearly holds otherwise. As the Georgia appellate courts have consistently recognized, information about ongoing government investigations cannot support a privacy claim because they are a matter of legitimate public interest *while they are pending*. See, e.g., Waters, 212 Ga. at 167 (“During the pendency and continuation of the investigation, and until such time as the perpetrator of the crime may be apprehended and brought to justice under the rules of our society, the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of petitioner’s right of privacy.”); Ramsey, 164 Ga. App. at 695 (“During the pendency of a criminal investigation, such matter continues to be one of public

interest and the dissemination of information pertaining thereto would not amount to a violation of one's right of privacy."); Reece, 154 Ga. App. at 197 (accord).

The Magistrate Court's Order does not cite a single case in support of its novel conclusion that information about an ongoing sexual harassment investigation of a public employee is not a matter of public interest. Instead, the Order makes a backhanded interpretation of two cases that, when read in a straightforward fashion, conflict with Plaintiff's purported privacy claim. The Magistrate Court dismisses Fincher v. State, 231 Ga. App. 49, 53 (1998), in which the Georgia Court of Appeals specifically rejected a privacy claim by a government official challenging the release of information pertaining to a sexual harassment investigation, finding that Fincher "involved disclosures made after the investigation was complete." Order at 8. Fincher did involve post-investigation disclosures, but there is nothing in Fincher that supports the Magistrate Court's novel conclusion that an ongoing investigation is not a matter of legitimate public interest, but a completed one is.

Similarly, the Court relies on Harris v. Cox Enterprises, Inc., 256 Ga. 299 (1986), for the notion that "[w]hile this state has a strong policy of open government, there is a corresponding policy for protecting the right of the individual to personal privacy." Order at 10. What the Magistrate Court's Order does not explain is that the Georgia Supreme Court in Harris went on to say that

privacy rights would *only* apply to “matters about which the public has, in fact and in law, no legitimate concern.” *Id.* at 302. Furthermore, the Supreme Court explained that any information “reflecting upon an individual’s performance of official duties” would not be protected by privacy rights. *Id.* at 302. Clearly, information that a sexual harassment investigation has been launched against a sitting dean at a public university pertains to the “performance of official duties.” It is not a private matter.

Because the Magistrate Court’s Order is contrary to settled Georgia law regarding information about the investigation of misconduct by public officials, it should be vacated.

2. Georgia Law Is Clear That A “Private Facts” Privacy Claim Cannot Be Premised on Speech For Which There Is No Legitimate Expectation of Privacy.

In its Order, the Magistrate Court adopted Plaintiff’s argument that the University of Georgia’s NDAH policy “gave him an expectation of privacy” until Georgia’s Open Records Act required disclosure of the investigation and “that it was that expectation of privacy, albeit limited, that was violated by the disclosures made to Ms. Simmons during the investigation.” Order at 8. See also *id.* at 9 (“The Court agrees that the University’s NDAH policy gave Plaintiff a legitimate expectation of privacy in the information he provided the University’s NDAH officer and the investigation he requested.”).

Not only is this conclusion contrary to the Georgia law referenced above that makes clear investigations are a matter of public concern during their “pendency,” it also is in conflict with any reasonable interpretation of an “expectation of privacy.”

As the record in this case demonstrates, the investigation of Dean Soloski required the investigator to interview more than one dozen members of the journalism school community. See, infra, at 5-6 (listing those interviewed during investigation). Neither the Magistrate Court’s Order nor the record in this case provides any basis to claim that these witnesses were restricted from discussing the fact of the ongoing investigation as they saw fit. See Order at 16, n.2 (finding that there would only be privacy violation if information was released by “the NDAH officer [Ms. Ballard-Washington] or her superiors”); E. Neely Dep. at 69 (noting that ongoing investigations do not always remain confidential “because there’s always people at the institution that know something is going on and, you know, may tell somebody about it”).

Indeed, Plaintiff’s accuser, Janet Jones-Kendall, was, for example, free to speak about the allegations she lodged against Dean Soloski as she saw fit, and Dean Soloski had no basis to “expect” her to remain silent. The same is true for the more than one dozen other witnesses that were drawn into the investigation. See, e.g., Ballard-Washington Dep. at 183 (“There’s nothing to stop individuals such as

Dr. Soloski, Janet Jones-Kendall, or other individuals who are aware of the investigation from speaking to the media or anyone else.”).

In fact, the record demonstrates that Plaintiff himself never perceived the investigation as a private matter. When called by Ms. Simmons while she was preparing the June 17, 2005 article, Dean Soloski promptly began discussing the merits of the investigation and then disclosed negative information about the work history of Ms. Jones-Kendall. See June 17, 2005 article (“I am very careful to keep things professional,” Soloski said from Ponte Vedra Beach, Fla., where he is attending a Georgia Press Association meeting. “I don't engage in harassment.” Soloski said he believed the employee filed the complaint because she had been criticized for her job performance. “We were having some problems with the employee,” Soloski said. “She had received a verbal reprimand.”). If the flawed logic in the Magistrate Court’s Order were correct (and it is not), Plaintiff himself would be guilty of violating Ms. Jones-Kendall’s right to privacy by discussing the investigation while it was pending. See, e.g., Cummings v. Walsh Construction Co., 561 F. Supp. 872, 885 (S.D. Ga. 1983) (refusing “to hold others liable for disclosure of matters from which [plaintiff] herself had stripped the veil of privacy. Such a double standard is not compatible with the principle and concept of a right of privacy.”).

It is also meritless to contend that an individual can have a temporary “expectation” of privacy until the conclusion of an investigation when that person has no control whatsoever on when that investigation will end. The Order acknowledges that records of the investigation were required to be disclosed by the Georgia Open Records Act as soon as the investigation was concluded. See Order at 11 (citing O.C.G.A. § 50-17-72(a)(5)). Accordingly, release of information about the investigation was inevitable and Plaintiff had no legal basis to control either the timing or the content of the disclosure.

Thus, the record establishes, without contradiction, that the sexual harassment investigation was (1) made known to more than a dozen persons in the journalism school community who were free to discuss it as they saw fit, (2) discussed by plaintiff himself when speaking to the news media, and (3) required to be disclosed under the Georgia Open Records Act on a schedule over which Plaintiff had no control. Given this record, the Magistrate Court’s Order finding that the investigation was subject to a reasonable expectation of privacy and therefore “a private, secluded, or secret fact” is contrary to law. See generally Restatement (Second) of Torts § 652D, comment b (1977) (a “private facts” invasion of privacy claim only applies “to matters concerning the private, as distinguished from the public, life of the individual.”); Holt v. Cox Enters., 590 F. Supp. 408, 414 (N.D. Ga. 1984) (“[D]efendants will not be held to have invaded

Holt's privacy by public disclosure of private facts where, as here, the plaintiff is at least for some purposes a public figure and the facts disclosed concern not a private matter but information related solely to the public part of a limited purpose public figure's life.”).

3. The Internal Rules of the University Do Not – And Could Not – Provide Plaintiff with a Privacy Claim.

The flawed reasoning behind the Magistrate Court’s Order is also readily apparent from the fact that it attempts to transform the internal policy of the University of Georgia into a legislative enactment of the Georgia General Assembly.

The Georgia General Assembly has *never* passed a law that authorizes a private cause of action based on the disclosure of state government information by state government employees.⁸ In the absence of such a statute, Plaintiff’s privacy claim lacks any legal foundation, so the Magistrate Court’s Order strained to interpret the internal rules of the University of Georgia to create a purported “expectation of privacy” and then held that this “expectation of privacy” was sufficient to trigger a common law “private facts” invasion of privacy claim.

⁸ Such a law would not be unheard of. In 1974, the United States Congress, recognizing that common law privacy claims generally did not apply to information gathered by federal agencies, passed the Privacy Act to create a statutory cause of action for persons injured by the release of certain information contained in the records of a federal agency by federal government employees. See 5 U.S.C. § 552a. Georgia has no similar statute.

The flaw in this legal alchemy, however, is that a “private facts” invasion of privacy claim does *not* turn on the particular employment position of the person who discloses the private information. If information is legitimately private under common law, its disclosure would be actionable if it was disclosed by anybody. For example, the University would be forbidden from even confirming the existence of the investigation, much less disclosing records on the investigation under the Georgia Open Records Act⁹; Janet Jones-Kendall would be forbidden from discussing the claims that she made; the newspaper would be forbidden to even publish its June 17, 2005 article.

But, even the Magistrate Court’s Order does not dare go that far. To the contrary, the Order repeatedly emphasizes that the novel privacy claim articulated in the Order will only be actionable if the disclosure came prior to the conclusion of the investigation from “someone constrained by the NDAH policy . . . namely, the NDAH officer Kimberly Ballard-Washington, or her superiors.” Order at 14. See also Order at 16, n.2 (“If, for instance, the information was not provided by the

⁹ As the Order notes, the Georgia Open Records Act has an exception for information that is legitimately private. See O.C.G.A. 50-18-72(a)(2); Order at 12, n.1 (“the tort of invasion of privacy . . . defines the scope of the ORA”). If the investigation were truly a private matter, records from it would never have to be disclosed.

NDAH officer or her superiors, there would appear to be no basis for liability of any Defendants in this case.”).

What the Magistrate Court’s Order does is improperly elevate a complaint about an alleged violation of University rules that should have been made by Dean Soloski as an internal administrative matter at the University into a private cause of action pending in federal court. In doing so, the Magistrate Court’s Order improperly gives Plaintiff subpoena power to harass a working journalist. The Magistrate Court apparently believes that, even with respect to senior public employees, it would be good public policy to keep allegations of sexual harassment “private until the truth can be ascertained.” Order at 13. Even if this were true as a matter of policy (and Movants, not surprisingly, strongly disagree with this view), what is dispositive for purposes of Movants’ motion to quash is that the Georgia General Assembly has *never* adopted such a view. Plaintiff’s privacy claim lacks any foundation either as a matter of common law or statutory law.

B. Even if Plaintiff Could State a Viable Privacy Claim (and He Cannot), The Magistrate Court’s Order Is Contrary to Law Because Plaintiff Still Has Not Made the Other Showings Required to Overcome the Reporter’s Privilege.

Even if Plaintiff could state a viable privacy claim (and he cannot), the record establishes that he has not established a basis to overcome the privilege.

First and foremost, there is no dispute that the University of Georgia confirmed the existence of the sexual harassment investigation against Plaintiff

while it was pending. See, supra, at 8 (listing *Atlanta Journal-Constitution* article, *Athens Observer* article, and *Red & Black* article in which Provost Arnett Mace is reported as confirming the existence of the investigation). Indeed, Provost Mace in deposition did not dispute that he confirmed that the investigation was ongoing in response to press inquiries, but Plaintiff's counsel never even explored his testimony in his deposition. See, e.g., Deposition of Provost A. Mace at 154. Even if we assume Plaintiff has a privacy claim, Plaintiff has not made any showing to establish that testimony from Ms. Simmons is necessary to his case because the University has not denied that it confirmed that the investigation was ongoing to the press. Plaintiff does not need to know the identity of the source or sources who *originally* alerted Ms. Simmons to the investigation because the University *subsequently* confirmed it. The Order is contrary to law for this reason as well.

Plaintiff also has not met his burden to overcome the privilege because he has not shown that he has exhausted alternative sources of information. As the record demonstrates, there are more than a dozen persons who were interviewed in the sexual harassment investigation and the vast majority of them have never been deposed. For example, Plaintiff never even bothered to depose Janet Jones-Kendall to ask her whether she had spoken with the news media about her allegations. What the record demonstrates is that rather than undertaking a

meaningful effort to exhaust alternative sources, Plaintiff and Defendants instead simply entered a conclusory stipulation that Plaintiff had met his burden. See Stipulation [Doc. No. 103]. Respectfully, both parties to this action have a motive to try to identify how The Atlanta Journal-Constitution gathers information about the University of Georgia, so the self-interested stipulation is meaningless. Indeed, it should raise suspicion of the Court. Plaintiff has not exhausted alternative sources so Movants' motion to quash should have been granted. See, e.g., Paul, supra, 270 Ga. at 687 (“The State cannot obtain the identity of confidential sources . . . under the second prong of the test without first exerting an effort to obtain the same information from county and city employees”); Stripling, supra, 261 Ga. at 9 (affirming trial court order enforcing reporter’s privilege based on failure to prove exhaustion of alternative sources); Price, supra, 416 F.3d at 1348 (“In this area it is reasonable to require that a party beat the bushes . . .”).

III. In the Alternative, the Court Should Decline To Exercise Supplemental Jurisdiction Over Plaintiff’s Novel Privacy Claim and Remand It to the State Court.

This case was originally filed in the Superior Court of Fulton County. The Defendants removed the case pursuant to 28 U.S.C. §§ 1441 and 1446 after Plaintiff filed his Second Amended Complaint, in which he added federal claims giving rise to this Court’s original subject matter jurisdiction under 28 U.S.C.

§ 1331. In his Third Amended Complaint, Plaintiff added the state claim for invasion of privacy that is the subject of the Magistrate Court's order.

That claim, along with several other state claims, are before this Court pursuant to its supplemental jurisdiction. See 28 U.S.C. § 1367(a) (“in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are . . . part of the same case or controversy”). Under 28 U.S.C. § 1367(c), however, a district court enjoys discretion under certain circumstances to determine whether to retain jurisdiction over a state claim. Frequently, a district court remands a pendent state claim because the court “has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). However, a district court is also permitted to decline to exercise jurisdiction over a pendent state claim, even if the court has not yet resolved the claims that gave rise to removal, where the pendent claim “raises a novel or complex issue of State law.” 28 U.S.C. § 1367(c)(1).

Courts regularly rely on Section 1367(c)(1) to remand pendent state claims. See, e.g., Owens v. Ala. Dep't of Mental Health & Mental Retardation, Civil Action No. 2:07cv650-WHA (WO), 2008 U.S. Dist. LEXIS 66530, **42-43 (M.D. Ala. Aug. 29, 2008) (declining under § 1367(c)(1) to exercise supplemental jurisdiction over state claims where plaintiffs alleged breaches of state law, including violation of departmental personnel policies: “It is apparent, therefore,

that resolution of the state law claims would require interpretation of state law and its interaction with [state agency] policies. This interpretation of state law causes the Plaintiffs' state law claims to involve complex issues of state law.”) (citations omitted); Hallmark Developers v. Fulton County, Civil Action No. 1:02-cv-01862-ODE, 2004 U.S. Dist. LEXIS 30616, *60 (N.D. Ga. Sept. 27, 2004) (remanding pendent state takings claim and state due process claim: “a state court’s review of Plaintiffs’ state constitutional claims . . . is appropriate.”); Bennett v. Ford Motor Co., 236 F. Supp. 2d 558, 559-60, 562-63 (D. S.C. 2002) (remanding pendent state negligence claim under § 1367(c)(1) because it sought to extend state common law in a manner that is “better left to the state courts . . . a declination of supplemental jurisdiction would afford the Plaintiff the opportunity to pursue his argument in the state court and on up through the courts of appeal”).

Here, the Magistrate Court’s Order articulates an entirely novel state law privacy claim and uses that as a purported basis to overcome a statutory reporters’ privilege that has never previously been overcome with respect to confidential sources since its passage in 1992. The Order thus sets the stage for a constitutional collision on what can, at best, be described as an entirely speculative and untested interpretation of Georgia law. If the Court is not inclined to vacate the Order in its entirety, it should instead remand Plaintiff’s privacy claim to the Fulton County

Superior Court, thereby rendering Plaintiff's subpoena and Movants' Motion to Quash moot. This is an issue of state law that is best resolved in a state forum.

CONCLUSION

For the reasons stated, non-parties The Atlanta Journal-Constitution and reporter Kelly Simmons respectfully requests that the Magistrate Court's Order be Vacated and Movants' Motion to Quash Non-Party Subpoena be granted. In the alternative, Movants request that the Court remand Plaintiff's privacy claim to the Fulton County Superior Court pursuant to 28 U.S.C. § 1367(c)(1).

DATED this the 3rd day of March, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the foregoing Objections to Magistrate Court's Order with the Court using the CM/ECF system, which will send electronic notice of same to the below-listed counsel of record:

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DATED this the 3rd day of March, 2009.

s/ Thomas M. Clyde
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