

Janet Jones-Kendall, that she considered to constitute sexual harassment. Kendall complained about the alleged harassment in a May 18, 2005 letter to Plaintiff, which, pursuant to the University's Nondiscrimination and Anti-Harassment ("NDAH") policy, he gave to the University's Office of Legal Affairs ("OLA") and asked them to investigate. The OLA did so and found that Plaintiff had violated the NDAH policy. The finding was made on June 29, 2008. Prior to the finding of sexual harassment, Plaintiff announced his resignation from the position of Dean of Grady College effective June 30, 2005.

On June 17, 2005, during the time that the UGA OLA was still investigating the sexual harassment complaint against Plaintiff, the AJC ran an article, written by reporter Kelly Simmons, that revealed the fact that UGA was investigating Plaintiff for sexual harassment, but provided no details of that investigation.

On June 27, 2006, Plaintiff filed this civil action in the Superior Court of Fulton County. Defendants removed the case to this Court on December 14, 2006. Notice of Removal [1]. Among Plaintiff's twelve claims for relief is a claim for Invasion of Privacy, which is based on the release of information concerning the sexual harassment investigation to the AJC. Fourth Amended Petition for Mandamus and Complaint for Damages (Fourth Amended Complaint) [123]. Plaintiff claims that

Defendants are liable for an invasion of his privacy in that they negligently or recklessly published and allowed the republication of false and offensive statements about his professional life, as well as private, confidential or exempt records, the publication of each of which placed him in a false light in the public eye. Fourth Amended Complaint at ¶¶ 154, 155.

Plaintiff issued a subpoena to Ms. Simmons on July 9, 2008. Movants filed this motion to quash on July 28, 2008. Plaintiff wishes to take Ms. Simmons' deposition in order to ask her about the information she received about the sexual harassment investigation before that investigation was complete. Plaintiff claims that he has no alternative means of discovering the identity of the individual who alerted Ms. Simmons to the investigation, and that the identity of this individual is essential to his invasion of privacy claim.

II. DISCUSSION

Movants contend that Ms. Simmons is protected by a statutory reporters' privilege that prevents her from having to disclose any information obtained in her gathering or dissemination of news unless Plaintiff can overcome this privilege. The Georgia qualified reporters' privilege provides:

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.

Plaintiff urges the Court not to apply the reporters' privilege, essentially arguing that it is unnecessary in this case. Plaintiff's Response to Motion to Quash (Pl. Resp.) [102] at 7-13. The Court finds that the Georgia legislature has already spoken on that issue, as the plain language of the statute compels the Court to apply the privilege it provides. It is the Plaintiff's burden to overcome the privilege. *See, e.g., In re Keith Paul*, 513 S.E.2d 219, 223 (Ga. 1999) ("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.").

A. Material and Relevant - Invasion of Privacy

Movants argue that Plaintiff cannot satisfy the first element of the three part test for overcoming the privilege and show that the information sought is “material and relevant” because his invasion of privacy claim is not viable. They argue that Plaintiff has no right to keep private an investigation into the misconduct of a public official. Because he has the burden, if Plaintiff cannot present evidence of the essential elements of an invasion of privacy claim, the information he seeks would not be material and relevant to that claim and he will be unable to overcome the statutory privilege protecting the information obtained by Ms. Simmons.

Plaintiff argues that the University’s NDAH policy gave him an expectation that the fact and details of the sexual harassment investigation against him would be kept private, at least until the investigation had been completed. In his Complaint at ¶¶ 154-155, Plaintiff appears to assert his invasion of privacy claim under two different theories of the tort: public disclosure of embarrassing facts, and publicity which places the plaintiff in a false light in the public eye. *See Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. App. 1966) (invasion of privacy is four disparate torts under a common name: (1) intrusion upon the plaintiff’s seclusion or solitude; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places

the plaintiff in a false light in the public eye, and (4) appropriation of the plaintiff's name or likeness). In opposition to the Motion to Quash, however, Plaintiff has not argued that any false information was disclosed, but only that there was a public disclosure of embarrassing private facts.

Public disclosure of embarrassing private facts requires proof of three necessary elements: (1) the disclosure of private facts must be a public disclosure; (2) the facts disclosed to the public must be private, secluded or secret facts and not public ones, and (3) the matter made public must be offensive and objectionable to a reasonable person of ordinary sensibilities under the circumstances. *Cabaniss*, 151 S.E.2d at 501. It is undisputed that the fact that Plaintiff was being investigated due to allegations that he had sexually harassed a subordinate was made public. Further, Movants do not (and could not) argue that the disclosure of this fact would not be offensive and objectionable. Thus, the issue remaining is whether the existence of the investigation was a private fact. If so, Plaintiff's privacy interest must be weighed against the public's interest in disclosure of the investigation.

1. **Plaintiff Had An Expectation of Privacy Until Completion of Investigation**

Movants argue that disclosure to the public of an investigation of a matter of public interest cannot be a violation of Plaintiff's right of privacy. *See generally Athens Observer, Inc. v. Anderson*, 263 S.E.2d 128, 130 n.4 (Ga. 1980) (“[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.”) (quoting *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956)); *Macon Telegraph Publ'g Co. v. Tatum*, 436 S.E.2d 655, 658 (Ga. 1993) (rejecting privacy claim by crime victim finding that she “became the object of a legitimate public interest and the newspaper has the right under the Federal and State Constitutions to accurately report the facts regarding the incident, including her name”).

Movants cite *Fincher v. State*, 497 S.E.2d 632 (Ga. App. 1998), to support their argument that the sexual harassment investigation against Plaintiff was a matter of public interest from its inception and thus, Plaintiff never had a right to keep the investigation private. In *Fincher*, the Georgia Court of Appeals held that any privacy interest the plaintiff had in information contained in the record of a sexual harassment

investigation against him was outweighed by the public interest in obtaining information about the investigation. *Id.* at 53.

Fincher, however, involved disclosures made after an investigation was complete. Plaintiff does not argue that his expectation of privacy would extend past the completion of the investigation. Instead, he argues that UGA had a policy (previously identified as the NDAH policy) which gave him an expectation of privacy, at least until Georgia's Open Records Act required disclosure, and that it was that expectation of privacy, albeit limited, that was violated by the disclosures made to Ms. Simmons during the investigation.

There are two sections of the NDAH policy that relate to the privacy of a sexual harassment investigation. First, under the heading "Timeline for Reporting," the policy reads:

The University will make reasonable efforts to protect the rights of both the complainant and the respondent. The University will respect the privacy of the complainant, the individual(s) against whom the complaint is filed, and the witnesses in a manner consistent with the University's legal obligations to investigate, to take appropriate action, and to comply with any discovery or disclosure obligations required by law.

Plaintiff's Exhibit 12 to Plaintiff's First Motion for Summary Judgment [92] at 5.

Further, under “Investigative Data,” the policy reads:

During this process, the NDAH Officer **will keep private the information gathered during the investigation** to the extent permitted by state and federal law. The NDAH Officer shall exercise due care in sharing identifiable information about students, staff or faculty.

Id. at 6 (emphasis added).

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. When Plaintiff forwarded Ms. Kendall’s complaint to the Office of Legal Affairs (“OLA”), the policy cited above gave him some expectation that, unless compelled by law to release information about it, the OLA would keep the complaint private. The next question is whether Plaintiff’s privacy interest in the sexual harassment investigation before its completion was outweighed by the public’s interest in knowing about the investigation.

2. **Plaintiff’s Privacy Interest Outweighed Public Interest at the Time the Information Was Disclosed**

In *Harris v. Cox Enterprises, Inc.*, 348 S.E.2d 448 (Ga. 1986), the Supreme Court of Georgia considered whether records of a completed criminal investigation

should be released pursuant to the Georgia Open Records Act despite the state's claim that the records contained information, the public release of which, could violate certain individuals' privacy rights. The court explained that the right of privacy, protected in tort, is limited to "the publicizing of one's private affairs with which the public has no legitimate concern," 348 S.E.2d at 450 (citation omitted), and continued that such a right "does not limit legitimate inquiry into the operation of a government institution and those employed by it . . . [I]nformation reflecting upon an individual's performance of official duties [is not] exempt from open records." *Id.* The case was remanded to the trial court for a determination of whether the individual privacy interest implicated by the records at issue was outweighed by the public interest in open government. *Id.* at 451.

The *Harris* court recognized 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." The court held that the state's policy, codified as the Georgia Open Records Act, O.C.G.A. § 50-18-72 ("ORA"), must be balanced against individual privacy interests in determining whether certain public records fall within an exemption from disclosure under the ORA for records, "the disclosure of which would be an invasion of personal privacy." O.C.G.A. § 50-18-72(a)(2).

Section (a)(2) of the ORA did not specifically exempt the records in that case from disclosure unless they were determined by the trial court to fall under the personal privacy exemption. In the instant case, there is no question that the information disclosed to Ms. Simmons before the completion of the investigation was not required to be disclosed under the ORA. The relevant portion of the ORA provides, at O.C.G.A. § 50-18-72:

Exception of certain records:

(a) Public disclosure **shall not be required** for records that are: . . .

(5) Records that consist of confidential evaluations submitted to, or examinations prepared by, a government agency and prepared in connection with the appointment or hiring of a public officer or employee; and records consisting of material **obtained in investigations related to the suspension, firing, or investigation of complaints against public officers or employees** until ten days after the same has been presented to the agency or an officer for action or the investigation is otherwise concluded or terminated, provided that this paragraph shall not be interpreted to make such investigatory records privileged.

O.C.G.A. § 50-18-72(a)(5) (emphasis added).

Section (a)(5) of the ORA allows government entities to withhold records of investigations of complaints against public employees until ten days after the investigation has concluded. Plaintiff argues that this exemption provides him a cause

of action based on the exemption itself. It does not.¹ The exemption shows, however, a legislative recognition that privacy interests may outweigh the need for public disclosure during the course of an investigation into sexual harassment allegations. This recognition, coupled with UGA's affirmative commitment to "respect the privacy of . . . the individual(s) against whom the complaint is filed" and its commandment that its NDAH officer "keep private the information gathered during the investigation to the extent permitted by state and federal law," supports the position that during a certain window of time, before an investigation is concluded, the privacy interests of individuals may outweigh the public's interest in disclosure.

As Plaintiff has discovered, allegations of sexual harassment can ruin one's reputation instantaneously, regardless of whether they turn out to be true. They reflect

¹Plaintiff cites the *Harris* court's statement that "[t]he invasion of personal privacy encompassed as an exception to the right of the public to access is to be determined by an examination of the tort of invasion of privacy," 348 S.E.2d 448 at 450 (citing *Athens Observer v. Anderson*, 263 S.E.2d 128 (Ga. 1980)), to support his argument that a "violation" of the ORA gives him a cause of action for invasion of privacy. Both the *Harris* and *Athens Observer* cases, however, firmly establish that a plaintiff wishing to bring an invasion of privacy action based on the disclosure of information pursuant to the ORA must have an independent basis for asserting that the information disclosed qualifies as private under the tort of invasion of privacy. See *Athens Observer*, 263 S.E.2d at 130 (construing the ORA exemption now at Section (a)(2) as "manifesting the intent of the General Assembly that reports which include the elements of the tort of invasion of privacy are to be exempted from the disclosure requirements of the Act"). As Movants argue, the tort of invasion of privacy occasionally defines the scope of the ORA, not *visa versa*. Movants' Reply at 9.

poorly not only on the individual accused, but also the institution he or she serves. There is a public as well as a private interest in keeping such allegations and related information private until the truth can be ascertained.

The *Harris* court stated that “various factors weigh on the question of whether personal privacy protects information from disclosure. Among other things, the court should consider whether the information is unsubstantiated . . .” 348 S.E.2d at 450. Where, as here, before even a preliminary investigation into a sexual harassment allegation is complete, that allegation is unsubstantiated. Though the fact of the investigation is true, its implications are serious and damaging. 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. Because the investigation must become public eventually, the University’s commitment to keep the allegations private until substantiated or dismissed “does not limit legitimate inquiry into the operation of a government institution and those employed by it.” *Harris*, 348 S.E.2d at 450. On the other hand, it serves the legitimate purpose of avoiding unnecessary humiliation and undue interference, caused by publicity, in the conduct of a sexual harassment investigation.

Because the ORA exemption at Section (a)(5) demonstrates the legislature's recognition that the public's right to information does not extend into the details of a sexual harassment investigation before it has concluded, and because UGA bound itself, through its NDAH policy, to avoid releasing information until compelled to do so by the expiration of the ORA exemption, the Court finds that in this case, the balance of interests favors Plaintiff's position; the information disclosed to Ms. Simmons was private information at the time it was disclosed. Therefore, Plaintiff has presented a potential invasion of privacy claim, and the identity of the source of information for Ms. Simmons' June 17, 2005 newspaper report is material and relevant to that claim. Plaintiff has satisfied the first prong of the three-prong exception to the qualified reporters' privilege.

B. No Alternative Means

Plaintiff must also show that the information he seeks "[c]annot be reasonably obtained by alternative means." O.C.G.A. § 24-9-30. In order to state his claim, Plaintiff needs to know whether the person who provided information to Ms. Simmons prior to the conclusion of the sexual harassment investigation was someone constrained by the NDAH policy not to do so - namely, the NDAH officer, Kimberly Ballard-Washington, or her superiors. Plaintiff has deposed Ms. Washington, who

had “absolutely no idea as to where it came from.” Washington Dep. at 181. He has also asked Elizabeth Neely, the former Associate Vice Chancellor for the Board of Regents Office of Legal Affairs, Provost Arnett Mace, and President Michael Adams whether they knew the source of Ms. Simmons’ information. None of them claimed to know. The Court finds that Plaintiff has made reasonable efforts to use alternative means to determine who spoke with Ms. Simmons about the investigation before the appropriate time, and has been unable to do so. Therefore, he has met his burden of showing that the information he seeks cannot be reasonably obtained by alternative means.

C. Necessary

Finally, Plaintiff must demonstrate that the information sought by his subpoena is “necessary to the proper preparation or presentation of [his] case.” O.C.G.A. § 24-9-30. The Court finds that Ms. Simmons testimony is necessary to the preparation of Plaintiff’s case because he cannot prove an invasion of his privacy with other available evidence. As the Court has found that Plaintiff’s expectation of privacy existed only during the sexual harassment investigation and for the ten days following its conclusion, during which time information pertaining to the investigation was exempt from ORA disclosure and protected by the NDAH policy, only the source of

Ms. Simmons' first article is relevant to his claim. Thus, it is necessary that Plaintiff discover whether that source is someone for whose actions the University may be held liable.

III. CONCLUSION

Plaintiff has carried his burden and the reporters' privilege may be pierced in this instance. *See* O.C.G.A. § 24-9-30.² Accordingly, Movants' Motion to Quash Non-Party Subpoena Issued to Reporter Kelly Simmons [77] is **DENIED**.

IT IS SO ORDERED this 30th day of January, 2009.



C. CHRISTOPHER HAGY
UNITED STATES MAGISTRATE JUDGE

²While denying the Motion to Quash because Plaintiff has shown a plausible invasion of privacy claim, the Court is not ruling on that claim at this time. Whether there is liability, and on whose part, will await further motions following the deposition of Ms. Simmons. If, for instance, the information was not provided by the NDAH officer or her superiors there would appear to be no basis for liability of any Defendants in this case.

Further, the Court recognizes that even if successful in his invasion of privacy claim, Plaintiff will have difficulty in establishing any damages that arose from the early disclosure that were different from those that followed the conclusion of the investigation and disclosure of its results.