IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA



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| **ZIVA BRANSTETTER and BH MEDIA GROUP INC. d/b/a TULSA WORLD,** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | **Case No. CV-2014-2372** |
| **MARY FALLIN, in her official capacity as GOVENOR OF THE STATE OF OKLAHOMA; MICHAEL C. THOMPSON, in his official capacity as COMMISSIONER OF THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,** | ) | |
| **Defendants.** | ) | |

## COMMISIONER THOMPSON'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

RESPECTFULLY SUBMITTED THIS 18th DAY OF MARCH, 2015.

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Commissioner of Public Safety Michael Thompson respectfully submits this as his response in opposition to Plaintiffs' motion for summary judgment filed herein.

1. **The fact that Plaintiffs seek public records is the beginning, not the end, of the necessary analysis before the Court.**

Plaintiffs say there is no dispute that the documents they have requested are "public records" within the meaning of the Open Records Act (ORA). Brief, p. 1. Plaintiffs go on to claim that they enjoy a "clear and undisputed right to access" to the documents they want. Plaintiffs claim *falsely* that under the ORA "all records of public bodies and public officials 'shall be open' for inspection and copying during regular business hours." Brief, p. 6. Plaintiffs claim *falsely* that the Governor and the Commissioner of Public Safety have, to date, "*refused* to release" the documents they seek. Brief, p. 2 (emphasis added). As demonstrated below, Plaintiffs' own allegations belie the existence of any such refusal.

As the Court doubtless knows, the ORA contains several provisions that prevent access to otherwise public records. For example:

> 1. The Oklahoma Open Records Act, Sections 24A.1 through 24A.28 of this title, does not apply to *records specifically required by law to be kept confidential* including:
> a. records protected by a *state evidentiary privilege* such as the *attorney-client privilege*, the *work product immunity from discovery* and the identity of informer privileges,

51 O.S. § 24A5(1)(a). As is pertinent to the present case, Oklahoma law forbids revealing the identity of persons participating in the execution process.

> The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.

22 O.S. § 1015(B). Except for certain classes of records not pertinent here, law enforcement records are confidential except where a court finds that the public interest or the interest of an individual outweighs the reason for denial. 51 O.S. § 24A8(B). Also, given the nature of Plaintiffs' request, it is foreseeable that the Governor particularly may rely upon the deliberative process privilege recently recognized by the Supreme Court in *Vandelay Entertainment, LLC v. Fallin,* 2014 OK 109. Thus, not "all" records kept by public officers are open to their review, and Plaintiffs know better. The fact that Plaintiffs have sought public records is only the start of the analysis before the Court.

**2. Plaintiffs' focus on the provision of the ORA they like keeps them from coming to terms with the statute in its entirety.**

The ORA does at least two separate things. First, it creates a right to access to public records, subject to exceptions as stated above. Second, it creates a right to sue for declaratory or injunctive relief in cases limited to a denial of records. Plaintiffs focus strongly on the "prompt, reasonable access" provision of the ORA, even to the extent of neglecting the rest of the sentence in which that language is found. The whole provision is as follows:

> 5. A public body must provide *prompt, reasonable access* to its records *but may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions.*

51 O.S. § 24A5(5). The word "but" in the statute modifies and clarifies the words "prompt" and "reasonable" in earlier part of the sentence. The Legislature understood that document requests could disrupt essential government functions. Record requests are not to be allowed to excessively disrupt essential functions given the other duties of public offices. Such requests must be responded to as promptly as reasonably possible

given the facts and circumstances but are not to be allowed to push other essential work for the public aside.

The right of the public to seek judicial remedy under the ORA is separate and distinct from the right to access public records and is intentionally limited to those instances in which public officers have *denied* that access:

> B. Any person denied access to records of a public body or public official:
>
> 1. May bring a civil suit for declarative or injunctive relief, or both, but such civil suit shall be limited to records requested *and denied* prior to filing of the civil suit;

51 O.S. § A17(B)(1) (emphasis added). Requesting records alone is not enough to justify a suit. Such justification exists only when records are requested *and denied.* By Plaintiffs' own admission, the records they seek have not been denied. Both the Governor and the Commissioner have promised production, and, indeed the Commissioner has produced over 5,000 pages of documents. Consequently, since it is undisputed in this case that neither public official has denied the production request there is no justiciable controversy before the Court, and hence no jurisdiction over the subject matter of this suit.

**3. Response to statement of undisputed facts and additional undisputed facts.**

Plaintiffs' statement of undisputed material facts is incomplete, ignoring as it does the totality of the facts regarding the reasonableness of the conduct of the Governor's office and the DPS. Consequently, Defendants offer additional undisputable facts that show Plaintiffs are not entitled to relief.

Defendants admit Plaintiffs' statements of undisputed facts in paragraphs 1-12.

13. Denied. See Affidavit of Kim Rytter, attached to Commissioner Thompson's response, ¶ 12.

14. Admitted.

15. Denied. See Affidavit of Kim Rytter, attached to Commissioner Thompson's response, ¶ 12.

16. Admitted but immaterial.

17. Admitted but immaterial. In addition, at the request of the Attorney General the Supreme Court stayed all executions using midazolam in Oklahoma. Exhibit 2, Supreme Court Order.

18. Admitted.

**4. Additional undisputed facts regarding Commissioner Thompson and the DPS.**

1. The DPS Assistant General Counsel working on the Lockett execution investigation has substantial other duties regarding asset forfeitures (over 105 pending cases), responding to subpoenas (910 received in 2014) and ORA requests (1,000) received in 2014), combating driver's license fraud, teaching legal topics and training for Capitol security officers, assisting the Attorney General's office with discovery matters, helping make DPS policy, and drafting legal opinions for internal DPS use. Exhibit 1, Rytter Affidavit, ¶¶ 2-3.

2. The DPS conducted 117 interviews as part of the investigation of the Locket execution. DPS lacked the capacity to transcribe these interviews, so it had to bid the transcription out. Exhibit 1, Rytter Affidavit, ¶ 6.

3. Plaintiffs in the federal *Warner* case subpoenaed from Commissioner Thompson all documents related to Lockett on September 23, 2014, and on October 15, 2014 moved to hold the Commissioner in contempt, despite his counsel's objection to the subpoena and its return date. Exhibit 1, Rytter Affidavit, ¶ 7.

4. The DPS General Counsel entered his appearance in the *Warner* case for the Commissioner on November 5, 2014. The next day the *Warner* Court entered an agreed protective order for documents produced in that case. Exhibit 1, Rytter Affidavit ¶ 7.

5. At its hearing on the *Warner* plaintiffs' contempt motion on November 13, 2014, the Court indicated it considered the Commissioner as in the same "basket" as the State of Oklahoma. The Court denied the contempt motion, but ordered the Commissioner to produce redacted interview transcripts on November 15, and all other documents except electronically stored emails on November 21, 2014. Exhibit 1, Rytter Affidavit, ¶ 8.

6. DPS was not equipped to redact so many transcripts in the time available and originally tasked six non-lawyer staff members to manually redact transcripts, only redacting for identity of execution participants and not for privilege. These were the interview transcripts provided to the *Warner* plaintiffs under protective order in November, 2014. Exhibit 1, Rytter Affidavit, ¶ 9.

7. On December 1, 2014 DPS began a second round of redactions to be done electronically, and to redact for various privileges. Four employees from the Department of Corrections and an employee from DPS conducted these redactions, in consultation with various agencies whose documents had been gathered by investigators. Rytter Affidavit, ¶ 10. On January 20, 2015 the *Warner* Court set a series of deadlines under which the parties would confer about additional redactions and ultimately make sealed reports to the Court about their progress. Rytter Affidavit, ¶ 11. As of the date of filing this response, the *Warner* Court has not ruled on what redactions should be released to the public. DPS produced documents to Ms. Branstetter and the Tulsa World on March 13, 2015. Exhibit 1, Rytter Affidavit, ¶ 12.

8. Despite their arguments to the contrary, Plaintiffs concede that both the Governor's office and the Department of Public Safety had promised to produce the requested documents after reviewing them and possibly redacting them for privilege. Brief, p. 4, ¶ 9 (Governor's office says request "placed in the queue of Open Records Act requests,"), Exhibit 1H (Governor's Press Secretary says "Our legal staff is working diligently on this and hopes to get you the records soon. There are three requests that need to be processed before yours.") and Branstetter Affidavit, ¶ 19, Petition, ¶ 23 (DPS's Legal Division was "conducting a review to determine which [email responsive to Branstetter's May 5 Open Records Request], if any may contain privileged or confidential information that is not subject to an open record request" and the review "would take up to another three months" to complete."), Petition Exhibit D (additionally stating (1) DPS cannot move forward without the autopsy report and DPS looked forward to releasing the report as soon as possible, (2) the Legal Division's comprehensive review process requires extended time, and (3) the ORA allows an agency a reasonable time to respond and given the sheer size of the request, the slow process of reviewing each individual record, and the limited number of attorneys who are available to conduct a legal review, DPS believes it is on track.), and Branstetter Affidavit ¶ 25 (DPS was reviewing approximately 5,000 pages of material gathered in connection with its investigation, including transcripts of interviews, and after redacting material as required by law to redact, would make material available to the public via its website).[1]

**5. Plaintiffs' constructive denial theory finds no support in the ORA.**

[1] Commissioner Thompson asks the Court to take judicial notice of these pleadings and exhibits on file in the present case.

Plaintiffs rely on 1999 OK AG 59 for the proposition that nothing in the ORA provides that a public body can "withhold" records for any amount of time. Brief, p. 6. This Attorney General's opinion dealt with public access to criminal case pleadings, and particularly the charging Information. It actually supports Defendants' position, relying on the same Oklahoma Supreme Court case Defendants have already brought to the Court's attention in their Motion to Dismiss at page 10. The Attorney General opined:

> In *Merrill v. Oklahoma Tax Comm'n.*, 831 P.2d 634 (Okla. 1992), the Oklahoma Supreme Court looked at such factors as the nature of the request for public records, the number of records requested and the format sought therefore, and the efforts necessary for the public body to compile those records, to determine whether the Tax Commission acted reasonably in response to a request for copies of public records. Although the request in *Merrill* may be seen as an extreme example, it sets forth a logic that public bodies must look only to the nature of the request and the efforts necessary to respond to it to determine a reasonable response time for the request. . . How long that time is a question of fact outside the scope of an Attorney General's Opinion.

1999 OK AG 59 ¶ 11. These factors, on the facts of this case, justify the time taken to locate, redact, and produce records requested by Plaintiffs *and other citizens who made earlier requests.*

Plaintiffs claim that *In the Matter of the Petition of University Hospitals Authority,* 1997 OK 162, ¶ 16, 953 P.2d 314, 319-20, "implicitly endorsed" their understanding of "prompt," Brief at pp. 6-7, completely lacks foundation. That case did not even use the word "prompt." In *University Hospitals Authority* the Court found no violation of the ORA when contestants were provided a copy of a contract as soon as it came into existence, but only two days before the hearing. *Id.* Nothing in the case suggests immediate production is the only acceptable production, and the case involved a single discrete contract and took no consideration of the rights of other requesters who had earlier sought documents. Nor did the case involve the expansive request made by Plaintiffs, which requires substantial searches or the assembly and

redaction of records or, in the case of DPS, records that are subject to discovery and contempt proceedings in federal court.

Plaintiffs' citation of *State ex rel. Wadd v. City of Cleveland,* 689 N.E.2d 25, 28 (Ohio 1998), a case involving requests for accident reports that dealt with a statute that provided "all public records shall be *promptly* prepared and made available for inspection to any person at reasonable times during regular business hours" does not help them. The statute did not define "promptly," so the Court employed its usual, normal, and customary meaning: without delay and with reasonable speed depending largely on the facts of each case. *Id.,* at 28 (emphasis added). The more simplistic language of the Ohio statute alone distinguishes *Wadd* from the facts of the current case, as does the simplicity of fulfilling the requests for accident reports. However, even *Wadd* recognized that the definition of "promptly" depends largely on the facts of each case, which, in the present case, are plainly more complex than in *Wadd* itself.

*Consumer News Servs. v. Worthington City Bd. Of Education,* 776 N.E.2d 82 (Ohio 2002) is also readily distinguishable from the present case both on the facts and on the law. In that case a journalist sought the names and resumes of candidates to become superintendent of schools. *Id.,* at 84. The pertinent statute required documents to be prepared and made available for inspection "promptly" which was taken to mean without delay and at a reasonable speed, depending largely on the facts of the case. *Id.,* at 88 (emphasis added). Copies of documents were to be provided within a "reasonable" period of time, which depended on all the facts and circumstances in each case. *Id. Consumer News Services* thus involved the easy job of preparing and copying a few resumes that were readily available and not voluminous, and certainly required no redactions for various privileges. Given the simplicty of the task, it should be done within six days under the facts and circumstances of the case. *Id.,* at 89.

Plaintiffs' reliance on *Citizens for Responsibility & Ethics in Washington v. FEC,* 711 F.3d 180, 188 (D.C.Cir. 2013) is misplaced, because the federal FOIA regime is substantially different that Oklahoma's Open Records Act, and Plaintiffs have not clearly explained the differences to the Court. In this case the plaintiffs sought certain correspondence, calendars, agendas, and schedules of the Federal Election Commissioners. *Id.,* 183. Under FOIA, the federal agency has 20 days (exclusive of weekends and legal holidays), or 30 days in "unusual circumstances" to determine in writing if the government will produce requested records, or the extent to which records will be produced. *Id.,* 184. If the government gives an appropriate "determination" within these time frames, a dissatisfied requester must exhaust his or her administrative remedies before going to court to challenge the adequacy of the promised production; without a timely and proper determination, exhaustion of administrative remedies is not necessary. *Id.* However, the "determination" does not require actual production of the requested documents at the same time as the "determination" is communicated to the requester. *Id.,* 188. The agency may still need additional time to physically redact, duplicate, and assemble for production documents it has decided to produce. *Id.,* 189. The actual production is to be made "promptly" which the Court in *Citizens for Responsibility* said should be, depending on the circumstances, within days or a few weeks, not months or years. *Id.,* 188 (emphasis added). Obviously, the FOIA statutory scheme is different from the Open Records Act which allows officials to establish systems to avoid disruption of their agency's essential functions, and nothing in *Citizens for Responsibility* compares to the dual burden placed on DPS of conducting a major investigation while simultaneously responding to discovery in a federal court case about the same events as were being investigated.

Plaintiffs misstate the law when they claim the ORA allows them to sue whenever access has been denied "expressly or otherwise," Brief, p. 8. Nothing in the text of the statute says any such thing. The only statutory authority to sue states:

> B. Any person *denied* access to records of a public body or public official:
> 1. May bring a civil suit for declarative or injunctive relief, or both, but such civil suit shall be limited to records requested *and denied* prior to filing of the civil suit;

51 O.S. § 24A17(B)(1)(emphasis added). The Act simply does not say *denied* "expressly or otherwise," and to claim it does misrepesents the law as written. Thus, Plaintiffs' constructive denial theory falls flat for lack of support in the statutory text.

What is more, neither of Plaintiffs' own definitions of "denied," Brief at 8, as "to refuse to give (something) to someone" or "to prevent someone from having or receiving (something)" applies to the facts of the case as they state them. Plaintiffs concede that both the Governor's office and DPS have indicated they will produce the requested records, subject to determination of legal privileges that may apply. *See,* DPS Statement of Undisputed Facts, ¶ 8. Nothing in Plaintiffs' claims or evidence states that requested documents have been *denied* in the sense they themselves define that term: that anyone has *refused* to give something (the documents) to someone or has *prevented* someone from having or receiving something (the documents). In fact, it is *undisputed* in this case that the Department of Public Safety has stated that it will make requested records available, subject to various privileges that apply, and that DPS has already produced over 5,000 pages of documents.

The smattering of authority that Plaintiffs suggest supports the notion that 51 O.S. § 24A.17 "embraces the concept of constructive denial," Brief p. 8, actually spurns any such embrace. No notion of constructive denial whatsoever appears in the federal FOIA, 5 U.S.C.

552(a)(6)(C)(i) as claimed by Plaintiffs, Brief p. 8. That provision actually only provides federal agencies must make their "determination" within 20 days (excluding weekends and public holidays) after receipt of a request whether to comply with the request and notify the requester of his or her right of administrative appeal:

> (6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—
>
> (i) determine within 20 day (excepting Saturdays, Sunday, and legal public holidays) after the recipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination;

The Arkansas statute relied upon by Plaintiffs actually undercuts their argument because it, unlike the ORA, explicitly provides that access is "deemed denied" if the custodian does not respond promptly to a document request. Obviously, the Oklahoma Legislature could have included such an express provision, but did not do so, indicating its legislative intent against such a "deemed denied" idea.

Neither does *Robertson v. U.S. Fidelity & Guaranty Co.*, 1992 OK 113, ¶ 1 836 P.2d 1294, 1294, help Plaintiffs. Plaintiffs work very hard—but fail--to turn an inapposite case into an endorsement of a their ORA constructive denial theory. In *Robertson* the issue was whether an insurance company is estopped from asserting loss of subrogation as a defense when it fails to offer and obtain a written rejection of uninsured/underinsured insurance coverage (UM) from the insured. *Robertson* had nothing to do with public records or the time within which public records must be produced. Instead, two insurance companies had failed in their statutory duty to offer UM coverage. The Court observed that Oklahoma law required an offer by the insurance company and the acceptance or written rejection by the insured of UM coverage. *Id.* ¶ 12, 836 P.2d at 1297. The Robertsons testified in their depositions that they had not been offered

uninsured motorist coverage, nor had they executed a written rejection of such coverage. *Id.*, ¶ 13, 836 P.2d at 1297. Although one of the insurers, USF & G, maintained the Robertsons had executed a written rejection of UM coverage, the company admitted that one of its agents had actually signed the rejection purportedly with the Robertsons' authorization. *Id.* Western, the other company, presented no evidence of a written rejection. *Id.* The Robertsons executed a release with the impression that neither policy included uninsured motorist coverage when by law, they had uninsured motorist coverage of at least the minimum amount under the Western policy and conceivably, under the USF & G policy. *Id.*, ¶ 14.

The Court held that an insurance company which does not offer UM coverage and obtain a written rejection from its insured, may not subsequently raise in a later suit by the insured to recover UM benefits, the Porter/Frey defense (in which execution of a settlement and release of the tortfeasor which destroys the insurer's right of subrogation was a complete defense to a suit on the policy for UM coverage) where an insured has settled, ignorant of the insurance company's failure to comply with its statutory duty under 36 O.S. § 3636 to provide UM coverage. *Id.*, ¶¶ 7, 14, 836 P.2d at 1295, 1297. The Court stated that, if it is true as the Robertsons alleged, that the insurance companies' failure to perform their statutory duty resulted in their signing the release, then there was a *constructive denial* of the claim and the insurance company was estopped to raise the Robertsons' settlement in this action to recover UM coverage. *Id.*, ¶ *16*, 836 P.2d at 1297. Nothing in the opinion established the general circumstances under which the Court would find a "constructive denial" of anything. Needless to say, *Robertson's* foray into the duty of insurers to offer UM coverage, and the results of their failure to do so, does not establish the basis for a "constructive denial" theory in an ORA case, especially since both public offices recognize their obligations to produce documents and are intending to do so.

Neither the Governor's office nor the Department of Public Safety is benefitting from any non-compliance with the law. Nor is Plaintiffs' hyperbole about public officers ignoring records request with impunity justified. Plaintiffs' assertion that the Governor and the DPS "continue to deny" records, Brief. P. 9, flies in the face *of their own factual assertions* that both have stated that they will produce records requested, subject to the various privileges.

**6. The Department of Public Safety has acted reasonably under the circumstances.**

The Department of Public Safety was charged with responsibility to investigate the circumstances of the Lockett execution. While it was doing so and preparing its report, it was drawn into federal court litigation which placed it under unprecedented pressure to produce documents containing the identity of execution participants and subject to various recognized privileges.

The Affidavit of DPS Assistant General Counsel Kim Rytter, Exhibit 1, makes clear not only the extent of his other many and important public duties, but also the complexities faced by the DPS in completing the investigation of the Lockett execution and providing subpoenaed documents to plaintiffs in the case of *Warner v. Gross, et. al,* Case No. 5:14-CV-00665-F (the *Warner* case), a matter the Plaintiffs almost entirely ignore. On September 23, 2014 the *Warner* Plaintiffs served a subpoena on Commissioner Thompson for "[a]ll Records concerning Clayton Lockett, who died April 29, 2014 while in the custody of law enforcement at the Oklahoma State Penitentiary, McAlester, Oklahoma." *See,* Exhibit 1-1 to the Rytter affidavit, *Warner* case Dkt. No. 65-1. Then, on October 15, 2104 the *Warner* Plaintiffs filed a motion to hold Commissioner Thompson in contempt for allegedly failing to respond to a subpoena (contempt motion). *See,* Exhibit 1-2 to the Rytter affidavit, Motion of Plaintiffs for Holding of Contempt and Other Relief and Brief in Support, *Warner* case Dkt. No. 65.

The *Warner* Plaintiffs' contempt motion came on for hearing on November 13, 2014. At that hearing the Court observed:

> Another question. The defendants—and by the way, let me clear the air on one thing. For discovery purposes and just as a practical matter for discovery purposes, among others, I put the Commissioner and the defendants in the same basket, that basket being the State of Oklahoma. And I'm well aware that different agencies can consider themselves to be different entities from other agencies. But for practical purposes, at least relating to discovery, I put the Commissioner and the defendants in the same basket, that is the State of Oklahoma.

Exhibit 1-3, Tr. 14:9-18. With that understanding, the General Counsel of DPS, Steven Krise put on testimony about DPS's progress in redacting documents for production to the Plaintiffs. Exhibit 1-3, Tr. 49-55. Thereafter, the Court reiterated:

> For purposes of my evaluation of the timing issues, I, without hesitation, regard all of the agencies involved in these discovery issues to be as a practical matter, albeit not as a legal proposition, one entity, namely, the State of Oklahoma.

Exhibit 1-3, Tr. 69:20-24. Thus, while neither the DPS nor the Commissioner were formally parties to the *Warner* case, the federal court considered them to be in the same "basket" as the State of Oklahoma, and DPS personnel worked cooperatively with the Attorney General and the Federal Public Defender (as counsel for the *Warner* Plaintiffs) in the production and redaction of subpoenaed documents.

The Court denied the Plaintiffs' contempt motion, but ordered Commissioner Thompson to produce redacted interview transcripts by noon on Saturday, November 15, 2014 (two days after the hearing), and deliver all other documents subject to the subpoena except videos identifying execution team members and electronically stored emails by noon, November 21, 2014, and ordered counsel to meet and confer on key word search protocol for emails by November 19, 2014. Exhibit1-3, Tr. 70: 4-19.

Unaccustomed as DPS was to redacting thousands of pages of documents, the requirements of the federal subpoena and the contempt motion against the Commissioner strained its limited resources. The Department at first used six non-lawyer staff members to quickly redact documents by obscuring only the names of individuals involved in the execution process. Time did not allow redaction for privilege at that point. These staff members used a list of such persons provided by DOC. They obscured the names by hand using two layers of white-out tape covered by dark marker to indicate where language had been redacted. The documents produced by the DPS to the Federal Public Defender's office (FPD), as counsel for the *Warner* Plaintiffs in November, 2014 were redacted in this way, but not redacted for privilege. Those documents were protected by the protective order entered earlier by the federal court, so they could not be released to the public with privileged material unredacted. Within days of the November, 2014 document production, the FPD and the Attorney General's office reported to DPS instances of both over-redaction and under-redaction using this method. That is, the staff members had missed some names of persons involved in the execution process and left them un-redacted, but also redacted some information not involving persons participating in the execution process.

It became clear that the first attempt at redaction was unsatisfactory, particularly for documents to be released to the public without benefit of the *Warner* protective order. The first attempt at redactions was inadequate both in terms of the way in which names of those participating in the execution process were handled, and in the fact that the documents had not been redacted for any other sort of privilege under federal law or the ORA. Aspects of the way these documents were organized in alphabetical order, and the narrow focus on only the names of those participating in the execution process, made it possible for an attentive reader to determine the identities of some of the execution participants. Further, the non-lawyer staff members did not,

and could not, redact the documents for other recognized privileges like attorney client privilege or work product protection.

On December 1, 2014, DPS decided to make a second round of redactions. Mr. Rytter was assigned to lead an effort to further redact these documents electronically using the Adobe Pro program purchased specially for that purpose. By December 4, 2014 a team of five people (four from DOC and one from DPS) gathered to redact approximately 10,000 pages[2] of documents for names and identifiers of persons involved in the execution process. The DOC personnel provided essential insight into DOC records and how to understand them. The product of this review would have been much different without their assistance. Once they finished their review, Mr. Rytter took over the reviewing of all of the documents. Mr. Rytter forwarded questions to various agencies, including, but not limited to, the DOC and the Attorney General's office, when he noted information that may have needed to be redacted for privilege or for some other reason. These privileges included attorney client privilege, work product protection, HIPAA privacy, confidentiality of medical records, etc. Each agency made its own determination as to whether grounds for redaction existed for their documents. Mr. Rytter only made actual decisions regarding redactions for the identity of persons involved in the execution process.

The federal court in *Warner* set deadlines by which the parties in that case were to propose additional redactions, confer on those proposals, and report to the Court under seal about the status of the redactions. *See,* Rytter affidavit, ¶ 11. Mr. Rytter worked with the Attorney General's office to appropriately redact the documents produced in the *Warner* case for all privileges that applied. These redactions to the initial group of over 5,000 pages were finally completed and

[2] These 10,000 pages include the report of the investigation and the documents supporting that report which have already been released in redacted form to the Plaintiffs. In addition, approximately 5,000 pages of investigators' rough personal notes and other documents are now being redacted and will be released when that process is completed.

provided to Plaintiffs Branstetter and the Tulsa World, and made available to others, on March 13, 2015. As of the date Mr. Rytter's affidavit was signed, the *Warner* Court has made no rulings on the appropriateness of the redactions submitted to that Court. Rytter affidavit, ¶ 12.

Given the unprecedented involvement of the federal court discovery proceedings and the limited resources DPS had available, the time it has taken in redacting and producing requested documents has been prompt and reasonable.

**7. Plaintiffs present no authority for the proposition that the Article II, Section 1 of the Oklahoma Constitution creates a cause of action for them.**

Plaintiffs claim that Article II, Section 1 of the Oklahoma Constitution "includes an independent right of the people to receive information necessary to meaningfully participate in the democratic process." Brief, p. 12. It does not. Oklahoma's Constitution provides:

> § 1. Political power - Purpose of government - Alteration or reformation.
> All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States.

Article II, § 1. We have found no case that supports Plaintiffs' claim, and Plaintiffs cite none.

Plaintiffs cite the provisions of the ORA itself making it the public policy of the State of Oklahoma that the people have the inherent right to know and be fully informed about their government. Brief, p. 12, citing 51 O.S. § 24A.2. The plain language of Article 1, § 1 creates no such public policy, but the Legislature did that in passing the ORA. Plaintiffs next rely on *Okla. Pub. Employees Assn. v. State ex rel. Oklahoma Office of Pers. Mgmt.*, 2011 OK 68, ¶ 36, 267 P.3d 838, 851. This was a case in which the Court recognized the legislative language utilized in 51 O.S. Supp. 2005 § 24A.7(A)(2) indicates the Legislature recognized a clearly unwarranted invasion of employees' personal privacy within the meaning of the statute could result from

release of public records, and that an application of a case-by-case balancing test should be utilized to determine whether personal information is subject to release. *Id.,* ¶ 39). Plaintiffs cite the *OPEA* case for the proposition that openness in government is essential to the functioning of a democracy and that in order to verify accountability, the public must have access to government files. Brief pp. 12-13. The paragraph in the *OPEA* case cited by Plaintiffs contains four footnotes. These footnotes cite to a U.S. Supreme Court case, a Kansas case, a California case, an Alabama case, and a single Oklahoma case, that does not rest on Article II, Section 1. It seems that if the Oklahoma Constitution contained the "independent right" to access to public records as Plaintiffs claim, the Oklahoma Supreme Court would have cited Article II, Section 1, rather than the array of cases from other jurisdictions that it did cite.

Plaintiffs also rely on *dictum* in Justice Edmondson's concurring and dissenting opinion in *Shadid v. Hammon,* 2003 OK 103, ¶ 13, 315 P.3d 1008, 1014 for the proposition that the right of the People for access to public documents (in that case sealed court records) exists independent of the ORA, and, since the ORA did not create such a right, the remedy in § 24A.17 should not be deemed exclusive. Brief p. 13. Unfortunately for Plaintiffs, Justice Edmondson did not say the right to access to public documents sprang from Article II, § 1 of the Constitution. No case that we have found has done so. The Justice did not favor us with his view of the source of that right, and Plaintiffs have not based their claim upon some other recognized source of law existing before the ORA was passed. All the Governor and Commissioner Thompson can do is respond to the claims Plaintiffs did make, and point out that Article II, § 1 simply does not support Plaintiffs' claims in this lawsuit.

**8. Plaintiffs' assault on the ORA statutory language is unavailing.**

Plaintiffs' unsupported assertion of a constitutional right to access to public documents appears to be an effort to shore up their case in the face of statutory language that undercuts it. Plaintiffs grudgingly concede that public officials are authorized to set up "reasonable procedures" to prevent excessive disruptions of essential functions under the ORA. Brief, p. 14. Plaintiffs go on to argue that these reasonable procedures cannot infringe on the supposed constitutional "inherent right to know and be fully informed about their government." Brief, p. 15. However, as demonstrated above, that right is not found in the Constitution, but in 51 O.S. § 24A.2. Plaintiffs next fall back on *Wadd,* the Ohio case, for the proposition that no pleading of interference with normal duties can be used to evade the public's right to inspect and copy documents within a reasonable time. Brief p. 15. However, the ORA, evidently unlike Ohio law, strikes the balance between public access to records and a government that can serve the public in its daily operation by allowing officials to establish reasonable procedures to prevent excessive disruptions of its essential functions. 51 O.S. § 24A5(5).

The crescendo of Plaintiffs' irritation comes in this passage:

> Defendants' apparent view that their offices have more important things to do than comply with the ORA and the mandates of the Oklahoma Constitution does not, as a matter of law, excuse their compliance.

This is excessive and unfounded. Evidently, though, Plaintiffs just cannot accept that public officials may prevent excessive disruptions of their essential functions. The public Plaintiffs purport to serve might consider, for instance, securing the people's own safety on our roads and highways, interdiction of drugs, and enforcement of our criminal laws more important than their ORA request. To the contrary, Plaintiffs clearly consider their requests more important than other things pending with the Department of Public Safety. But, the Legislature struck a reasonable balance between the public's right to access to public records, and the public's right

to a government that does the People's work. After all, "government is instituted for their protection, security, and benefit, and to promote their general welfare." That truth actually is in the Constitution, Art. II, § 1 and is the mission of the Department of Public Safety.

The Oklahoma Supreme Court has found that a disruption of an agency's critical day-to-day functions can result from having to pull staff off their regular jobs to comply with an Open Records request. *Merrill v. Oklahoma Tax Commission,* 1992 OK 53, ¶ 13, 831 P.2d 634, 642-43. Such circumstances constitute an "excessive disruption of the public body's essential functions" under the Act, authorizing the imposition of a search fee for the request. *Id.* at ¶¶ 11-13, 831 P.2d at 642-43. Following *Merrill,* one Court of Civil Appeals has observed that the public interest is as equally well served by public agencies performing their essential services without burdensome, disruptive records requests as in providing release of information to taxpayers. *McVarish v. New Horizons Community Counseling and Mental Health Services,* 1995 OK CIV APP 145, ¶ 3, 909 P.2d 155, 156.

No legal justification exists for requiring the personnel of the Department of Public Safety to lay aside their other duties serving the people of Oklahoma in order to provide Plaintiffs with their promised records before tending to their other essential tasks.

**9. Moreover, Plaintiffs fail to state a justiciable controversy, so this Court lacks subject matter jurisdiction over their claims.**

The state judiciary's subject matter jurisdiction is derived from the State Constitution which gives Oklahoma courts unlimited original jurisdiction over all *justiciable* matters unless otherwise provided by law. *Reeds v. Walker,* 2006 OK 43, ¶ 11, 157 P.3d 100, 107. Subject matter jurisdiction of a court is invoked by pleadings filed with a court which show that the court has power to proceed in a case of the character presented, or power to grant the relief sought. *State ex rel. Oklahoma Bar Association v. Mothershed,* 2011 OK 84, ¶ 47, 264 P.3d 1197, 1215.

To be justiciable, and thus confer subject matter jurisdiction, a claim must be suitable for judicial inquiry; this requires determining whether the controversy (a) is definite and concrete, (b) concerns legal relations among parties with adverse interests and (c) is real and substantial *so as to be capable of a decision granting or denying specific relief of a conclusive nature. Dank v. Benson,* 2000 OK 40, ¶ 8, 5 P.3d 1088, 1091 (emphasis in original). Additionally, for declaratory relief, the issue involved in the controversy must be ripe for judicial determination. *Knight v. Miller,* 2008 OK 81, ¶ 8, 195 P.3d 372, 374. Plaintiffs' supposed claim is not justiciable, because Plaintiffs repudiate the notion they have been denied requested records. Thus, this Court lacks subject matter jurisdiction.

**Conclusion.**

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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ORBISON & LEWIS

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ATTORNEYS FOR DEFENDANTS
MARY FALLIN, in her official capacity as

GOVERNOR OF THE STATE OF OKLAHOMA and MICHAEL C. THOMPSON, in his official capacity as COMMISSIONER OF THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of March, 2015, a true and correct copy of the foregoing instrument was mailed, postage paid, to:

Robert D. Nelon
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
Chase Tower, Suite 2900
100 North Broadway
Oklahoma City, OK 73102-8865

Katie Townsend
The Reporters Committee for the Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

Robert A. Nance

# EXHIBIT 1

# EXHIBIT 1

# AFFIDAVIT OF KIM RYTTER

**STATE OF OKLAHOMA** )
) **SS.**
**COUNTY OF OKLAHOMA** )

Kim M. Rytter, being of lawful age and first being sworn upon his oath deposes and states:

1. I am an Assistant General Counsel at the Oklahoma Department of Public Safety (DPS) and have been so employed since April 2011.
2. My responsibilities include handling forfeiture actions under the Oklahoma Controlled Dangerous Substances Act. I currently have over 105 active forfeiture cases. These cases are similar to other litigation matters, including discovery and potential jury trials. I also assist DPS in responding to subpoenas, usually involving dash cam videos, collision investigations, and criminal arrest records. DPS received and responded to 910 subpoenas in 2014. I also help DPS respond to Open Records Act (ORA) requests. DPS received 1000 such requests in 2014. Most ORA requests involve information in collision investigations (photographs, witness statements, etc.) and documents relating to implied consent hearings. I have an assistant who helps with the simpler requests. The more complicated requests seek information such as all information pertaining to fatality collisions or officer involved shootings. These investigations contain information that is confidential pursuant to federal and state laws, such as criminal background information, social security numbers, driving records, etc.
3. I additionally work with a wide variety of matters including driver's license fraud, responding to questions from Highway Patrol personnel regarding use and retirement



EXHIBIT 1

of K-9 police service dogs, return or destruction of evidence, training requirements for armed security at the Capitol, and record retention relating to videos. I also teach a block of instruction at the DPS academy relating to legal topics. I help the Attorney General in providing responses to discovery in cases in which the Attorney General represents DPS personnel. I am a member of the DPS policy committee which drafts DPS policies on various issues, and I created procedures for the redaction and release of dash cam videos in response to ORA requests. I also draft legal opinions for internal DPS use.

4. The DPS has a queue system for responding to ORA requests. Under this system, requests are handled in the order in which they are received when possible. The order may sometimes be altered when information relating to a later request becomes available before information relating to an earlier request.

5. I assisted in several aspects of the investigation of the Lockett execution ordered by the Governor (the investigation). I helped coordinate the exchange of information between the investigative team and the various agencies involved in different aspects of the investigation. For example, these agencies included the Attorney General's office, the Governor's office, the Dallas County Medical Examiner's office (Southwestern Institute of Forensic Sciences, or SWIFS), the Dallas County District Attorney's office, and the Department of Corrections (DOC). I answered legal questions from the investigative team and assisted in locating and obtaining information it needed to conduct the investigation. I was also involved in the process of objecting to the requests being made in Texas for information that the Oklahoma Medical Examiner had

forwarded to the Dallas County Medical Examiner's office (SWIFS). This was important because Oklahoma law, 22 O.S. § 1015(B) provides:

> The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.

The names of certain persons participating in the execution process were in documents sent to the Dallas County Medical Examiner's Office (SWIFS). We did not want the names of those persons to be revealed as a result of requests made in Dallas County under the Texas version of Oklahoma's ORA. I was also involved in redaction of various documents for release in federal court and in requests under the Oklahoma ORA, as described more fully below.

6. DPS investigators conducted a total of 117 interviews in the investigation. These interviews were audio recorded. DPS does not have the internal capability to transcribe so many interviews. In order to produce printed transcripts of the interviews, the investigative team created bid specifications to bid out the task of transcribing the audio recordings. These specifications were sent to DPS procurement in order to create a bid packet to be posted on line for prospective bidders. Transcription vendors had approximately two weeks to submit bids. Bids were sent to the investigative team which ultimately selected a vendor to do the transcriptions. The purchase order was issued June 6, 2014. The process of transcribing the audio recordings began the following week, June 9-14. However, interviews themselves continued through July and a few were conducted in August, 2014.

7. On June 25, 2014 representatives of several death row inmates, including Charles Warner, filed an action in the United States District Court for the Western District of

Oklahoma, styled *Warner v. Gross, et. al,* Case No. 5:14-CV-00665-F (the *Warner* case). On October 15, 2104 Plaintiffs filed a motion to hold Commissioner Thompson in contempt for allegedly failing to respond to a subpoena (contempt motion). *See,* Exhibit 1-1, Motion of Plaintiffs for Holding of Contempt and Other Relief and Brief in Support, *Warner* case Dkt. No. 65. Plaintiffs filed my letter of October 2, 2104 to Ms. Patti Palmer Ghezzi as an Exhibit to the contempt motion. Exhibit 1-1, Dkt. 65-3. In that letter I objected to the subpoena directed to Commissioner Thompson and reported that DPS had approximately 5,000 pages of information collected in the course of the investigation that had to be redacted pursuant to 22 O.S. § 1015(B), set forth above. I reported it was not possible to redact and produce the information demanded by the subpoena before October 6, 2014, the date designated for production in the subpoena, and asked for additional time to comply with the subpoena. DPS General Counsel Stephen Krise entered his appearance in the *Warner* case on behalf of Commissioner Thompson on November 5, 2014. *Warner* Dkt. No. 85. The next day, on November 6, 2014 the Court entered an Agreed Protective Order regarding discovery materials marked "Confidential." Exhibit 1-2, *Warner* Dkt. No. 90.

8. The Plaintiffs contempt motion came on for hearing on November 13, 2014. At that hearing the Court observed:

> Another question. The defendants—and by the way, let me clear the air on one thing. For discovery purposes and just as a practical matter for discovery purposes, among others, I put the Commissioner and the defendants in the same basket, that basket being the State of Oklahoma. And I'm well aware that different agencies can consider themselves to be different entities from other agencies. But for practical purposes, at least relating to discovery, I put the Commissioner and the defendants in the same basket, that is the State of Oklahoma.

Exhibit 1-3, Tr. 14:9-18. With that understanding Mr. Krise put on testimony about DPS's progress in redacting documents for production to the Plaintiffs. Exhibit 1-3, Tr. 49-55. Thereafter, the Court reiterated:

> For purposes of my evaluation of the timing issues, I, without hesitation, regard all of the agencies involved in these discovery issues to be as a practical matter, albeit not as a legal proposition, one entity, namely, the State of Oklahoma.

Exhibit 1-3, Tr. 69:20-24. The Court denied the Plaintiffs' contempt motion, but ordered Commissioner Thompson to produce redacted interview transcripts by noon on Saturday, November 15, 2014 (two days after the hearing), and deliver all other documents subject to the subpoena except videos identifying execution team members and electronically stored emails by noon, November 21, 2014, and ordered counsel to meet and confer on key word search protocol for emails by November 19, 2014. Exhibit 1-3, Tr. 70: 4-19.

9. The process of redacting so many documents strained DPS's resources. DPS does not ordinarily undertake such large document review and redaction processes. Knowing that DPS was under both federal court subpoena and multiple ORA requests, the Department at first used six non-lawyer staff members to quickly redact documents by obscuring only the names of individuals involved in the execution process. These staff members used a list of such persons provided by DOC. They obscured the names by hand using two layers of white-out tape covered by dark marker to indicate where language had been redacted. The documents produced by the DPS to the Federal Public Defender's office (FPD), as counsel for the *Warner* Plaintiffs in November, 2014 were redacted in this way. Those documents were protected by the protective order entered earlier by the federal court. Within days of our document production, the FPD and the Attorney General's office reported to us instances of both over-redaction and under-redaction using this

method. That is, the staff members missed some names of persons involved in the execution process and left them un-redacted, but also redacted some information not involving persons participating in the execution process.

10. It became clear that the first attempt at redaction was unsatisfactory, particularly for documents to be released to the public without benefit of the *Warner* protective order. The first attempt at redactions was inadequate both in terms of the way in which names of those participating in the execution process were handled, and in the fact that the documents had not been redacted for any other sort of privilege under federal law or the ORA. Aspects of the way these documents were organized in alphabetical order, and the narrow focus on only the names of those participating in the execution process, made it possible for an attentive reader to determine the identities of some of the execution participants. Further, the non-lawyer staff members did not, and could not, redact the documents for other recognized privileges like attorney client privilege or work product protection. On December 1, 2014, DPS decided to make a second round of redactions. I was assigned to lead an effort to further redact these documents electronically using the Adobe Pro program purchased specially for that purpose. By December 4, 2014 a team of five people (four from DOC and one from DPS) gathered to redact what ultimately totaled approximately 10,000 pages of documents for names and identifiers of persons involved in the execution process. The DOC personnel provided essential insight into DOC records and how to understand them. The product of this review would have been much different without their assistance. Once they finished their review, I took over the reviewing of all of the documents. I forwarded questions to various agencies, including, but not limited to, the DOC and the Attorney General's office, when I noted information

that may have needed to be redacted for privilege or for some other reason. These privileges included attorney client privilege, work product protection, HIPAA privacy, confidentiality of medical records, etc. Each agency made its own determination as to whether grounds for redaction existed for their documents. I only made actual decisions regarding redactions for the identity of persons involved in the execution process, social security numbers, and certain personal telephone numbers and home addresses to protect personal privacy.

11. On January 20, 2015, the *Warner* Court entered a further order regarding defendants' (the State) blanket designation of confidentiality for the transcripts of interviews conducted in the DPS investigation. Exhibit 1-4, *Warner* Dkt. 191. That order stated that no later than February 9, 2015 the defendants should notify counsel for plaintiffs of any additional proposed redactions of DPS transcripts, and state the reasons for such additional redactions. Not later than February 20, 2015 counsel were to meet and confer to try to resolve any differences with respect to further redactions. Not later than February 24, 2015 counsel for Plaintiffs were to inform the court by a document filed under seal the extent of any remaining disagreements as to the merits of any remaining disagreements on the additional proposed redactions. Not later than ten days after that, the defendants were to file, under seal, a memorandum supporting the merits of their proposed additional redactions, to which plaintiffs could respond no more than ten days later.

12. I worked with the Attorney General's office to appropriately redact the documents produced in the *Warner* case for all privileges that applied. Redactions were finally completed and over 5,000 pages were provided Plaintiffs Branstetter and the Tulsa

World, and made available to others, starting March 13, 2015. Since March 13, 2015 DPS has provided seven more disks of these documents to a variety of media requesters. These documents produced were those that supported the DPS final report of its investigation. About 5,000 more pages of rough notes and miscellaneous papers remain to be reviewed and redacted. As of the date this affidavit was signed, the *Warner* Court has made no rulings on the appropriateness of the redactions submitted to that Court.

FURTHER AFFIANT SAYETH NOT.

Dated this 18th day of March, 2015.

Kim Rytter

Subscribed and sworn to before me this 18th day of March, 2015.

My Commission Expires:
04/18/15

My Commission Number:
11003517


Notary Public

# EXHIBIT 1-1

# EXHIBIT 1-1

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

| | | |
|---|---|---|
| CHARLES L. WARNER, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Case No. CIV-14-665-F |
| | ) | |
| KEVIN J. GROSS, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**MOTION OF PLAINTIFFS FOR HOLDING OF CONTEMPT AND OTHER RELIEF AND BRIEF IN SUPPORT**

Plaintiffs move, pursuant to Rule 45(e), Federal Rules of Civil Procedure, for an order holding Commissioner Michael Thompson, Oklahoma Department of Public Safety, hereafter DPS, in contempt for failure to obey a subpoena for production of documents. In the alternative, Plaintiffs move for such other relief as the Court deems appropriate, including a motion ordering DPS to comply with the subpoena.

The subpoena was served September 23, 2014, and required production of records on October 6, 2014. The subpoena, together with the return of service, are attached as Exhibit 1.

The subpoena is in aid of pretrial discovery being conducted in this §1983 case, which includes claims relating to the execution of Clayton Lockett on April 29, 2014. Commissioner Thompson, who was a witness to the

EXHIBIT 1-1

Lockett execution, was also appointed by the Governor of the State of Oklahoma to conduct "an independent review of the events leading up to and during the execution of Clayton Derrell Lockett." Doc. 42-2 (Executive Order 2014-11).

Commissioner Thompson issued an Executive Summary of his "review" on September 4, 2014. Defendants represented to this Court on September 16, 2014 the Commissioner's "final report" would be released in the coming weeks. Doc. 49 at 1, n. 1. The "final report" has yet to be released.

The subpoena requests all records concerning Clayton Lockett, who died April 29, 2014 while in the custody of law enforcement at the Oklahoma State Penitentiary, McAlester, Oklahoma. These same records were requested under the Oklahoma Open Records Act on May 23, 2014. *See* Exhibit 2, (Letter to DPS on behalf of David Autry, dated May 23, 2014). Counsel for Mr. Autry, who also represents Plaintiff Warner in this action has received no response to his request.

On October 2, 2014 Commissioner Thompson objected to the production of the material demanded as overly broad and as failing to allow a reasonable time to comply. DPS also stated they would be required by statute to redact statutorily confidential information from the responsive material and needed additional time to comply. *See* Exhibit 3 (DPS letter, dated October 2, 2014).

On October 10, 2014, pursuant to LCvR 37.1, Plaintiffs' counsel and

Assistant DPS General Counsel personally met and conferred in good faith in an attempt to resolve this discovery dispute and were unable to reach an accord. While counsel assured Plaintiffs they will produce 5000 pages of information collected during the investigation after redactions have been made, he could offer no date certain when the documents would be supplied. Nor could counsel offer a time when any additional information other than the 5000 pages of information would be supplied. Counsel indicated DPS possibly would supply the information in un-redacted form if a protective order was entered, but could not be certain.

These records were originally requested almost 5 months ago. Complying with the subpoena is not unduly burdensome. This Court should hold Commissioner Thompson in contempt for failing to obey the subpoena. In the alternative, the Court should order him to comply with the subpoena.

Respectfully submitted,

*s/ Patti P. Ghezzi*

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Attorney for Plaintiff Wood

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of October, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Stephen Krise
General Counsel
Oklahoma Department of Public Safety
P.O. Box 11415
Oklahoma City, Oklahoma 73136-0415
skrise@dps.state.ok.us

*s/ Patti Palmer Ghezzi*
PATTI PALMER GHEZZI

AO 88B (Rev. 12/13) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

# UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

Charles F. Warner, et al
*Plaintiff*
v.
Kevin J. Gross, et al
*Defendant*

Civil Action No. CIV-14-665-F

## SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Commissioner Michael Thompson
Oklahoma Department of Public Safety
*(Name of person to whom this subpoena is directed)*

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: All Records concerning Clayton Lockett, who died April 29, 2014 while in the custody of law enforcement at the Oklahoma State Penitentiary, McAlester, Oklahoma

| Place: | Date and Time: |
|---|---|
| Federal Public Defender's Office<br>215 Dean A. McGee Avenue, Ste. 707<br>Oklahoma City, OK 73102- | 10/06/2014 10:00 am |

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

| Place: | Date and Time: |
|---|---|
| | |

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 9-22-14

*CLERK OF COURT*

OR

*Signature of Clerk or Deputy Clerk*

Patti Palmer Ghezzi
*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs, who issues or requests this subpoena, are:

Patti Palmer Ghezzi, patti_ghezzi@fd.org, 405-609-5975; Randy A. Bauman, randy_bauman@fd.org, 405-609-5975

**Notice to the person who issues or requests this subpoena**

A notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88B (Rev. 12/13) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. CIV-14-665-F

**PROOF OF SERVICE**

***(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)***

I received this subpoena for *(name of individual and title, if any)* Comm. Michael Thompson on *(date)* 9-22-14 .

☑ I served the subpoena by delivering a copy to the named person as follows: By serving DPS General Counsel, Stephen Krise, who accepted service for Comm. Thompson on *(date)* 9-23-14 ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 9-23-14

Patti Palmer Ghezzi
*Server's signature*

Patti Palmer Ghezzi, Asst. Fed. Public Defender
*Printed name and title*

215 Dean A McGee, Ste 707, Oklahoma City, OK 73102
*Server's address*

Additional information regarding attempted service, etc.:

Gary Peterson
Attorney at Law

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Oklahoma City, OK
73102

405 606 3367

gp@garypeterson.com

www.garypeterson.com

May 23, 2014

Department of Public Safety
P.O. Box 11415
Oklahoma City, OK 73136-0415

Re: Oklahoma Open Records Act request

To the Department of Public Safety:

This is a request for copies of records under the Oklahoma Open Records Act. I am making this request on behalf of David Autry.

The request seeks copies of all records concerning Clayton Lockett, who died April 29, 2014 while in the custody of law enforcement at the Oklahoma State Penitentiary, McAlester, Pittsburg County, Oklahoma.

The request includes, but is not limited to:

Records generated or consulted in connection with or as a result of the autopsy of Clayton Lockett;

Records generated or consulted in connection with the testing of any drugs used or to be used in the execution of Clayton Lockett or of any other person;

Records received from or originating with the Department of Corrections that relate or refer to Clayton Lockett;

Images and recordings, whether photographic, audio or video, of Clayton Lockett, his cell and the scene of his death;

Records received from or originating with the Department of Corrections that relate or refer to

Gary Peterson
Attorney at Law



Clayton Lockett; and

Any report or other record which relates or refers to any of the circumstances of the execution or death of Clayton Lockett.

I would prefer to receive the requested copies in PDF or digital form, if they are available in that format.

Please notify me of the anticipated cost of producing the requested copies if that cost will exceed $25.

Thank you for your assistance.

Very truly yours,

Gary Peterson

MICHAEL C. THOMPSON
COMMISSIONER

MARY FALLIN
GOVERNOR

STATE OF OKLAHOMA
DEPARTMENT OF PUBLIC SAFETY

LEGAL DIVISION

Cert# 7000 0520 0022 0177 5822

October 2, 2014

Ms. Patti Palmer Ghezzi
Federal Public Defender's Office
215 Dean A. McGee Avenue, Suite 707
Oklahoma City, OK 73102

Re: Subpoena in *Warner v. Gross*, CIV-14-665-F

Dear Ms. Palmer Ghezzi,

On September 22, 2104, a subpoena was issued by you in the above referenced action demanding the production of "All Records concerning Clayton Lockett, who died April 29, 2014 while in the custody of law enforcement at the Oklahoma State Penitentiary, McAlester, Oklahoma." The Department of Public Safety ("DPS") objects to the production of the material demanded as overly broad and as it fails to allow a reasonable time to comply. DPS possesses approximately 5,000 pages of information collected during the investigation conducted at the direction of Governor Fallin into the execution of Clayton Derrell Lockett. See Executive Order 2014-11. It is not clear from the subpoena whether this is the material sought or whether it is also directed at other material.

Pursuant to 22 O.S. §1015(B), "The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings." Therefore, DPS is required by statute to keep this information confidential. In order to comply with your subpoena, DPS must review all responsive material and redact the statutorily confidential information. It is not possible for DPS to conduct this review, redact the information, and produce the information demanded by the subpoena before 10/06/2014, the date for production in the subpoena. DPS requires additional time to comply with your subpoena.

Sincerely,

Kim Rytter
Assistant General Counsel

# EXHIBIT 1-2

# EXHIBIT 1-2

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

| | |
|---|---|
| CHARLES F. WARNER, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KEVIN J. GROSS, *et al.*,<br><br>Defendants. | **Case No: CIV-14-665-F** |

## AGREED PROTECTIVE ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Unless otherwise ordered, none of the documents, materials, testimony or information generated or produced during discovery in this action and designated by any party or a non-party witness as "CONFIDENTIAL" shall be revealed or disclosed, in whole or in part, or described, in whole or in part, to any person other than:

a. the parties' attorneys who are involved in the prosecution or defense of this action;

b. employees of such attorneys, who are involved in the prosecution or defense of this action;

c. expert witnesses who have been retained or consulted to assist in the prosecution or defense of this action; and

EXHIBIT 1-2

d. the trial judge in this action, and administrative personnel of the trial judge's office.

2. None of the documents, materials, testimony or information so designated as "CONFIDENTIAL" shall be used by any recipient authorized in subparagraphs (a)-(d) above for any purpose other than the prosecution or defense of this action.

3. Documents, materials, testimony or information may be designated by a party or a non-party witness as "CONFIDENTIAL" by a written notice to the non-designating party or parties describing the designated documents, materials, testimony or information. Alternatively, documents may be designated as "CONFIDENTIAL" by marking a document with the notation "CONFIDENTIAL." Alternatively, information and testimony generated during depositions may be designated as "CONFIDENTIAL" by the making of a statement on the record or later transcript that confidential treatment under this Order is requested.

4. Documents, including transcripts, which have been designated as "CONFIDENTIAL," or which contain information designated as "CONFIDENTIAL," and which are filed with the Court, shall be filed in sealed envelopes bearing the title of the case and the prominently displayed notation: "CONFIDENTIAL: NOT TO BE OPENED EXCEPT BY COURT ORDER."

Such documents should not be filed via ECF systems, but should instead only be filed as sealed documents.

5. Each party and non-party witness will designate as "CONFIDENTIAL" only those documents, materials, testimony and information which they in good faith believe to be confidential, or which will cause a party or person annoyance, embarrassment or oppression, within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure.

6. If either party believes that any document or item of information was improperly designated as "CONFIDENTIAL," that party may file a motion with the Court, under seal, requesting that the seal be lifted with regard to any identified testimony or exhibits and set forth the reasons that the matter is either not "CONFIDENTIAL" or that it should be unsealed regardless of its status. The requirement to file this motion to unseal does not alter the fact that it is the designating party's burden to establish the basis for the sealing of any documents or testimony.

7. In the event that any entity or person subject to this Order receives a subpoena, civil investigative demand or other process or request seeking disclosure of any document or information designated as "CONFIDENTIAL," such entity or person shall serve immediate written notice of such request to all parties, together with a copy of such process.

8. Each recipient authorized by this Order, to whom "CONFIDENTIAL" information, documents, materials or testimony has been disclosed, or is disclosed pursuant to this Order, shall be advised that it is subject to the terms of an order of the Court, and that the sanctions for any violation of this Order include the penalties which may be imposed by the Court for contempt.

9. This Order shall not terminate upon termination of this litigation. Any documents, transcripts or other materials produced by a party or non-party witness and designated as "CONFIDENTIAL," and all copies thereof, shall be returned to the producing party when the case is closed and not subject to further review, as determined by the Court.

10. The Clerk is directed to maintain under seal all pleadings, documents and transcripts of testimony filed in Court in this action which have been designated, in whole or in part, as "CONFIDENTIAL" pursuant to this Order, provided that any such materials shall be lodged with the Clerk in a sealed envelope bearing a label clearly disclosing that the enclosed materials have been designated as "CONFIDENTIAL" and are filed under seal.

11. Plaintiffs (and any other individual who joins this case) are not to be permitted to view photos, videos, or depictions of the execution chamber, or any of the documents produced by Defendants or any of the transcripts generated during discovery which may be designated as confidential. This Order does not preclude

Plaintiffs from re-urging this matter as to any specific document. This Order also does not preclude any Plaintiff (and any other individual who joins this case) from having direct access to: (1) any healthcare records relating to that Plaintiff; and (2) any non-confidential document that is filed with the Court in a manner making it publicly available through the Court's ECF system or information that is within the public realm.

14. This Order shall not be modified except after notice and an opportunity to be heard is accorded all parties, except that neither this paragraph, not anything else in this Order, shall preclude the Court from making reference to confidential information or materials in orders entered by the Court.

Dated this 6th day of November, 2014.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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# EXHIBIT 1-3

# EXHIBIT 1-3

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

CHARLES F. WARNER, et al.,

Plaintiffs,

vs. Case No. CIV-14-665-F

KEVIN J. GROSS, et al.,

Defendants.

---

TRANSCRIPT OF MOTION FOR CONTEMPT

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

NOVEMBER 13, 2014 1:30 P.M.

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

*Tracy Washbourne, RDR, CRR*
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

EXHIBIT 1-3

information.

And, Your Honor, I did bring with us an investigator from the highway patrol, who was part of that investigation, if the Court would really want a better breakdown than what I'm giving. I'm prepared to put a witness on to provide the Court with that information.

THE COURT: Well, I'm not to that point. I may not get to that point this afternoon.

Another question. The defendants -- and by the way, let me clear the air on one thing. For discovery purposes and just as a practical matter for discovery purposes, among others, I put the Commissioner and the defendants in the same basket, that basket being the State of Oklahoma. And I'm well aware that different agencies can consider themselves to be different entities from other agencies. But for practical purposes, at least relating to discovery, I put the Commissioner and the defendants in the same basket, that is the State of Oklahoma.

And now there's another state agency, if you want to call it that, and that's the Court of Criminal Appeals. And the reason I mention the Court of Criminal Appeals is that the Court of Criminal Appeals has set two executions to occur not too long after the first of the year, and that has a pretty direct bearing on some timing issues that I'm keenly aware of.

Anyway, back in I believe it was September, the defendants filed a pleading of some sort that said that the Commissioner's

MR. KRISE: Did the Court plan to inquire or would you like me to --

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. KRISE:

Q. Would you please, just for the record, introduce yourself and give us a brief background of who you are and what you do.

A. My name is Lieutenant Brent Jones. I'm employed with the Oklahoma Highway Patrol. I was a member of the Clayton Lockett execution investigative team.

Q. Was that -- when you refer to the investigation, we're referring to the one that was ordered by Governor Mary Fallin after the Lockett execution?

A. Yes, sir.

Q. Do you have intimate knowledge or personal knowledge of the amount of records and the scope of records that were given to the department during that investigation?

A. Yes, sir.

Q. Do you have any records or documents with you that would help you describe for the Court what those consist of?

A. I have a yellow piece of paper that I just kind of transcribed just general as far as general documents that we have.

Q. So excluding anything that are in the form of e-mails or anything that is part of the executive summary itself, would

you in order just read what you have in the nature of those documents?

A. Absolutely. Okay. We have DPS-generated reports which is going to be the executive summary. A witness is not interviewed. Which is the investigative team and anybody else in which there's not a transcript where they weren't actually interviewed are processing reports whenever we collected evidence from the Department of Corrections, anything that was collected by SWIFS, so on and so forth, photo logs for pictures that we took. We toured the prison after the execution and we took some pictures there. We went in and actually had someone lay on the execution gurney, so we had an idea of the movement whenever a person is strapped down to that table. So there's some pictures of that.

We obviously have the interviews and transcripts that have been talked about, the appeals of Clayton Lockett, Attorney General generated documents. We have DOC-generated reports which is relating to Clayton Lockett, which is his medical reports, incidents, things related to the execution itself. We have DOC execution assignments and duties that day for Clayton Lockett's execution. We have a DOC timeline for the execution and events that day, which had prior been released to the press, which has already been public released. We have DOC execution procedures, which is several -- you know, they made a change of drugs between the last execution, the Clayton Lockett

execution. So those have changed up a little bit. And we have the originals on those.

We have ExperTox lab reports, Southwestern Institute of Forensic Sciences reports, Oklahoma Chief Medical Examiner reports. We also have video, DOC security video. We have DOC cell extraction video, DOC welfare check video. And all this is relating back to Clayton Lockett. And then obviously pictures.

And that's just kind of a general overview. That may not be all encompassing, but that is a general overview of what we have.

Q. Okay. Lieutenant James, can you give the Court an estimate as to the amount of documents that you just referred to?

A. It's going to be right around 5,500 documents is what I've referred to there. And then if they go into any notes we made during the investigation, I don't know how many documents that is -- that is a box. It's a ream of -- you know, what you would get reams of paper in, it's a box. And so however many are in there, I don't -- I wouldn't know exactly what that estimate would be.

Q. Okay. Let me ask you this: You said about 500 -- or 5,000 pages of documents. Was I inaccurate when I told the Court 3,000 a moment ago?

A. About what?

Q. I advised the Court we were talking about 3,000 --
A. I'm wanting to say that whenever you do the summary and the documents that are with it, can I just -- I'm going to say it's between 5,200 and 5,500 documents. I can't remember what the final page number was whenever we sent that in for redaction. Whenever we got that and we sent that report in for redaction, it was page numbered. And I can't remember what the total page numbers were on that. But it's somewhere between that 52 and 55.
Q. And some of the records you've mentioned are not only records that were given to the department in the course of its investigation but some that were generated by the department during the investigation; is that correct?
A. That's correct.
Q. Are those more or less in the nature of what I would call housekeeping or just procedural documents relating to the course of the investigation?
A. Yes, sir.
Q. Okay. Nothing of what I would consider to be of material value or substantive regarding the issues of the execution itself?
A. No.
Q. Okay. Do you know how many of those we're talking about that we could potentially extract from what's actually related to the execution?

A. Just DPS as far as the investigative team's generated documents. Well, obviously the summary had already been released. As far as -- repeat the question.
Q. Well, just take out -- subtract from that total number of documents anything that DPS created simply by virtue of being the investigating agency.
A. I would guess that would be less than a hundred documents.
Q. Okay. The remaining documents --
THE COURT: Excuse me. You've referred to 5,000 documents and a hundred documents. Are you referring to documents or pages of documents?
MR. KRISE: Well, I would have been talking about pages.
THE COURT: Don't interrupt, Mr. Krise. I'm asking the witness about his use of words.
THE WITNESS: I'm sorry, Judge. I didn't realize you were asking me. What I'm talking about is I'm talking about the total number of pages, Judge. Whenever they talk about a final report, the final report is the executive summary plus our generated documents plus everything that we got from DOC, all the laboratories, the Attorney General's Office. Because, obviously, we gathered an enormous amount of documents that we pored over during this investigation.
THE COURT: Okay. Well, my question is just definitional. You've referred several times to a certain

number of documents. And are you basically referring to that number of pages of documents?

THE WITNESS: Pages.

THE COURT: Okay.

THE WITNESS: Pages, yes, sir.

THE COURT: You may continue.

Q. (BY MR. KRISE) When we extract from that count the number of solely DPS-created documents, were the remainder given to the department from other agencies?

A. Yes, sir.

Q. Okay.

MR. KRISE: So I guess we're talking somewhere in the nature of 5,000 -- around 5,000 additional pages of documents that we would look to for identifying names and information that could lead to the identity of individuals.

THE COURT: I think a lot -- it sounds to me like categorically -- I'm going to allow further direct examination, if defense counsel care to do so, as well as cross-examination. But it sounds to me, at this point, like a lot of those -- if there's 5,000 pages, it sounds to me like a lot of those 5,000 pages could be reviewed at a rate of about a second per page, just from the very nature of the documents. But maybe I'm getting ahead of myself. You may continue.

MR. KRISE: I don't have any further questions for Lieutenant Jones. But I may point out to the Court that some

of what he's talking about could be obtained from another entity. For instance, simply turn away from us and turn to DOC and get the same document, which would limit our time for reviewing those. If that helps with compressing how quickly these things can be produced.

THE COURT: Well, maybe the DOC ought to send some people to your office and help out. We'll see. I'm going to put a deadline in place here pretty quick and you're not going to like it. But it's the State of Oklahoma that wants to execute these people and it's the State of Oklahoma that has given me an execution date in January. And so my heart does not bleed for the State of Oklahoma on these timing issues, especially since a document request was made months and months ago. That's one thing I want everybody in this courtroom to understand. That's what nights and weekends are for. You're going to be under a deadline and it's going to be uncomfortably short. Any examination by Mr. Hadden?

MR. HADDEN: I'll have Mr. Stewart do it --

THE COURT: Surely.

MR. HADDEN: -- because he has been handling our documents.

CROSS-EXAMINATION

BY MR. STEWART:

Q. Mr. Jones, just a couple of questions. You mentioned incident reports. Are these incident reports the reports that

say equally emphatically that that comes to rest with the State of Oklahoma, which has scheduled two of the plaintiffs for execution shortly after the first of the year.

I, as a district judge, am obligated to determine the serious issues raised by the motion for preliminary injunction in a manner that is fair to all parties on a schedule that leaves the aggrieved party following my ruling on the motion for preliminary injunction adequate time to seek relief in the Court of Appeals and leaves the Court of Appeals adequate time prior to the execution date to give due consideration to the case.

In setting the schedule that I set in this order, I am for that reason mindful, as I must be, of the needs of all parties, but I'm also mindful of the fact that all or substantially all of the documents at issue were requested by way of a formal open records request several months ago. And I've reviewed that letter. I think it was a letter either written by or on behalf of David Autry, but -- and that may not be the only request, but it went out a long time ago.

For purposes of my evaluation of the timing issues, I, *without hesitation, regard all of the agencies involved in* these discovery issues to be as a practical matter, albeit not as a legal proposition, one entity, namely, the State of Oklahoma. I would add that the onerousness of the requirements imposed by the order I'm about to enter is alleviated somewhat

by the estimate that the transcripts that have already been reviewed for redaction purposes amount to about 75 percent of the 5,000 documents to be produced in hard copy.

As a motion for citation for contempt, the motion is denied because it is procedurally improper under Rule 45.

As an alternative motion to compel production, the motion is granted in part as follows: Commissioner Thompson is directed to produce to the Office of the Federal Public Defender in Oklahoma City not later than noon on Saturday, November 15, 2014, the redacted interview transcripts. Commissioner Thompson is further directed to produce to the Office of the Federal Public Defender in Oklahoma City not later than noon on November 21, 2014, all documents within the scope of the subpoena except, first, videos that identify execution team members and, second, digitally stored e-mails. Counsel for the parties are directed to meet and confer not later than November 19, 2014, for the purpose at arriving at a key word protocol for searching and producing digitally stored e-mails.

The Court will hold a status conference in open court on the record at 9 a.m. on Monday, November 24, 2014, for the purpose of, first, ascertaining the status of the Commissioner's compliance with this order and, second, addressing the arrangements for production of the digitally stored e-mails. That concludes my ruling on the motion for

# EXHIBIT 1-4

# EXHIBIT 1-4

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

| | | |
|---|---|---|
| CHARLES F. WARNER, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Case No. CIV-14-0665-F |
| | ) | |
| KEVIN J. GROSS, et al., | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

Before the court is plaintiffs' Second Motion to Unseal Pursuant to the Protective Order, doc. no. 154, filed under seal on December 12, 2014. Defendants have responded to the motion by response filed on December 23, 2014, doc. no. 175.

The motion challenges defendants' blanket designation of confidentiality with respect to transcripts of interviews from the Department of Public Safety (DPS) investigation. Motion, at 2. When the court entered the protective order in this case, the court did not contemplate that there would be blanket designations of confidentiality. At the same time, the court will note that there may well, in some instances, be merit to the concerns identified by defendants in their response. Accordingly, although the court intends to remove the blanket designation of confidentiality with respect to the DPS transcripts, the court does not intend to ignore the legitimate security and other concerns articulated by the defendants.

Accordingly, it is **ORDERED** as follows:

1. Not later than February 9, 2015, the defendants shall notify counsel for plaintiffs of any additional proposed redactions to the DPS transcripts, together with a statement of the reasons for any such additional proposed redactions.

EXHIBIT 1-4

2. Not later than February 20, 2015, counsel for the parties shall meet face to face and confer in good faith with a view to resolving any differences with respect to the merits of the additional proposed redactions. (Negotiating authority, for this purpose, may be delegated to one or more of plaintiffs' counsel by other plaintiffs' counsel, provided that counsel to whom negotiating authority is delegated shall have full authority to resolve issues as to redactions.)

3. Not later than February 24, 2015, counsel for plaintiffs shall inform the court, by a document filed under seal in this case, as to the extent of any remaining disagreements as to the merits of the additional proposed redactions. That filing shall include a copy of all pages which contain additional proposed redactions that are objected to by plaintiffs (together with any other pages necessary for an understanding of the context), with an indication of the material as to which there is an additional proposed redaction to which plaintiffs object.

4. Not later than 10 days after the filing of the document referred to in paragraph 3, defendants may file, under seal, a memorandum in support of the merits of their proposed additional redactions. Plaintiffs may respond thereto not later than 10 days after the date of filing of the defendants' memorandum. The court will rule on the merits of the additional proposed redactions as soon as reasonably possible.

Dated January 20, 2015.

S P Friot

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

14-0665p041.wpd

# EXHIBIT 2

# EXHIBIT 2

(ORDER LIST: 574 U.S.)

WEDNESDAY, JANUARY 28, 2015

ORDER IN PENDING CASE

14-7955 (14A796) GLOSSIP, RICHARD E., ET AL. V. GROSS, KEVIN J., ET AL.

Respondents' application for stays of execution of sentences of death presented to Justice Sotomayor and by her referred to the Court is granted and it is hereby ordered that petitioners' executions using midazolam are stayed pending final disposition of this case.

EXHIBIT 2