

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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IN THE DISTRICT COURT OF OKLAHOMACOUNTY
STATE OF OKLAHOMA

ZIVA BRANSTETTER and BH Media
Group Inc. d/b/a *TULSA WORLD*,

Plaintiffs,

v.

MARY FALLIN, in her official capacity as
GOVERNOR OF THE STATE OF
OKLAHOMA; MICHAEL C.
THOMPSON, in his official capacity as
COMMISSIONER OF THE OKLAHOMA
DEPARTMENT OF PUBLIC SAFETY,

Defendants.

Case No. CV-2014-2372

Judge Bryan C. Dixon

**COMMISSIONER THOMPSON'S RESPONSE TO PLAINTIFFS' MOTION
FOR *IN CAMERA* REVIEW AND TO COMPEL THE DISCLOSURE OF RECORDS
IMPROPERLY WITHHELD IN WHOLE OR IN PART IN RESPONSE
TO PLAINTIFFS' OPEN RECORDS ACT REQUESTS**

Comes now Michael Thompson, and for his response to Plaintiffs' Motion for an *in camera* review of records and motion to compel production of records, states as follows:

Background

Plaintiffs originally brought this suit challenging the production of records by DPS in response to two requests for records made by, or on behalf of, the Plaintiffs pursuant to the Oklahoma Open Records Act. The records responsive to those requests have been produced, with certain portions redacted.

I. The scope of the Plaintiffs' Motion is limited to "Redacted versions of interviews conducted by DPS."

The Plaintiffs point out that as far as DPS is concerned, their Motion is directed only at redacted information in interview transcripts identifying individuals and entities that participated in or supplied materials for the execution of Clayton Lockett. Plaintiffs' Motion at 2.

As DPS pointed out in its privilege log, the redacted information is confidential pursuant to state law, which provides that "[t]he 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). Plaintiffs essentially argue that DPS has redacted the names or identities of persons who are not subject to the confidentiality provisions of Section 1015(B).

II. The redacted information is confidential.

The redacted information in the interview transcripts produced by DPS refers to individuals who are employees or agents of the Department of Corrections (DOC) and not the Department of Public Safety. The redactions were done by DPS based on information provided to it by DOC and the Office of Attorney General. DPS has no independent knowledge of any specifically named individuals identified by DOC or what role they play in the execution process, or whether or not they are subject to the confidentiality requirements of 22 O.S. § 1015(B), aside from what was obtained during its investigation of the Lockett execution.

As part of its investigation, investigators from DPS interviewed the individuals involved in the Lockett execution. Based on information obtained during those interviews, the duties and roles certain individuals play as part of the execution process clearly identify them as persons

“who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution” as set forth in Section 1015(B).

In their Motion, Plaintiffs’ provided the following quote from the Oklahoma Supreme Court regarding Section 1015(B): “[Section 1015(B)] makes secret only the identity of the persons who carry out the execution and the identity of the persons who supply the drugs and medical equipment necessary to do so.” Plaintiffs’ Motion at 6. The Plaintiffs interpret this statement to limit the confidentiality to only the executioners themselves. This is not the case, as this sentence alone does not provide the necessary context for the analysis by the Court in that case. The full paragraph from which they carved out that one sentence provides:

“The challenged provision makes secret only the identity of the persons who carry out the execution and the identity of the persons who supply the drugs and medical equipment necessary to do so. The identity of the drug or drugs and the dosage of the drugs are not covered by the provision. At the same time, the provision makes the identity of the executioners and the drug and medical suppliers confidential. *Properly understood, the provision protects the identity of certain persons*, not the identity of the drug or drugs to be used in executions. Thus, the sole question in the DOC’s appeal becomes whether the constitutional guarantee of access to the courts renders unconstitutional the secrecy of the source of the drug or drugs. In other words, does secrecy concerning disclosure of the source of the drug or drugs prevent inmates’ access to the courts to pursue an Eighth Amendment claim?” (Emphasis added).

Lockett v. Evans, 2014 OK 34, ¶12, 330 P.3d 488, 491.

The Supreme Court was dealing with a case where the plaintiff was asserting the right to know the names of those who manufactured and supplied drugs that would be used in his execution. Contrary to the assertions of the Plaintiffs in this case, the Court made no determination as to the extent of the confidentiality provided by 22 O.S. §1015(B). The Court did not address what duties an individual in an execution must perform for them to be protected by 22 O.S. §1015(B).

III. Because the redacted information is part of a law enforcement record, the Open Records Act does not make disclosure of the redacted information compulsory.

Section 24A.3 of the Open Records Act identifies the Department of Public Safety as a law enforcement agency. 51 O.S. § 24A.3(5). The records at issue in this case qualify as law enforcement records first, because they are records of a law enforcement agency and second, because they were obtained as part of the Department's statutory authority to conduct investigations and because the investigation was carried out at the behest of the governor. *See Doe v. FBI*, 936 F.2d 1346, 1353 (D.C. Cir. 1991).

As a law enforcement agency, Section 24A.8(B) of the Open Records Act provides that a DPS "may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial." 51 O.S. § 24A.8(B). Only in Section 24A.8(A) does the Act mandate the release of records, and defines what those records are.

In this matter, it is undisputed that none of the records that are required to be released by the Act are among the redacted portions of the records that have already been produced to Plaintiffs by DPS. Plaintiffs do not allege in either their Amended Petition or in their Motion for *in camera* review that the redacted information is information required to be disclosed by a law enforcement agency pursuant to 51 O.S. § 24A.8(A).

IV. The interests of privacy and confidentiality outweigh the Plaintiffs' interest in revealing the redacted information.

In accordance with the plain language of Section 24A.8(B) of the Open Records Act, DPS would urge the Court to analyze why the Plaintiffs want to know the specific names of the individuals involved in the execution process. What is the public interest served by naming these individuals in the media?

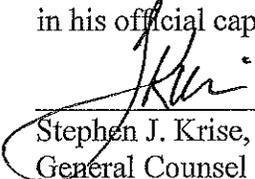
The Department of Corrections has a legal responsibility to carry out executions in Oklahoma. This task requires individuals to participate in what has been a highly controversial enterprise. Disclosure of information such as the individual identity of a member of the execution team threatens DOC's ability to safely and securely fulfill its obligations, and more importantly, it serves no legitimate purpose other than to embarrass, harass or annoy the persons identified so they (and persons who have not yet participated) decline to do so in the future.

There is no plausible reason the Plaintiffs can offer that show the revealing of the identities of these individuals outweighs their need for confidentiality. Consequently, the Court should decline to consider the need to conduct an in camera review.

Conclusion

Because Plaintiffs have failed to demonstrate that the public interest in revealing the names of person involved in the execution process outweighs these individuals' interests in confidentiality and privacy, the Court should not undertake the lengthy and time consuming review of hundreds of pages of documents. DPS urges the Court to deny the Plaintiffs' Motion.

RESPECTFULLY SUBMITTED,
COMMISSIONER MICHAEL C. THOMPSON
in his official capacity



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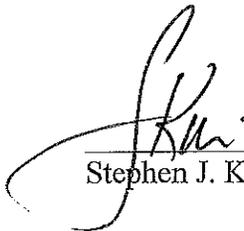
CERTIFICATE OF MAILING

I hereby certify that on the 15th day of November, 2016, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

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