

IN THE DISTRICT COURT OF OKLAHOMACOUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

NOV 14 2016

RICK WARREN
COURT CLERK
40

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

**GOVERNOR FALLIN'S COMBINED RESPONSE TO PLAINTIFFS' MOTION TO
COMPEL THE GOVERNOR TO SEARCH FOR AND PRODUCE EMAIL RECORDS
MAINTAINED ON NON-GOVERNMENTAL EMAIL ACCOUNTS AND/OR SERVERS
THAT ARE RESPONSEIVE TO PLAINTIFFS' OPEN RECORDS REQUEST AND
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**

RESPECTFULLY SUBMITTED THIS 14TH DAY OF NOVEMBER, 2016

Jennifer E. Chance, OBA #19320
General Counsel
OFFICE OF GOVERNOR MARY FALLIN
2300 North Lincoln Blvd., Suite 212
Oklahoma City, Oklahoma 73105
Telephone: (405)522-8836
Facsimile: (405)521-3353
Jennifer.chance@gov.ok.gov

TABLE OF CONTENTS

Table of Authorities.....ii

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 REQUESTS1

PROPOSITION I:
TITLE 22 SECTION 1015(B) REQUIRING THE SECRECY OF THE IDENTITY OF INDIVIDUALS INVOLVED IN THE EXECUTION PROCESS APPLIES TO GOVERNOR’S STAFF DIRECTLY INVOLVED IN THE ADMINISTRATION OF THE DEATH PENALTY1

PROPOSITION II:
THE RELEASE OF PRIVATE EMAIL ADDRESSES OF GOVERNOR’S STAFF AND PRIVATE CONSTITUENTS IS A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY5

PROPOSITION III:
RECORDS WERE PROPERLY WITHHELD PURSUANT TO THE ATTORNEY CLIENT PRIVILEGE, WORK PRODUCT PRIVILEGE, AND EXECUTIVE PRIVILEGE8

PROPOSITION IV:
PLAINTIFFS ARE NOT ENTITLED TO INFORMATION REGARDING RECORDS NOT RESPONSIVE10

RESPONSE TO PLAINTIFFS’ MOTION TO COMPEL SEARCH OF NON-GOVERNMENTAL EMAIL ACCOUNTS10

Certificate of Service.....13

TABLE OF AUTHORITIES

CONSTITUTION

Okla. Const., Art. VI, §10	4
----------------------------------	---

CASELAW

<i>Am. Airlines, Inc. v. State ex rel. Okla. Tax Comm'n</i> , 2014 OK 95, 341 P.3d 95	3
<i>Glossip v. Gross</i> , 135 S. Ct. 2726, 192 L.Ed2d 761	9
<i>Ledbetter v. Howard</i> , 2012 OK 39, 276 P.3d 1031	3
<i>Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n</i> , 1988 OK 117, 764 P.2d 172, 179	3
<i>Lockett v. Evans</i> , 2014 OK 34, 330 P.3d 488	2
<i>Naylor v. Petuskey</i> , 1992 OK 88, 834 P.2d 439	3
<i>Okla. Public Employees Assoc. v. State ex rel. Okla. Office Personnel Management</i> , 2011 OK 68	5
<i>Udall v. Udall</i> , 1980 OK 99, 613 P.3d 742,	3
<i>Vandelay Entm't, LLC. V. Fallin</i> , 2014 OK 109, 343 P.3d 1273	9
<i>YDF, Inc. v. Schlumar, Inc.</i> , 2006 OK 32	3

STATUTES

22 O.S. §1015(B) (Supp. 2011)	1, 2, 3
22 O.S. §1001.1(G) (Supp.2004)	4
22 O.S. §1004 (Supp. 1914)	4
51 O.S. § 24A.12	8
51 O.S. § 24A.7 (A)(2)	5

OTHER AUTHORITY

Department of Corrections Execution Policy, https://www.ok.gov/doc/documents/op040301.pdf	4
--	---

ATTORNEY GENERAL OPINIONS

2001 OK AG 46	7
---------------------	---

COMES NOW, Governor Mary Fallin, in her official capacity as Governor of the State of Oklahoma, and submits her Combined Response to Plaintiffs' Motion to Compel the Governor to Search for and Produce Email Records Maintained on Non-Governmental Email Accounts and/or Servers that are Responsive to Plaintiffs' Open Records Request ("Plaintiffs' Motion to Compel") and 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 (Plaintiffs' Motion). In support thereof, Governor Fallin submits the following argument and authority:

**GOVERNOR'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**

**PROPOSITION I: TITLE 22 SECTION 1015(B) REQUIRING THE SECRECY OF THE
IDENTITY OF INDIVIDUALS INVOLVED IN THE EXECUTION PROCESS APPLIES
TO GOVERNOR'S STAFF DIRECTLY INVOLVED IN THE ADMINISTRATION OF
THE DEATH PENALTY**

Section 1015(B) of Title 22 of the Oklahoma Statutes provides, in pertinent part,

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 proceeding.

22 O.S. §1015(B) (Supp. 2011). Contained within the records provided to Plaintiffs over a year ago, is the redaction of several email addresses of governor's staff due to the *requirements* of Section 1015(B). The redacted information contains the state email address of the governor's staff member directly involved in the execution process. The email address contains the entire first and last name of the staff member.

Plaintiffs argue Section 1015(B) only applies to *actual executioners* and those who supply the drugs and medical equipment. (See Plaintiffs' Motion P.6 ¶ 1). In support of this contention, Plaintiffs rely wholly on their unique interpretation of the Oklahoma Supreme Court's decision in *Lockett v. Evans*, 2014 OK 34, 330 P.3d 488. Specifically, Plaintiffs cite ¶ 12 in *Lockett* as stating:

While the "identit[y]," and only the identity, "of the executioners[,]" may be withheld under Section 1015(B), the identities of those--other than suppliers of drugs and medical equipment for the execution-- who do not "carry out the execution" are not within the scope of the statute. *Id.* (*emphasis added*).

(See Plaintiffs' Motion for *In Camera* Review, P.6, ¶ 1).

In *Lockett v. Evans*, the issue before the Supreme Court was not, as Plaintiffs suggest, who is considered to be involved in the "process of or administer an execution." Rather, "... [T]he sole question of 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." *Id.* At ¶12. The Court's discussion of Section 1015(B) focused on the issue of whether 1015(B) required the *type of drug* to be kept secret. The statement Plaintiffs claim supports the contention that only "executioners" are included, actually states:

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 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.

Id. The Supreme Court did not, in its reasoning, limit the application of Section 1015(B) to actual executioners.

Plaintiffs ask this court to severely limit the applicability of Section 1015(B), while ignoring the rules of statutory construction and the legislature's intent. The cardinal rule of

statutory construction is to ascertain and give effect to the legislative intent and purpose as expressed by the statutory language. *Am. Airlines, Inc. v. State ex rel. Ok. Tax Comm'n*, 2014 OK 95 ¶33, 341 P.3d 95 citing *Naylor v. Petuskey*, 1992 OK 88, ¶4, 834 P.2d 439, 40; *Ledbetter v. Howard*, 2012 OK 39, ¶12, 276 P.3d 1031, 1035. See also *Udall v. Udall*, 1980 OK 99, ¶11, 613 P.3d 742, 745, ("[i]n ascertaining legislative intent, the language... should be construed with a reasonable and sensible construction"); *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*, 1988 OK 117, ¶7, 764 P.2d 172, 179, ("[s]tatutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits.").

The Oklahoma Constitution and Title 22 of the Oklahoma Statutes clearly contemplate the governor's direct role in the administration of the death penalty. This court is specifically authorized by the Supreme Court to consider other statutes relating to Section 1015(B) in the resolution of the intent of the provision. *Am. Airlines*, 2014 OK 95 at ¶33 *Naylor*, 1992 OK 88 at ¶4. The Supreme Court stated, "This Court will not limit consideration to one word or phrase but will consider the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying the intent. *Am. Airlines*, 2014 OK 95 at ¶33 citing *YDF, Inc.*, 2006 OK 32 at ¶6.

The Supreme Court went on to state:

If the legislative intent cannot be ascertained from the language of a statute, as in the cases of ambiguity, we must apply rules of statutory construction. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. Where a statute is ambiguous or its meaning uncertain it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. The legislative intent will be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. (internal citations omitted).

Id.

On the day of Lockett's execution, the governor had not exhausted her constitutional authority to stay the execution for up to 60 days. Thus, the presence and consent of the governor just prior to Lockett's execution and constant communication with the governor was "necessary to administer the execution process." In fact, this necessity was played out by the events occurring during Lockett's execution, as evidenced by the Stay of Execution ordered by the governor for Charles Warner, whose execution was scheduled immediately following Lockett's execution. (See Exhibit B, Executive Order, attached hereto).

Notwithstanding Plaintiffs' argument, an execution cannot occur in this state without the direct and real-time involvement of the governor. Plaintiffs argue a member of the governor's staff "clearly was not present" at the execution of Clayton Lockett. Plaintiffs disregard the governor's constitutional authority to at any time leading up to an execution and even after an execution has begun, to order a stay of execution. *See Okla. Const. art. VI §10, 22 O.S. §1001.1(G)(Supp.2004), 22 O.S. §1004 (Supp. 1914).* The Oklahoma Department of Corrections Execution Policy *requires* the governor to be contacted several times in the hours leading up to an execution, including to receive authority to "proceed with the execution." (See Exhibit A, ODOC Execution Policy OP-040301, attached hereto). The direct involvement of the governor, or her designated staff member, is clearly required during an execution. The legislative intent of Section 1015(B), in protecting the identity of individuals involved in the execution process is clear, especially when considered with relevant Oklahoma law as it relates to the governor's authority during executions.

PROPOSITION II: THE RELEASE OF PRIVATE EMAIL ADDRESSES OF GOVERNOR'S STAFF AND PRIVATE CONSTITUENTS IS A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Plaintiffs assert the governor (or anyone else) has no privacy interest in a private email address because the Open Records Act, specifically, Section 24A.(7)(A)2 does not specifically enumerate "personal email addresses" as an exception to information required to be disclosed. However, the Oklahoma Supreme Court, in *Okla. Public Employees Assoc. v. State ex rel. Okla. Office of Personnel Mgmt.*, 2011 OK 68, 267 P.3d 838, recognized the list contained in Section 24A.(7)(A)2 is neither exhaustive nor exclusive:

When the Legislature sought to specifically enumerate items that it intended to be kept confidential in all instances, it used mandatory language providing that public bodies "shall keep confidential the home address, telephone numbers and social security numbers" of its employees. Nevertheless, its utilization of the phrase "**such as**" in a statutory provision is not a term of strict limitation. Rather, it is utilized to indicate that there are other matters intended to be included within the statutory limits which are not specifically enumerated by the legislative language. The phrase indicates a descriptive, non-exclusive list of matters of the same or like kind. (Court's emphasis)

Id. 2011 OK 68 ¶14.

The Court found a case-by-case balancing test should be utilized to determine whether personal information is subject to release, and acknowledged a privacy interest in personal facts:

The United States Supreme Court has recognized the privacy interest in keeping personal facts away from the public eye. It has also acknowledged that, in some instances, the duty to avoid unwarranted disclosures is rooted in the Constitution. Even where an event is not wholly private, the Court accepts that an individual may have some interest in limiting disclosure or dissemination of the information.

Id. at ¶25, ¶39.

Plaintiffs claim the public interest outweighs any possible privacy interest of Governor Fallin and private constituents, citing archiving requirements and the ability to determine if personal email accounts are adequately searched for open records. However, Plaintiffs fail to explain how, the widespread public knowledge of Governor Fallin's, members of her staff, and private constituents' personal email addresses would accomplish this public interest.

Plaintiffs' assertions are incongruent with Plaintiffs' own evidence. Plaintiffs' Exhibits very clearly indicate emails containing electronic communications via non-state email addresses have been consistently released pursuant to open records requests.

For example, Exhibit F, page 1, of Plaintiffs' Motion to Compel is an email record which involves nine email addresses, seven of which are state email addresses including Alex Weintz (former Communications Director) and Governor Fallin, and two of which are private email addresses of Weintz and Governor Fallin. This exhibit is emblematic of how Governor Fallin utilizes her non-state email address, but her email communications are nevertheless, captured on the state server, properly archived, and ultimately available for open records production.

Another example is found in Plaintiffs' Exhibit G, Page 1, attached to Plaintiffs' Motion to Compel, includes email communications with governor's staff after hours between 6:54pm and 7:30pm with twenty-three instances of records saved on the state server. Most notably, however, the use of a private email for Steve Mullins is explained. In an email at 7:03pm, the sender includes Mr. Mullins' personal email to enable Mr. Mullins to read the email "on his pc." This illustrates the use of personal email communications, by governor's staff, after hours, when staff has limited or no access to the state email server, when it is necessary for governor's staff to handle state business.

There is no rule which specifies which source retains and makes available agency records. The Oklahoma Attorney General, in *Question submitted by: Dir. Susan C. McVey, Okla. Dep't. of Libraries*, 2001 OK AG 46, stated:

[I]n a situation where the e-mail is being sent from one person to another within the same agency, this seems a needless duplication of storage on valuable computer space. In such an instance, so long as either the sender or the receiver retains it as a record, the retention requirement is satisfied, as the e-mail is indeed being saved within the agency.

Id. ¶20.

Further, any agency may require the search of any employee's personal email for official records, without the public disclosure of the employees' non-state email address.

In support of Plaintiffs' flawed premise, they cite Secretary Hillary Clinton's email scandal as an example. However, the public knowledge of Clinton's personal email address did absolutely nothing to protect the public's interest in archiving and accessing Clinton's emails. Secretary Clinton and her staff systematically avoided communicating on *any government* email. As we are all too familiar, however, the public's knowledge of Secretary Clinton's email did not prevent the destruction of her public records.

In stark contrast, Governor Fallin, and members of her staff, utilize non-state email address, on occasion, to expedite the receipt of information and more efficiently perform her duties as the Chief Executive of this state. As evidenced by Plaintiffs' own exhibits, when the governor's personal email address is used in communications with her staff, her staff consistently uses a government email account, which results in electronic communications being properly stored on the state server.

The public dissemination of the governor's, her staff, and private constituent personal email addresses not only risks individual privacy, but also the governor's security. More importantly, the use of a personal email, especially in the manner in which Governor Fallin uses hers, is not contrary to law, not prohibited, and constitutes absolutely no wrongdoing. Governor Fallin has *never* contended that emails from her personal email address concerning official state business are not public records, and the constant, consistent and repetitive release of open records which routinely include records reflecting her use, and her staff's use of personal email addresses is direct evidence of the preservation of official records.

PROPOSITION III: RECORDS WERE PROPERLY WITHHELD PURSUANT TO THE ATTORNEY CLIENT PRIVILEGE, WORK PRODUCT PRIVILEGE, AND EXECUTIVE PRIVILEGE.

A. Attorney Client Privilege

Plaintiffs complain of the governor's withholding of seven pages under the attorney-client privilege. All seven pages were also privileged for a variety of other reasons. Specifically, pages 41735-38 (also privileged under §1015(B), executive privilege), 41739, 41741 (also withheld privileged under executive privilege, §1015(B), and work-product) and 41750-51 (also withheld under 51 O.S. §24A.12). Governor Fallin does not object to the *in camera* review, to the extent allowed by law, of these documents in order for the Court to evaluate the validity of the privileges.

B. Work Product

Page 41741, as indicated on the governor's privilege log is a *draft* of an email by member of the governor's staff, whose identity is protected under Section 1015(B). Any other information provided must be done *in camera* and *ex parte* in order to comply with Section 1015(B). Governor Fallin does not object to the *in camera* review, to the extent allowed by law, of these documents in order for the Court to evaluate the validity of the privileges. Plaintiffs argue the personal email addresses redacted from page 36142 are improperly withheld. Governor Fallin incorporates by reference her arguments regarding the release of personal email addresses, above.

C. Executive privilege requires an *in camera* review of withheld documents to determine whether a qualified privilege applies, and Plaintiffs interests do not outweigh the governor's need for candid, confidential advice from senior advisors.

Plaintiffs claim the privilege log provided by Governor Fallin does not meet the standard in *Vandelay Entm't, LLC. V. Fallin*, 2014 OK 109, 343 P.3d 1273, and therefore Governor

Fallin cannot assert executive privilege. To the contrary, the Supreme Court specifically contemplated an *in camera* review of records withheld pursuant to executive privilege. The court stated:

A qualified privilege is also one in which the burden falls upon the government entity asserting the privilege. *Id.* at 1053. Had Governor Fallin not waived the privilege, she would have had the burden, upon *in camera* review, to demonstrate that the withheld documents fell within the privilege. Significantly, Governor Fallin's brief in support of her motion for summary judgment recognized this burden and requested the opportunity to demonstrate that the retained documents are protected by the deliberative process privilege.

Vandelay, 2014 OK 109 at ¶22.

Plaintiffs' request of this Court to exclude records from executive privilege based upon a privilege log is wholly without authority, and should be denied.

In balancing executive privilege with a substantial or compelling need for disclosure, the Supreme Court stated:

Once the Governor establishes that a document satisfies the criteria above, the burden shifts to the party requesting a document to show (1) a substantial or compelling need for disclosure, and (2) this need for disclosure outweighs the public interest in maintaining the confidentiality of the executive communication. A case in which there is reason to believe that documents may shed light on government wrongdoing may present a substantial or compelling need for disclosure that would outweigh the need for confidentiality. (Internal citations omitted).

Id. at ¶25.

Plaintiffs' argument that the Lockett execution was and continues to be a matter of great public interest is supported only by Plaintiffs' business interests. Plaintiffs ignore the release of the Department of Public Safety investigation, and the United States Supreme Court's ruling in *Glossip v. Gross*, 135 S. Ct. 2726, 192 L.Ed2d 761.

Plaintiffs' other arguments are based upon events which occurred well after the release of the over 41,000 pages of records to Plaintiffs, which could not have been anticipated at the time

the privileges were claimed. Contrary to Plaintiffs' conspiracy theory assertions, Governor Fallin is confident that the Court's *in camera* review will reveal the necessity of the records to remain privileged.

PROPOSITION IV: PLAINTIFFS ARE NOT ENTITLED TO INFORMATION REGARDING RECORDS NOT RESPONSIVE TO THEIR OPEN RECORDS REQUEST

Plaintiffs are not entitled, under any authority, to expand the scope of their open records request which is the subject of this litigation. All records listed in the governor's privilege log that pre-date Plaintiffs' time frame specified in their request, "May 1, 2014 to present" are not responsive documents. Plaintiffs cite no authority for this Court to require an *in camera* review of documents which are non-responsive to an open records request.

Plaintiffs complain of the inadvertent redaction on page 15988 of Steve Mullins', former General Counsel, personal email address. However, the privilege log specifically refers Plaintiffs to page 15986, which is a duplicate of page 15988, which contains the partial redaction of Mullins' personal email. The governor has previously addressed the appropriate redaction of personal email addresses, above.

GOVERNOR FALLIN'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL SEARCH OF NON GOVERNMENTAL EMAIL ACCOUNTS

Near the beginning of this litigation, undersigned counsel thoroughly explained to Plaintiffs' counsel the policy utilized by the Governor and her staff in the use of non-state email addresses to conduct official business. It was explained to Plaintiffs that the Governor's use of her non-state email address supplemented her use of state email, and facilitated the immediate transmission of information between the governor and her staff when she was outside of the

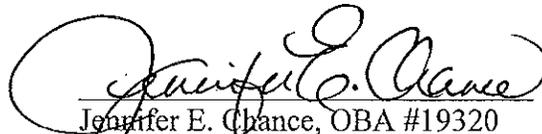
office. (See Exhibit C, Letter dated January 8, 2016, to Katie Townsend, and Exhibit D, Letter dated February 22, 2016, to Katie Townsend).

In addition to undersigned counsel's verbal and written explanations of the governor's use of her personal email, Plaintiffs' own Exhibit A attached to Plaintiffs' Motion to Compel contains a *detailed explanation* provided to Plaintiffs by Alex Weintz, former Communications Director, regarding Governor Fallin's and her staff's occasional use of non-state email for state business. In Plaintiffs' Exhibit A, Weintz acknowledges the emails related to official business are subject to the Open Records Act on either personal or state email accounts. Weintz further explained, "[T]he governor does the vast majority of her business in person, which is why you see very few emails from her."

A search for records responsive to Plaintiffs' open records request has been conducted on Governor Fallin's personal email, the results of which were (including non-official records) reviewed by undersigned counsel. No additional responsive documents were found, evidencing the governor's *previous* reasonable and adequate search for records conducted on the state server in this case. One record was found which included the search term "Lockett", and although not responsive to Plaintiffs' open records request, will be provided to the Court, *in camera*, if requested by the Court to do so.

WHEREFORE, PREMISES CONSIDERED, Governor Fallin respectfully requests this Court to conduct the appropriate *in camera* review of the documents the Court deems appropriate, affirm the governor's withholding of information required to be kept confidential, or as allowed due to the privileges asserted.

RESPECTFULLY SUBMITTED,



Jennifer E. Chance, OBA #19320

General Counsel

Office of Governor Mary Fallin

2300 N. Lincoln Blvd., Room 212

Oklahoma City, OK 73105

405.522.8836 (Telephone)

405.523-4224 (Facsimile)

jennifer.chance@gov.ok.gov

ATTORNEY FOR

GOVERNOR MARY FALLIN

CERTIFICATE OF SERVICE

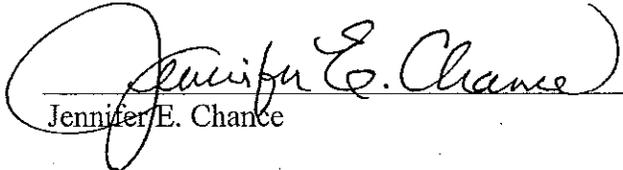
I hereby certify that on this 14th day of November, 2016, a true and correct copy of the forgoing was delivered to the following:

The Honorable Bryan C. Dixon
District Court Judge
Oklahoma County Courthouse
321 Park Avenue, Room 821
Oklahoma City, Oklahoma 73102
VIA HAND DELIVERY

Robert D. Nelon
Hall, Estill, Hardwick, Gable, Golden & Nelson
Chase Tower, Suite 2900
100 North Broadway
Oklahoma City, Oklahoma 73102
bnelon@hallestill.com
ATTORNEY FOR PLAINTIFFS
VIA US MAIL AND EMAIL

Katie Townsend
The Reporters Committee for Freedom of the Press
1156 15th Street NW
Washington, DC 20005
ktownsend@rcfp.org
ATTORNEY FOR PLAINTIFFS
VIA US MAIL AND EMAIL

Steven J. Krise
General Counsel
Department of Public Safety
3600 Martin Luther King Ave.
Oklahoma City, OK 73111
405.425.2158 (Telephone)
405.425-2660 (Facsimile)
skrise@dps.state.ok.us
ATTORNEY FOR COMMISSIONER MICHAEL C. THOMPSON
VIA EMAIL



Jennifer E. Chance

The Oklahoma Department of Corrections (ODOC) establishes procedures for planning and carrying out the execution of a person convicted of a capital offense and sentenced to death. These procedures shall be followed as written unless deviation or adjustment is required, as determined by the director of Corrections or their designee (in the event of an absence). This procedure outlines the internal procedures and does not create any legally enforceable rights or obligations.

I. Definitions

A. Stay or Stop An Execution

1. Stay

An order by the governor or court of competent jurisdiction to relieve or suspend the execution of the judgment of death.

2. Stop

Upon order by the director, all acts congruent to an execution shall immediately cease until the director orders the execution to continue or a stay is ordered by the governor or court of competent jurisdiction.

II. Responsibility

The ODOC ensures the execution of a person sentenced to death under state law by a court of competent authority and jurisdiction is carried out in keeping with statute, case law and professional practices.

A. The ODOC shall make every effort in the planning and preparation of an execution to ensure the execution process:

1. Faithfully adheres to constitutional mandates against cruel and unusual punishment, in accordance with Article II, Section 9 of the Oklahoma Constitution and the Eighth Amendment to the United States Constitution;
2. Is handled in a manner that minimizes its impact on the safety, security and operational integrity of the facility and the community in which it occurs;
3. Accommodates the public's right to obtain certain information concerning the execution;
4. Reasonably addresses the privacy interests as provided by law;

- i. The warden will ensure the assigned cell is preserved and secured immediately after the offender is moved to the execution chamber. Entry will be limited to preservation of mission only and will be released by the inspector general once the execution is completed or a stay of execution is issued.
 - j. The offender may be offered a mild sedative.
 - k. No later than four hours prior to the execution the offender may be offered an additional mild sedative.
 - l. These time frames may be adjusted as necessary in the event of a stay of execution or other exigencies.
4. Notification to Proceed With Execution
 - a. Prior to moving the offender from the holding cell to the execution table, the director shall confer with the attorney general or designee and the governor or designee to confirm there is no legal impediment to proceeding with the lawful execution.
 - b. The H Unit Section chief shall direct the Restraint Team to prepare and escort the offender into the execution chamber.
 - c. The Restraint Team shall secure the offender on the execution table.
5. IV Site(s) Preparation and Establishment
 - a. The IV Team shall enter the Execution Room to prepare and insert a primary IV catheter and a backup IV catheter. The arm veins near the joint between the upper and lower arm shall be utilized as the preferred site for the IV injection.
 - b. The director, acting upon the advice of the IV Team leader, shall determine the catheter sites.
 - c. In the event that the IV Team is unable to establish an IV at a preferred site, the member(s) may establish an IV at an alternative site(s), including a central line, for use by the Special Operations Team when administering execution drugs.

- d. The IV Team may utilize a non-invasive device to assist in locating a vein.
 - e. The IV Team shall be allowed as much time as is necessary to establish a viable IV site(s).
 - f. If the IV Team is unable to establish viable IV sites(s) the member(s) shall consult with the director.
 - g. The director shall consult with others as necessary for the purpose of determining whether or how long to continue efforts to establish viable IV sites(s).
 - h. After one hour of unsuccessful IV attempts, the director shall contact the governor or designee to advise of the status and potentially request a postponement of the execution.
 - i. A central line shall not be used unless the person placing the line is qualified to place a central line.
6. Confirming and Recording Establishment of IV Sites(s)
- a. An IV Team member shall test the viability of the IV site with a low-pressure saline drip through IV tubing. If necessary, a heparin lock may be attached to the IV needle as an alternative to the saline drip.
 - b. The H Unit Section chief and IV Team leader shall both confirm the visibility of the IV sites.
 - c. The H Unit Section Team Recorder shall document in the Correctional Service Log the number of attempts to establish an IV site.
7. Using Alternative IV Sites
- a. The H Unit Section Team chief shall observe the offender during the injection process to look for signs of swelling or infiltration at the IV site, blood in the catheter, and leakage from the lines and other unusual signs or symptoms.
 - b. The H Unit Section Team chief shall determine whether it is necessary to use an alternate IV site.
 - c. Whenever it is necessary to use alternate IV sites, the Special Operation Team shall administer a full dosage of the

execution drugs through the alternate site, using additional syringes as necessary, prepared in accordance with the terms of this procedure.

- d. In the event the H Unit Section Team chief changes to another IV site, the Special Operation Team recorder shall capture that information on the Correctional Service Log.

8. Proceeding with the Execution

- a. When the offender is secured on the execution table by the Restraint Team and readied by the IV Team, the H Unit Section Team chief shall advise the director and order the witnesses to their respective seating.
- b. The director shall reconfirm with the attorney general or designee and the governor or designee that there is no legal impediment to proceeding. Upon oral confirmation that there are no legal impediments to proceeding with the execution, the director shall order the H Unit Section chief to proceed with the execution.
 - (1) If there is a legal impediment the director shall instruct the H Unit Section chief to stop the execution and to notify the offender witnesses that the execution has been stayed or delayed. The H Unit Section chief shall also notify the Command Team to notify the agency's public information officer in the Media Room.
- c. The H Unit Section chief shall read aloud a summary of the Warrant of Execution.
- d. The H Unit Section chief shall ask the offender if he wishes to make a last statement that is reasonable in length and does not contain vulgar language or intentionally offensive statements directed at the witnesses. The microphone shall remain on during the last statement, after which time it shall be turned off. The microphone may be turned off earlier in the event the offender uses vulgarity or makes intentionally offensive statements.

- e. The director shall instruct the disbursement of chemicals to begin in accordance with Attachment D entitled "Preparation and Administration of Chemicals."

G. Pronouncement and Documentation of Death

1. The director or designee shall announce death has occurred.
2. The H Unit Section chief shall complete and sign the return of the Death Warrant. The H Unit Section chief is also responsible for coordinating with the general counsel's office for the filing of the document with the sentencing court and the Oklahoma Court of Criminal Appeals within five business days.
3. The State Medical Examiner's Office shall be given custody of the body in order to issue a Certificate of Death.

H. Stay of Execution

1. Upon receipt of notification that the court and/or governor has issued a Stay of Execution, the director shall advise the Command Team.
2. Upon receipt of the notification, the H Unit Section chief shall:
 - a. Instruct the Special Operations Team to stand down.
 - b. Direct the Restraint Team to remove the offender from the chamber and return to the assigned cell if the stay of execution is less than 35 days.
 - (1) Prior to moving the offender back to the assigned cell, the inspector general shall release the cell.
 - (2) The assigned cell shall be thoroughly searched prior to placing the offender in the cell.
 - c. Advise the witnesses a Stay of Execution has been issued.
 - d. The Command Team shall inform the following teams of the Stay of Execution:
 - (1) Traffic Control Team Leader.
 - (2) Critical Incident Management Team Leader.
 - (3) Communications Director.



Mary Fallin
Governor

FILED

APR 29 2014

OKLAHOMA SECRETARY
OF STATE

EXECUTIVE DEPARTMENT
EXECUTIVE ORDER 2014-10

I, Mary Fallin, Governor of the State of Oklahoma, pursuant to Article 6 Section 10 of the Oklahoma Constitution, hereby grant a stay of the execution of Charles Frederick Warner of fourteen (14) days from the scheduled date of execution, April 29, 2014. This stay is issued to allow the Oklahoma Department of Corrections to evaluate the current execution protocol and to allow exhaustion of all possible legal remedies. The execution for Charles Frederick Warner is therefore scheduled for May 13, 2014.

This Executive Order shall be forwarded to the Director of the Oklahoma Department of Corrections and the Oklahoma Attorney General who shall cause the provisions of this Order to be implemented by all appropriate agencies of state government.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 29th day of April, 2014.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

Mary Fallin

MARY FALLIN

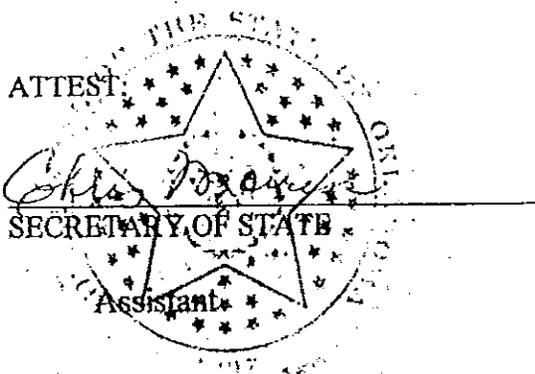


Exhibit B

046902



STATE OF OKLAHOMA
OFFICE OF THE GOVERNOR

January 8, 2016

Electronic Delivery

Ms. Katie Townsend
The Reporters Committee for Freedom of the Press
1156 15th Street NW
Washington, DC 20005
ktownsend@rcfp.org

Re: *Branstetter, et al., v. Fallin, et al.*, Oklahoma County Case No. CV-14-2372

Dear Ms. Townsend:

I have reviewed your correspondence of December 14, 2015.

In paragraph 3 of your letter, you state this office withheld 383 pages of responsive records in their entirety, citing Mr. Mullins cover letter to our Open Records response. This office only withheld 39 documents (consisting of 54 pages) of responsive but privileged documents, as the last paragraph of Mr. Mullin's letter states.

Further, you request a *Vaughn* index on the redactions and the withheld documents in the Open Records response provided to you on October 7, 2015 consisting of 41,697 pages. Although I disagree with your assertion we are required to produce a *Vaughn* index with our Open Records responses, you indicated, "Plaintiffs are willing to identify specific records to prioritize creating a *Vaughn* index." Please provide a list of the records you would like to prioritize. This will enable me to fully evaluate the validity of this request as it relates to discoverable matters within the scope of this litigation, and determine the time necessary to complete this task, should I agree to do so.

You also claim the Governor's production did not include email attachments. Contrary to your assertion, all non-privileged attachments to all emails have been produced. I have included a table below which illustrates this for each example email contained in your letter. No attachments were withheld unless they are contained in the 54 pages of documents this office did not release, as explained above.

Exhibit C

Page In Question	Attachment Name in Email	Title on Reference Document	See Page #s Below In Open Records Response
6522	Affidavit of Anita Trammel - Warner, Lockett	Affidavit of Anita Trammel in Pittsburg County	1373 - 1386
37054	OSP Protocol	Oklahoma State Penitentiary Execution Timeline/ Protocol	37076 - 37129
37061	Gattoni Ltr	Letter from Michael Oakley to Susana Gattoni	6976 - 6982
37061	Protocol dated 041414	Procedures for the Execution	37137 - 37247
37248	OK State Penitentiary Execution	Oklahoma State Penitentiary Execution Timeline/ Protocol	37076 - 37129
1807	Lockett - App for Exec date	Lockett v. State - Application for Execution Date	11267 - 11281
1807	Warner - App for Exec date	Warner v. State - Application for Execution Date	35644 - 35663

Your third assertion is the Governor's production included "encrypted emails," and you referenced pages 41658-41675 of the Open Records response. The "encrypted emails" you reference are attachments to a pleading authored by attorneys in your local counsel's law firm, Hall Estill, entitled "Reply in Support of Plaintiff's Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment." This pleading begins on Page 41472 of the Open Records response. This office received an electronic copy of that pleading from the Office of the Attorney General, and it was filed in *Lockett and Warner v. Evans, et al.*, Oklahoma County Case No. CV-2014-330 (the litigation that was the subject of the recusal of Judge Parrish). Further, the email attachments to the pleading are not records of the Governor's Office, rather records of the Attorney General's Office.

In your fourth request, you ask me to identify which private email accounts were searched for responsive documents to your Open Records request. The Governor does not use private email accounts to conduct official state business, with the exception that her private email account is used in a dual notification. To explain, the Governor's staff will, at times, send an email to the governor on both her official and private email account. That notification is captured on the state email server. The dual notification is to ensure the Governor sees the notification as soon as possible. At times, the Governor will respond to the dual notification from the private email. That response is also captured on the state server. Therefore, any record responsive to your Open Records request that is contained in the Governor's private email account is also captured on the state server and has been produced, unless it is contained in the 54 pages this office did not release, as explained above.

In summary:

- Only 54 pages of documents were withheld as privileged to your Open Records request;
- You may provide a list of prioritized documents for which you are requesting a *Vaughn* index. Upon receipt of the list, I will be able to meaningfully consider and respond to your request;
- No email attachments have been withheld, excluding attachments contained in the 54 pages of privileged and withheld documents;
- No encrypted emails were provided as part of the Open Records response. The documents you refer to are documents in the possession of your local counsel, Hall, Estill, and the Office of the Attorney General;
- Any use of private email accounts by the Governor or her staff is captured on the state server by use of our dual notification system.

The majority of the issues you so vehemently raised in your December 15, 2015 letter are issues that with a closer review by Plaintiff's counsel, would have prevented unnecessary time spent by me responding to assertions that are simply not true. The Governor and her staff work very hard and *always* act in good faith. The Governor has released more open records than all previous Oklahoma governors combined.

There is an interesting article in the December Oklahoma Bar Journal entitled "Civility in Lawyers' Writing." The article reminds readers of the ABA initiative that calls civility the "linchpin of our legal system" and a "hallmark of professionalism." I am hopeful this litigation can move forward with civility and professionalism, and without false, vehement accusations that have previously and routinely been contained in Plaintiffs' correspondence and pleadings, as it really does make the practice of law more pleasant.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer E. Chance". The signature is written in black ink and is positioned above the typed name.

Jennifer E. Chance
Deputy General Counsel



STATE OF OKLAHOMA
OFFICE OF THE GOVERNOR

February 22, 2016

Ms. Katie Townsend
The Reporters Committee for Freedom of the Press
1156 15th Street NW
Washington, DC 20005
ktownsend@rcfp.org

Re: *Branstetter, et al., v. Fallin, et al.*, Oklahoma County Case No. CV-14-2372

Ms. Townsend:

I have reviewed your correspondence dated January 19, 2016. It appears we have three unresolved issues:

1. Your request for a *Vaughn* index;
2. Your demand for this office to produce decrypted copies of the emails identified as pages 41658-41675, and
3. Your request for this office to search non-governmental email accounts and provide a *Vaughn* index for any emails withheld.

First, you stated in your January 19, 2016 letter, "...Plaintiffs appreciate your willingness to provide a *Vaughn* index..." To the contrary, I have not agreed to provide a *Vaughn* index. Perhaps my January 8, 2016 correspondence was confusing. I stated in that letter, "Please provide a list of the records you would like to prioritize. This will enable me to fully evaluate the validity of this request as it relates to discoverable matters within the scope of this litigation, and determine the time necessary to complete this task, should I agree to do so." (Emphasis added)

Thus, when I receive your list of "prioritized documents," I will review the documents and advise whether or not I agree to provide a *Vaughn* index as to those records. If you have any questions regarding this issue, please feel free to call me.

Second, as I attempted to explain in my January 8, 2016 letter, this office does not possess unencrypted copies of the emails contained in pages 41658-41675. Those "encrypted emails" were not generated by this office. As my previous letter stated: The "encrypted emails" you reference are attachments to a pleading authored by attorneys in your local counsel's law firm,

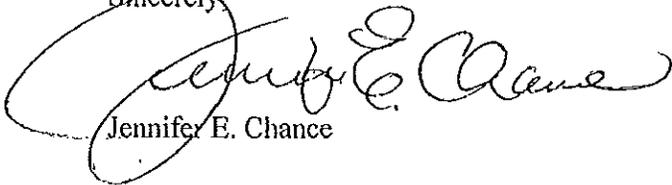
Hall Estill, entitled "Reply in Support of Plaintiff's Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment." This pleading begins on Page 41472 of the Open Records response. This office received an electronic copy of that pleading from the Office of the Attorney General, and it was filed in *Lockett and Warner v. Evans, et al.*, Oklahoma County Case No. CV-2014-330 (the litigation that was the subject of the recusal of Judge Parrish).

The emails contained in 41658-41675 are emails that were generated by the Attorney General's Office. This office does not possess unencrypted versions of those emails, nor do I have access to those emails.

Third, this office has not searched non-governmental email accounts in responding to the Open Records request that is the subject of this litigation. While I previously explained the dual notification the Governor's staff uses, there are instances where a non-governmental email account may be used by the Governor or her staff when communicating with other staff members via staff's *governmental* email accounts. Thus, in all instances, these communications are nevertheless captured on the State server and preserved. As a result, these communications are available in a search of the state server for open records. This is clearly evidenced by the three exhibits attached to your January 19, 2016 correspondence. This office does not use non-governmental email accounts to circumvent the Open Records Act.

Please feel free to call me directly if you have any other questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer E. Chance". The signature is written in black ink and is positioned above the printed name.

Jennifer E. Chance