

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

ZIVA BRANSTETTER and BH MEDIA)
GROUP INC. d/b/a TULSA WORLD,)

Plaintiffs,)

vs.)

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.)

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Case No. CV-2014-2372

GOVERNOR FALLIN'S RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

RESPECTFULLY SUBMITTED THIS 18th DAY OF MARCH, 2015.

Robert A. Nance, OBA #6581
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
528 NW 12th Street
Oklahoma City, OK 73103
Telephone: (405) 843-9909
Facsimile: (405) 842-2913 fax
Email: rnance@riggsabney.com

Stephanie L. Theban, OBA No. 10362
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Frisco Building
Tulsa, OK 74119
Telephone: (918) 587-3161
Facsimile: (918) 587-9708
Email: stheban@riggsabney.com

ATTORNEYS FOR DEFENANTS
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

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Governor Mary Fallin respectfully submits this as her 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 purportedly 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 the 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 3, Supreme Court Order.

18. Admitted.

4. Additional undisputed facts regarding the Governor's office.

1. The Governor's General Counsel Office consists of the General Counsel, two Deputy General Counsels and a Paralegal/Extradition Coordinator. Deputy General Counsel Jennifer Chance and Paralegal/Extradition Coordinator Audrey Rockwell have the most direct responsibility for ORA response matters. Exhibit 1, Rockwell Affidavit ¶ 2. Exhibit 2, Chance Affidavit ¶ 20.

2. Ms. Chance additionally has responsibilities to coordinate with the Cabinet Secretaries of Education and Workforce Development, Finance, Administration and Information Technology, Safety and Security, Science and Technology, and Commerce and Tourism. She is also assigned to the State Board of Equalization and the Oklahoma Capitol Improvement Authority. She also oversees extraditions and detainers, judicial selection and judicial reform, and pardons, paroles, and executions. Exhibit 2, Chance Affidavit ¶¶ 3-5.

3. Further, Ms. Chance has responsibilities relating to the Department of Corrections and the Oklahoma Highway Safety Office. She is liaison to the District Attorney's Council, the Office of Juvenile Affairs, the Commissioners of the Land Office, the Department of Tourism, and assists the General Counsel and Director of Appointments in Judicial Selection. She reviews pending legislation and meets with legislators to discuss policy positions and discuss the effects of pending legislation on executive agencies. She initially reviews all bills and analyzes passed bills, attends bill signings with the Governor, and drafts veto messages when required. She oversees litigation involving the Office of the Governor. Exhibit 2, Chance Affidavit ¶¶ 6-7, 9-16.

4. Ms. Chance attends meetings and reviews interim studies involving any area under her responsibility. She meets with legislators and constituents when requested

regarding areas she handles. She advises the Director of Constituent Services regarding legal issues. She serves as Director of Gaming Compliance and hires a Deputy Director and Compliance officer. She develops policies and procedures for casino inspections and enforcement of the Model Tribal Gaming Compact. She meets with tribal officials and attorneys regarding casino inspection findings. She also meets with gaming testing laboratories regarding game certifications. She oversees litigation regarding Compact compliance. She also coordinates with the Oklahoma Horseracing Commission and the State Auditor and Inspector's Office in an effort to reorganize the Gaming Compliance Unit. Exhibit 2, Chance Affidavit ¶¶ 18, 21.

5. Ms. Rockwell is the Paralegal/Extradition Coordinator for the General Counsel's Office. She was also the Executive Assistant for the Native American Liaison for the Governor from August 8, 2012 until February 13, 2015. She schedules meetings with many individuals and coordinates with the schedules of the Governor, the Chief of Staff and other departments within the Governor's office, and with outside agency directors, cabinet secretaries, legislators and others. In her former capacity with the Native American Liaison she organized and scheduled meetings with tribal leaders as well. Ms. Rockwell also prepares letters of support for those making grant applications. Exhibit 1, Rockwell Affidavit ¶¶ 4-5.
6. Ms. Rockwell logs passed legislation in and calendars internal deadlines for the analysis and action on bills. She prepares bills for the Governor's signature, creating signing statements. She places any veto messages in final format. She prepares information necessary for filing bills with the Secretary of State and makes the filings. After receipt of Plaintiffs' ORA request on May 1, 2014, the office of the Governor acted on 236 bills following the conclusion of the 2014 legislative session. Exhibit 1, Rockwell Affidavit ¶ 6.
7. Since May, 2014 Ms. Rockwell has processed 110 foreign/domestic extraditions and reviewed 150 interstate detainers. She is in weekly communication with the Pardon and Parole Board and the Department of Corrections regarding pardons, paroles, and parole revocations. Since May, 2014 Ms. Rockwell has handled 103 pardons, 122 paroles, 4 medical paroles, and 118 parole revocations. Exhibit 1, Rockwell Affidavit ¶¶ 7-8.
8. Additionally she calendars deadlines and creates electronic folders for administrative rulemaking. Since May 2014 the General Counsel's office received and processed 37 emergency rules, 87 proposed permanent rules, and 50 permanent rules. Additionally, Ms. Rockwell assists with Executive Orders and Proclamations. Since May 2014 the Governor has issued 28 Executive Orders. Exhibit 1, Rockwell Affidavit ¶¶ 9-10.
9. In complying with ORA requests, Ms. Rockwell reviews the request to see if it requires a document "pull," or if it is a request for records maintained by a staff member. If it requires a document pull she places it in the queue (a system

established January 2013) and sends an acknowledgement to the requester. If the request does not require a document pull, it is answered immediately, such as providing current copies of the ORA queue log. Since May 2014 she had responded to such letters on multiple occasions. Exhibit 1, Rockwell Affidavit ¶¶ 13-15.

10. The Governor's office has received 11 ORA requests regarding executions with some reference to the Lockett execution. In such circumstances Ms. Rockwell sends a batch of electronic search terms to the Information Services Division in order to search for emails. The best way to handle multiple requests on the same topic is to create the broadest request for search terms encompassed by all related requesters and answer all requesting parties at the same time. This saves the time and effort of making and managing multiples searches and responses on closely related topics. A technician searches the necessary email accounts and provides the office with a batch of emails containing the chosen search terms. Ms. Rockwell puts these emails in a PDF format for review by an attorney. Exhibit 1, Rockwell Affidavit ¶¶ 16-17.
11. Ms. Rockwell also identifies documents not stored on a computer and speaks with relevant individuals from each department within the office to verify whether they have paper documents or electronic documents on their work network drives. If such responsive documents are found to exist they are pulled or printed and then scanned into the open record file. This open record file is then reviewed by a Deputy General Counsel for responsiveness and privilege. When the review is complete, Ms. Rockwell collates responsive documents into a file or files (depending on size) and reviews them for personal and protected information that should be redacted. A Deputy General Counsel re-reviews her work for documents missed in redaction. Ms. Rockwell bates numbers the pages and then produces the documents to the requester. Exhibit 1, Rockwell Affidavit ¶¶ 18-21.
12. During Ms. Rockwell's employment in the Governor's office, that office has never refused or failed to produce documents responsive to a request for records. The policy is clearly to respond to every request as quickly as possible consistent with the office's other essential functions. During her employment with the Governor's office the office has produced 1,029,140 pages of documents. Exhibit 1, Rockwell Affidavit ¶¶ 22-23.
13. In preparation to responding to Plaintiffs' request (and other related requests), an email documentation pull was sent to Information Services and all physical documentation regarding executions per the request has been gathered and scanned in. Ms. Rockwell has been working diligently on these requests. Responsive documents will be produced as soon as possible given the constraints of personnel, budget, and other resources to accomplish this, and other essential work. Exhibit 1, Rockwell Affidavit ¶¶ 26, 29.
14. Ms. Chance is also assigned to make an attorney review and release of ORA request responses, which is a lengthy and time consuming process. When she receives documents in electronic form from the paralegal (Ms. Rockwell), she first determines

which are actually responsive to the request. Approximately one third of the documents usually produced are not responsive, but must be looked at anyway. Ms. Chance also looks at the responsive documents for privilege and sensitivity. Ms. Chance consults with the General Counsel about potentially privileged documents and notifies the Chief of Staff about potentially sensitive documents. The General Counsel decides if a claim of privilege will be made. Ms. Chance reviews the documents again to double check Ms. Rockwell's redactions, if any. The Governor's office redacts personal information, such as personal cell phone numbers and residential addresses as potential intrusions on privacy. Before releasing documents, Ms. Chance and Ms. Rockwell determine if anyone should be notified regarding sensitive documents prior to their release, and, if so, those persons are notified. Ms. Chance drafts a letter for the General Counsel to the requesting party which details whether or not a claim of privilege is being made, and notifying the requesting party of the release. Ms. Rockwell then releases the records. Exhibit 2, Chance Affidavit ¶ 20.

15. On March 17, 2013 the Governor's office released 61,744 pages of records regarding the lesser prairie chicken to two requesters. These requests were ahead of Plaintiffs' in the queue. Exhibit 2, Rockwell Affidavit ¶ 28.
16. 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 Governor Fallin 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 therefor, 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 require 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 simplicity of the task, the Court

determined this 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 than 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 misrepresents 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*, Statement of Undisputed Facts, ¶ 16. 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 both the Governor’s office and the Department of Public Safety have stated that they will make requested records available, subject to various privileges that apply.

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 receipt 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 Governor has not violated the ORA by denying Plaintiffs’ records.

Plaintiffs claim that the time necessary for the Governor to provide requested documents is unreasonable. Brief, p. 11. However, Plaintiffs’ sole and steadfast focus on only their own needs, and not the larger picture of governing Oklahoma, leads them to ignore the many other tasks and responsibilities attested to in the affidavits of Audrey Rockwell, Exhibit 1, and Jennifer Chance, Exhibit 2. Plaintiffs make no mention of the work done for the people of Oklahoma by the Governor’s office and by her General Counsel’s office regarding relations with Native American tribes, supporting grant applications, tracking and preparing legislation for signature, managing extraditions and detainers, handling pardons, paroles, and revocations of paroles, administrative rulemaking, assisting with Executive Orders and Proclamations, as well as responding to ORA requests. *See*, Affidavits of Audrey Rockwell, Exhibit 1, and Jennifer Chance, Exhibit 2. The Governor’s office has just released 61,744 pages of records to two earlier requesters, and eliminated a major project from ahead of Plaintiffs in the queue. The time to respond to so large a request, consistent with the other undisputed duties of the Governor’s

office, would be substantial. Yet Plaintiffs dismiss the effort involved with a suggestion the Governor should apply to the Legislature for help. Brief p. 16. This is a singularly insensitive suggestion in a year with a hole in the budget of more than \$600 million. Plaintiffs seem willing to take money from other more essential public services in order to get their requested documents on a schedule more to their liking.

Plaintiffs misread the length of the queue at the time they filed their request. According to Ms. Rockwell's affidavit, there were twenty five requests in line ahead of theirs, not 15. Quite simply, in the statutory provision saying public body must provide "prompt, reasonable access" to its records *but may establish reasonable procedures to prevent excessive disruptions of its essential functions* the reasonable procedures are part of what is meant by reasonable access. The law does not require public officials to drop everything they are doing for all of the people to fulfill the request of a very few of the people, no matter how prominent or politically favored they are. Nor does the law require the prominent be allowed to cut in line before their neighbors in getting ORA requests responded to.

Moreover, Ms. Branstetter's request is not as straightforward as she would have the Court believe, because she asked for email communications between the Governor, her various legal counsel and highest advisors. This request implicates, at a minimum, the attorney client privilege and the deliberative process privilege. These are matters that require attorney review, once responsive emails are located.

Plaintiffs are not entitled to judgment as a matter of law, because the Governor's office has acted reasonably, and, more fundamentally, the Governor's office has not, and will not, deny their request for records. Such a denial is the jurisdictionally required predicate for an ORA

lawsuit, and the Governor's *admitted* agreement to produce records deprives the Plaintiffs, and the Court, of jurisdiction to proceed farther.

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, 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 that 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). However, 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. However, 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 court 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. Governor Fallin particularly joins with Plaintiffs in their devotion to the right of the people to exercise their inherent political power, since the people have twice exercised that power to elect her Governor.

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 its essential functions. The public Plaintiffs purport to serve might consider, for instance, dealing with a \$600 million budget hole more important than their ORA request. However, Plaintiffs clearly consider their requests more important than other things pending in the Governor’s office. 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.

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 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 Ms. Chance, Ms. Rockwell, or others, to lay aside their other extensive duties serving the people of Oklahoma in order to provide Plaintiffs with their promised records before tending to other essential tasks of the Governor's office.

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

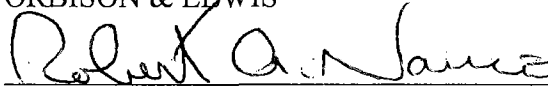
as to be capable of a decision granting or denying specific relief of a conclusive nature. *Dank v. Benson*, 2000 OK 40, ¶ 8, 5 P.3d 1088, 1091 (emphasis in original). Additionally, for declaratory relief the issue involved in the controversy must be ripe for judicial determination. *Knight v. Miller*, 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,

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS



Robert A. Nance, OBA No. 6581
528 NW 12th Street
Oklahoma City, Oklahoma 73103
Telephone: (405) 843-9909
Facsimile: (405) 842-2913

-AND-

Stephanie L. Theban, OBA No. 10362
502 West Sixth Street
Frisco Building
Tulsa, OK 74119
Telephone: (918) 587-3161
Facsimile: (918) 587-9708

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

Legislative Duties.

6. During the legislative session I receive all the legislation passed by the Oklahoma House of Representatives and the Oklahoma State Senate. Once received I have to log the bills into the Office of Management and Enterprise Services database so that they can begin to create a bill analysis. I then calendar the bills for deadline, distribute copy of the received bills to the Secretary of State, the Chief of Staff, the four (4) members of the policy office, and all the attorneys. I then prepare the bills for signature by the governor. This requires creating a bill signing statement for each piece of legislation received. If a veto message is needed I place it into final format. After the Governor has acted on the legislation, I fill out the information page on the back of the bill requiring date received and the date and time of Governor's signature. I then file the bills with the Secretary of State's office and distribute the bill signing messages to the designated legislative body. Due to the fact that I track and receive the legislation, I field a multitude of daily questions regarding the status of legislation and when the Governor will be signing legislation, etc. After May 1, 2014, which is the date our office received the open record request from the Tulsa World in our office, the office of the Governor acted on two hundred and thirty-six (236) bills following the conclusion of the 2014 legislative session.

Duties regarding Extraditions and Detainers.

7. My duty as the extradition coordinator for the state of Oklahoma includes handling all requisitions for Governor's warrants from each District Attorney's office, all requisitions from Governor's Warrants from other Governors, and all Interstate Agreement on Detainers for the state of Oklahoma. Each extradition requires a review of each page of a packet (foreign requisitions packets include 2 copies of the requisition and domestic requisitions include 3 copies of the requisition) to verify that it meets all legal requirements as required by the state of Oklahoma. Since May of 2014, I have completed one hundred and ten (110) foreign/domestic extraditions. Interstate Agreement on Detainers is a process of form exchange between the requesting state and the receiving state. As the state administrator for the Interstate Agreement on Detainers, it is my duty, when the state of Oklahoma is the receiving state, to review all forms completed in the process to verify that the documents were completed in the proper order and that each form was fully executed. If the requesting party has met that standard I then sign Form VI so that the requesting party can coordinate with the sending state for pick-up of the inmate. Since May of 2014, I have reviewed one hundred and fifty (150) Interstate Agreement on Detainers. I receive calls and emails daily from a multitude of in state and out of state agencies seeking assistance on both extraditions and interstate agreement on detainers.

Pardon and Parole Duties.

8. Another duty the office of the General Counsel handles for the Governor is the review of each pardon, parole, and revocation. I am weekly in communication with staffs of both the Pardon and Parole Board and the Department of Corrections. When a request for the Governor's

action is received I calendar the deadline, create a packet, and forward the file to reviewing Deputy General Counsel, track the file through the review/decision process, edit any certificates as requested by the Governor, notify the Pardon and Parole Board and/or the Department Corrections of the Governor's decision, and then file that decision with the Secretary of State's office. A packet for pardon/parole consists of the Pardon and Parole Board's file that has to be printed, the certificate of parole/pardon that has to be printed, any additional information regarding the crime or the offender, and any constituent mail received regarding the individual. A revocation packet consists of the Department of Corrections file, the Pardon and Parole Board file, any additional information regarding parole violations, any constituent mail received, and the revocation certificate that has to be printed. Our office has an open door policy on meeting with individuals regarding their input on an individual's pardon/parole/revocation. I am responsible for coordinating and scheduling these meetings. These meetings can be with a victim, a family member of the inmate, or a District Attorney. I am the office contact for state legislators and their assistants regarding questions on pardon and parole issues. I also handle most of the constituent calls/emails regarding questions on pardons, paroles, revocations, and inmates in the Department of Corrections. Since May of 2014, our office has handled one hundred and three (103) pardons, one hundred and twenty-two (122) paroles, four (4) medical paroles (which statutorily require action in four (4) business days), and one hundred and eighteen (118) parole revocations.

Duties regarding Administrative Rulemaking.

9. Another duty of our office is the review of administrative rules. Agencies electronically file emergency, proposed permanent, and permanent rules either via the state's website or email. Once our office has received notification of the rules it is my duty to calendar the deadline if required; create an electronic folder; print the rules if review by an Deputy General Counsel is required; pass the file to the reviewing Deputy General Counsel; review the signature document verifying for proper statutory authority, dates, and that it includes all rules to be acted on by the Governor; file Governor's action with the Secretary of State's Office; for emergency rules show Governor's action on the rules website; send an email to required parties notifying them of Governor's action; and mail the signature page to requesting agency. Since May of 2014, our office has received and processed thirty-seven (37) emergency rules, eighty-seven (87) proposed permanent rules, and fifty (50) permanent rules.

Duties regarding Executive Orders and Executive Proclamations.

10. The Governor's Executive Orders are processed through the General Counsel's office. When an active duty soldier, a former elected official, or statute requires the flags to be lowered to half-mast it is my duty to write the executive order, have it reviewed by a Deputy General Counsel, prepare it for Governor's signature, file it with the Secretary of State, and notify required parties. I typically handle all constituent calls regarding the lowering of the flags. All other executive orders are written by an Deputy General Counsel and reviewed by appropriate

staff. I prepare the document for signature, file it with the Secretary of State, and notify required parties. One of the most important executive orders we issue each year is the state holiday executive order which requires extensive review and work. I work with the press department frequently to answer questions regarding our executive orders. This also includes coordinating the Executive Orders for the Governor's new cabinet and the Executive Order carrying over previous administrations executive orders. Since May of 2014, the Governor has issued twenty-eight (28) executive orders.

11. Since May of 2014, the Governor has issued nine (9) Executive Proclamations. An executive proclamation requires coordination with state agencies, county agencies, the state election board; writing the proclamation (I write special election and appointment proclamations); review by the named or affected parties. I prepare the document for Governor's signature, file the document with the Secretary of State, and send notification to the required parties.

Open Records Duties.

12. In addition to my regular duties I also have a role in the production of Open Records Requests. We receive open record requests via email, letter, and from the communications department.

13. Beginning January 2013, the Governor's office implemented a process to respond to Open Records Requests. We always follow the process established by the General Counsel.

14. When I receive a request I review it to see if it requires a document/email pull or if it is a request for documents maintained by a staff member. If it requires a document pull I place the request into the open records queue. I then send an acknowledgement email or letter to the requesting party giving them their assigned queue number and the request is entered into the queue. See attached log.

15. If the request does not require a document pull it is answered immediately. For example we constantly release a copy of the open records log/queue to requesting members of the press. I will also send a letter to an individual when they request records that our office does not maintain. Since May of 2014, I have responded to Open Records document requests on a regular basis with release of responsive documents or applicable letters on multiple of occasions.

16. The Governor's office often receives multiple open record requests regarding the same topic. For example, we have eleven (11) different open records requests regarding executions. See attached log.

17. I send a batch of search terms to the Information Services Division of the Office of Management Enterprise Services in order to search for requested emails. In order to serve all requesting parties we decided the best way to handle multiple requests on the same topic would be to create the broadest request encompassed by all related requesters and answer all requesting parties at the same time. This saves us the time and effort of making and managing multiple searches and responses on closely related topics. The assigned technician searches the necessary email accounts for the specified search terms and provides our office with a batch of emails containing the chosen search terms. That document is then transferred to our network drive. I then have to export those files from the outlook .pst format to a .pdf format. This allows the reviewing attorney to review all documents pulled by the technician for actual responsiveness to the Open Records Act requests.

18. I also identify any documents that are not stored on the State's computer for production. In order to complete this step, I speak with an individual from each department within our office to verify whether they have paper documents or electronic documents on their work network drives. If those documents are found to exist they are pulled and/or printed then scanned into the open records file.

19. The Deputy General Counsel then conducts a privilege and responsiveness review of the documents provided by Information Services.

20. Once the review is complete, I then collate all responsive documents into a file or files dependent on the number of responsive pages. I then review those files for personal and protected information that needs to be redacted. Any private information is then redacted from the file.

21. The attorney then re-reviews the documents for information missed for redaction. I Bates number the pages and then produce the request.

22. During my employment the Governor's office has never refused or failed to produce a document responsive to a request for records. In fact, the policy is clear – we will respond to every request as quickly as possible consistent with our other essential functions.

Number of Pages of Records Produced.

23. Since I have been employed we have produced one million twenty-nine thousand one hundred forty (1,029,140) pages of documents. To put this into perspective, a single box of copy paper contains 2,500 sheets of paper. I have been responsible for the production of the equivalent of 411.66 boxes of copy paper in just two and a half years.

Current Request of Plaintiffs Branstetter and the Tulsa World.

24. The request at issue in this case is numbered 2014-016.
25. At the time of receipt of the request it was the twenty-fifth (25th) in the line of active requests. Ahead of the request were requests 2013-023, 2013-025 – 2013-032, and 2014-001 – 2014-015. See log attached.
26. In preparation to responding to Plaintiffs' request the email documentation pull was sent to the Information Services Division of the Office of Management Enterprise Services and all physical documentation regarding executions per the request has been gathered, and scanned in.
27. During the pendency request 2014-015 the majority of my efforts regarding open records requests have been the following:
- a. Processing other, earlier requests as outlined above and making productions of responsive documents. The largest of this was producing the responsive documents for open record request 2014-008 and 2014-012.
 - b. I assigned our fall intern to begin moving documents for request 2014-007/ 2014-012 from .pst format to .pdf format. Our intern completed the project in his semester with our office. He worked three days a week part-time. He was occasionally pulled from this project to assist with time sensitive issues but this rarely occurred.
 - c. The Deputy General Counsel then began to review the documents for responsiveness.
28. On March 17, 2015, the Governor's office released sixty-one thousand seven hundred and forty-four 61,744 pages of records regarding the lesser prairie chicken and endangered species to two requesters. These requests were ahead of Plaintiffs' in the queue.

Conclusion.

29. I have been working diligently on these requests. I typically work 40-50 hours per week on all the tasks assigned to me. Responsive documents will be produced as soon as possible given the constraints of personnel, budget, and other resources to accomplish this, and other essential work. This office is committed to providing full and accurate responses to requests for records.

FURTHER AFIANT SAYETH NOT.

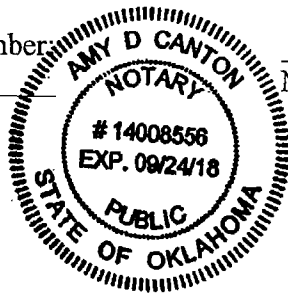
Dated this 18th day of March, 2015.

Audrey Rockwell
Audrey Rockwell

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

My Commission Expires:
9-24-2018

My Commission Number:
14008556



[Signature]
Notary Public

Completed	Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Dept	# of Pages in Response
	2014-001	1/10/2014	All communication between Representative Glen Mulready and GMF office re: Health Care; Affordable Care Act; OK Health Insurance Exchange Program	Representative M. Ritze, D.O.	7/15/2014	Legal	22
	2014-002	1/13/2014	Any Open Records Requests denied by the Office of the Governor and the reasoning requests were denied and/or partially denied/withheld	Michael Konopasek, News 9	8/5/2014	Legal/ Press	14
	2014-003	3/5/2014	Emails to or from Katie Altshuler re: Insure Oklahoma and the new "Oklahoma Plan" on health coverage beginning Oct. 1, 2013	Warren Vieth, OK Watch	8/6/2014	Legal	717
	2014-004	3/12/2014	Communications with the Governor's office regarding 57 O.S. § 332.7(A) and Commutations from 2011 to March 13, 2014.	Robert Cotner, OSR DOC #093780	8/7/2014	Legal	4651
	2014-005	3/12/2014	A list of all state employees retirement funds that have stock in private prisons	Robert Cotner, OSR DOC #093780	8/7/2014	Legal	1
	2014-006	3/13/2014	Emails sent or received by Denise Northrup or AJ Mallory re: Clark Jolley, US House District 5, Jacob(Jake) Parsons, Kaleb Bennett, Fount Holland, Chad Alexander, fundraiser(s), endorsements for US House District 5	Clifton Adcock, OK Watch	8/8/2014	Legal	203
	2014-007	3/27/2014	All emails sent or received by GMF and staff regarding: Dusten Brown, the Capobiancos, and Baby Veronica	Michael Overall, Tulsa World	4/18/2014	Legal	2638
	2014-008	4/7/2014	All communication re: State v. US Dept of Interior, Case No. CIV. NO. 14-123 (N. Dist); any litigation issues on "endangered" or "threatened" species under the Endangered Species Act(ESA); Settlement Agreements between US Fish and Wildlife that concern FWS's listing of species under the ESA	Amy Atwood, Center for Biological Diversity	3/13/2015	Legal	61744
	2014-009	4/9/2014	All documents, records, and communications regarding GMF Communication Personnel(this includes people responsible for disseminating press releases) sick leave, annual leave, or any other type of leave taken.	Wallace Collins, OK Democrats	3/19/2015	Legal	57

2014-010	4/10/2014	All communication with GMF and staff re: Gross Production Tax Incentive for Horizontal Drilling	F.S. Barnes, attorney	in the works		
2014-011	4/22/2014	GMF staff emails and text messages re: 2014 executions	B. McBride, AP	in the works		
2014-012	4/22/2014	GMF and staff electronic communications starting Jan. 1, 2011 until fulfillment of request re: lesser prairie chicken, LPC, prairie chicken, endangered species, threatened species, US Fish & Wildlife, Fish & Wildlife, FWS, USFWS, Endangered Species Act, ESA, Western Assoc. of Fish & Wildlife Agencies, WAFWA, Dan Ashe, Alisa Shull, OK Ecological Services Field Office	Joe Wertz, State Impact	see 2014-007	Legal	2014-007
2014-013	4/22/2014	GMF and staff electronic communications starting Jan. 1, 2011 until fulfillment of request re: Wind energy, wind power, solar power, solar energy, turbine, wind farm, solar panel, Senate Bill/ SB 1440, Senate Bill/ SB 1159, 1140, 1559, EDP Renewables, OK Property Rights Assoc, TradeWind, Mustang Run, Wind Capital Grp, Frank Robson, Frank C. Robson, Robson, Drummond, Wind Coalition, Curt Roggow, Apex Clean Energy, OK Wind Energy Development Act	Joe Wertz, State Impact			
2014-014	4/23/2014	GMF and staff electronic communications starting Jan. 1, 2011 until fulfillment of request re: gross production, severance tax, horizontal drilling, drilling incentive, oil tax, oil taxes, drilling tax, drilling taxes, OK Independent Petroleum Association, OIPA, OK Oil & Gas Association, OKMOGA	Joe Wertz, State Impact	see 2014-010		
2014-015	4/30/2014	Denise Northrup, Steve Mullins, and GMF emails, text messages or instant messages re: the execution of Clayton Lockett or Charles Warner from April 20, 2014 to April 30, 2014	Ryan McNeill, Thomson Reuters	see 2014-011		
2014-016	5/1/2014	GMF and staff emails re: Execution of Clayton Lockett and Charles Warner from March 1, 2014 to May 1, 2014	Ziva Branstetter, Tulsa World	see 2014-011		
2014-017	5/5/2014	Autopsy report for Clayton Lockett	Molly Hennessy-Fiske, LA Times	see 2014-011		

2014-018	5/6/2014	Communications from and to the Office of Governor Mary Fallin between Feb. 1 to May 5, 2014 re: Execution protocol, execution drugs, Clayton Lockett, Charles Warner	Sean Murphy, AP	see 2014-011		
2014-019	5/13/2014	Any and all communications with GMF and staff re: Nursing homes, long term care facilities, assisted living, group homes, icfm's, nursing home operators, nursing home owners, nursing home administrator's, long term care lobbyists, long term care advocacy groups, representatives of long term care associations, A Perfect Cause, Wes Bledsoe, Fern Horton	A Perfect Cause			
2014-020	5/19/2014	Communications with the Governor Fallin and staff re: Executions of Clayton Lockett and Charles Warner	Clifton Adcock, OK Watch	see 2014-011		
2014-021	5/20/2014	Communications with Governor Fallin and staff re: Executions of Clayton Lockett and Charles Warner	Brady Henderson, ACLU	see 2014-011		
2014-022	5/29/2014	A copy of the report regarding the investigation of the Execution of Clayton Lockett.	Graham Brewer, OPUBCO	see 2014-011		
2014-023	6/9/2014	Records relating to the appointment of Joe Highberger to the Oklahoma Funeral Board.	Jim Parks, jim_parks@parksbrothers.net			
2014-024	6/13/2014	Communications with Governor Fallin and staff re: Executions of Clayton Lockett	Ben Crair, New Republic	see 2014-011		
2014-025	6/20/2014	May 16, 2014 to June 13, 2014 any communications with Governor Fallin and staff re: Common Core, House Bill 3399	Nate Robson, OK Watch			
2014-026	6/24/2014	All emails sent or received by GMF and staff from Sec. Teague and DEQ re: Public Water Supply (PWS), Private Investigators, Wendy Caperton, and Don Armes	Phil Cross, Fox 25			
2014-027	6/16/2014	Communications with GMF and Staff re: executions, lethal injection drugs, Richard Glossip, Clayton Lockett, Charles Warner	Katie Fretland	see 2014-011		
2014-028	7/11/2014	All application material submitted to the Governor's office by John Harrington for consideration for public appointment	Phil Cross, Fox 25			
2014-029	7/16/2014	All communications regarding the execution of Garry Thomas Allen and Brian Darrell Davis	Arnold Hamilton, the Oklahoma Observer	see 2014-011		
2014-030	7/16/2014	Emails, Calls, or Texts between GMF and R. Sommers from June 23, 2014 to July 16, 2014.	Nate Robson, OK Watch			

2014-031	7/16/2014	Emails, Calls, or Texts between GMF and J. Barresi from June 23, 2014 to July 16, 2014.	Nate Robson, OK Watch			
2014-032	7/30/2014	Emails or Letters to or from GMF and staff re: Fort Sill, Ft Sill from June 1, 2014 to start date	Ben Felder, OK Gazette			
2014-033	8/19/2014	Communications with the Office of Governor Mary Fallin re: Public Service Announcements	Wallace Collins, OK Democrats			
2014-034	8/20/2014	Any records retained by the Office of the Governor re: expenditures from the Governor's Closing Fund or Quick Action Closing Fund (62 OS Sec 48.2) since January 2011.	Art Kane, Watchdog.org			
2014-035	8/21/2014	Emails between GMF and GRP re: Steven C. Anagnost, M.D.	Richard Warzynski, Sneed Lang PC			
2014-036	8/25/2014	Emails between GMF, GRP, and AG Pruitt re: Steven C. Anagnost, Oklahoma State Board of Medical Licensure, and Case No. 09-10-3861	Richard Warzynski, Sneed Lang PC			
2014-037	9/23/2014	Any records from Jan 2012 to present re: Judicial Reform; term/age limits; partisan/non-partisan elections for the OK Sup Ct; Judicial Nominating Committee reform; SJR 21	ACLU			

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF JENNIFER CHANCE

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA) SS.

Jennifer E. Chance, being of lawful age and first being sworn upon her oath, deposes and states as follows.

1. I am making this affidavit to support the response of Governor Mary Fallin to a Motion for Summary Judgment filed against her in the case of *Branstetter and BH Media Group, Inc. v. Fallin and Thompson*, District Court of Oklahoma County Case No. CV-2014-2372. I have personal knowledge of the matters set forth herein.

2. I am Deputy General Counsel for the Office of Governor Mary Fallin. I have been employed in that capacity since November 2013. I am also employed as the Director of the Gaming Compliance Unit for the State of Oklahoma. I have been employed in that capacity since June 1, 2014.

General Duties.

3. As Deputy General Counsel, I am assigned cabinet secretaries with which I am primarily responsible communicating and coordination on behalf of the Governor’s office. Each cabinet secretary is responsible for the oversight of particular executive agencies. I am assigned the following cabinet secretaries: Secretary of Education and Workforce Development, Secretary of Finance, Administration and Information Technology, Secretary of Safety and Security, Secretary of Science and Technology, and Secretary of Commerce and Tourism. I am also assigned to staff the State Board of Equalization and the Oklahoma Capitol Improvement Authority. I am also responsible for the oversight of extraditions and detainers, judicial selection and judicial reform, open records, open meetings, pardons, paroles and executions.

Pardon and Parole Responsibilities.

4. The Pardon and Parole Board (PPB) is included under the responsibilities of the Secretary of Safety and Security. Since my employment here began, I have been the direct contact for the Executive Director and the Chairman of the Board for communication with the Governor and the General Counsel’s office. During May 2, 2014-present, this has included extensive communication regarding significant personnel, operating, and policy issues including the resignation of the acting executive director and general counsel, hiring an interim executive director, and the search for a permanent executive director, general counsel and other staff positions. Additionally, I have been responsible for identifying new PPB member applicants for vacancies on the Board, coordinating the application and selection process, and making

recommendations to the Governor. I am also responsible for attending portions of PPB meetings as needed, which also includes attending some clemency hearings. I am responsible for coordinating with the District Attorney's Council regarding their concerns with the Board and Board meetings. I also coordinate between the Board and the Department of Corrections Probation and Parole division regarding parole revocations, executive parole revocation hearings, and executive parole revocation decisions.

5. I review and make recommendations to the Governor on all parole, medical parole and pardon recommendations from the Board. Paroles must be processed within 30 days, medical paroles within 4 business days and pardons within ninety (90) days from the date we receive the recommendations from the Board. It is my practice to process paroles and pardons far in advance of the thirty (30) and ninety (90) day deadlines. In processing the parole recommendations, I review investigative reports and other supporting documents (i.e.: letters of support or objection, district attorney narrative, ballots, previous parole hearing documents) for violent offender paroles approved by the PPB. These can range in size from ten (10) pages to over a hundred (100) pages per offender packet. I frequently consult with law enforcement agencies and the Department of Corrections regarding the offender prior to making a recommendation. Additionally, I meet with, or speak on the phone with, anyone who requests. This includes district attorneys, offender's attorneys, victim's families, offender families, and other offender or victim advocates who support or object to paroles. For medical paroles, I speak directly to the physician who recommends the medical parole, and other medical staff if necessary. I also meet with or speak to pardon applicants, their families and/or their attorneys, when requested. After my review, I staff the paroles, medical paroles and pardons with the governor and/or a senior staff member on a bi-weekly or as needed basis. Since we received the Plaintiffs' open records request, I have reviewed and made recommendations on one hundred and three (103) pardons, one hundred and twenty-five (125) paroles, four (4) medical paroles and one hundred and eighteen (118) parole revocations.

Duties relating to Corrections and the Department of Corrections.

6. The Department of Corrections is also an agency included under the Secretary of Safety and Security's responsibility. Since my employment began, I have been the primary contact for the Director of Corrections and the Board of Corrections for the Governor's office. I receive all communication from DOC and the Board on behalf of the Governor's office. I review those communications and advise senior staff accordingly. For example, I receive notifications of all offender deaths, including initial notification, investigative reports and medical examiner reports. I review those notifications, and at my discretion, advise senior staff and the Governor when necessary. I receive these types of communications and others on a daily basis. Further, I communicate directly with the Director regarding escapes, serious incidents, and other general issues and advise senior staff and the Governor when necessary. I communicate with the Coordinator on the Prison Rape Elimination Act (PREA) regarding the Department's compliance

with PREA, and receive and review all DOC PREA audits. Additionally, I coordinate with the General Counsel and other staff regarding policy and procedure changes and legislation. Generally, I communicate with DOC staff on a daily basis. I also attend Board of Corrections meetings when necessary, and assist in the appointment process for new Board members by interviewing potential board members.

Responsibilities Pertinent to Highway Safety.

7. The Oklahoma Highway Safety Office (OHSO) is another agency under the purview of the Secretary of Safety and Security. Since February 2014, I have been heavily involved with the OHSO due to the Governor's Impaired Driving Prevention Advisory Council (GIDPAC) and the ENDUI campaign. I attend the quarterly GIDPAC meetings, and also participate in the legal working group which meets as needed approximately every two (2) months. The legal working group consists of collaboratively drafting legislation involving limited municipal courts of record, which resulted in Senate Bill 58 and creating a DUI prosecution pilot program currently operating in Cleveland County. This project required attending meetings, and extensive review of proposed legislation. Further, I coordinated the ENDUI campaign between the Governor's office and OHSO, which consisted of coordinating with Governor's press staff and OHSO regarding press releases and conferences, and different aspects of the ENDUI advertising campaign.

Lockett Investigation Responsibilities.

8. The Department of Public Safety is also under the Secretary of Safety and Security. I am the primary legal contact for DPS. During the execution investigation, I attended meetings with the investigative team for briefings on the progress of the investigation and assisted the investigators with any necessary coordination between executive agencies.

District Attorney's Council Responsibilities.

9. I am also assigned to the District Attorney's Council. I routinely communicate and meet with the Executive Director and elected District Attorneys regarding various issues, including PPB, DOC, and justice reform. I also serve on the Justice Assistance Grant (JAG) Board, which meets approximately eight (8) times per year and administers the Edward Byrne Justice Assistance Grant. This Board reviews grant applications from law enforcement agencies across the state and District Attorney's Offices, approves or denies the grant applications, and reviews the performance of grantees.

Responsibilities to Various Agencies.

10. I am the primary contact for the Office of Juvenile Affairs (OJA) on behalf of the Governor's office. I am advised by OJA regarding compliance with PREA, the creation of charter schools at secure facilities, and any other legal issue. I advise senior staff and the Governor when necessary.

11. I am assigned to the Commissioners of the Land Office (CLO). I attend CLO meetings with the Governor on a monthly basis.

12. I attend Board of Equalization (BOE) briefings with the Governor, and attend the BOE meetings with the Governor. These meetings occur three (3) times per year.

13. I attend briefings with the Oklahoma Capitol Improvement Authority, and attend OCIA meetings with the Governor. These meetings occur approximately seven (7) times per year.

14. I am also assigned as the primary legal contact for the Department of Tourism, which under the purview of the Secretary of Commerce and Tourism. Primarily, I have coordinated with Tourism regarding litigation matters and statutory interpretation. I have attended Board meetings when requested.

15. I assist the General Counsel and the Director of Appointments in Judicial Selection. I review all applications from the applicants recommended by the Judicial Nominating Commission, prepare a briefing and interview information for the Governor, interview the judicial candidates, and make recommendations to the Governor.

Duties regarding Legislation.

16. During the legislative session, my duties include review of pending legislation and meeting with legislators regarding policy positions and effects of pending legislation on executive agencies. When the Governor's office receives passed bills, I am responsible for an initial review of all bills, attending Governor's staff meetings to review and analyze passed bills, and attend bill signing with the Governor. I am also responsible for drafting and finalizing all veto messages and coordinating the release of veto messages.

Litigation Duties.

17. I am responsible to assist in the oversight of litigation involving the Office of the Governor. I attend court hearings; communicate and meet with attorneys; provide

information/documents to attorneys; answer discovery and advise the Governor and/or senior staff when necessary;

General Duties.

18. My general duties also include attending or viewing legislative interim studies that involve any area I am assigned, meeting with legislators and constituents on various issues, consulting with legislators and legislative staff regarding proposed legislation, and meeting with constituents when requested. For example, I often meet with non-profit groups regarding incarcerated individuals and re-entry to society and victim's advocacy groups.

19. I also perform general daily legal functions, such as advising our Director of Constituent Services regarding constituent legal issues, which involves either advising Constituent Services on how to respond to the inquiry, or requires me to contact the constituent and assist with their inquiry. I also advise our Communications staff regarding any media release or inquiry relating to areas to which I am assigned, which includes responding to media inquiries and approving, from a legal perspective, press releases. I also advise Policy staff regarding any area to which I am assigned. I also advise any staff member regarding ethics questions.

Open Records Act Duties.

20. I am also assigned to process, review and release all open records requests. This process is very lengthy and time consuming. It begins when I receive the records electronically from my paralegal. I initially review all potentially responsive documents to determine if they are, in fact, responsive, if any are potentially privileged, or "red flagged" for sensitivity. Approximately one-third or more of the documents I review are non-responsive. Thus, I review many more documents than are actually released. After my initial review, I consult with the General Counsel regarding the potentially privileged documents and sensitive documents. I also notify the Chief of Staff regarding potentially sensitive documents. The General Counsel makes a decision on whether or not we will claim privilege. I then review the documents again to double check my paralegal's redactions. We redact personal information, such as personal cell phones and residential addresses. Prior to the release, my paralegal and I determine if anyone should be notified regarding sensitive documents prior to the release, and those individuals are notified. I then draft a letter on behalf of the General Counsel to the requesting party, which details whether or not we claim privilege on documents, and notifying the requesting party of the release. My paralegal then releases the records.

Duties regarding Tribal Gaming Compliance.

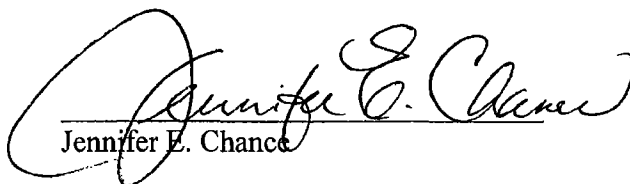
21. In my capacity as the Director of Gaming Compliance (GCU), my responsibilities include supervising GCU employees, oversight of GCU organizational restructuring, hiring the Deputy Director and Compliance Officers, developing policies and procedures for casino inspections and enforcement of the Model Tribal Gaming Compact requirements, weekly, bi-weekly, and/or as needed meetings with supervisor of GCU (formerly Lynne Bajema, State Comptroller; currently Brandy Manek, Policy Director, OMES). Additionally, I meet with tribal officials and/or tribal attorneys regarding casino inspection findings, communicate with vendors of casino games regarding game classification and Compact requirements, meet with testing laboratories regarding game certification, attend training regarding casino audits and Compact requirements, and oversee all litigation regarding Compact compliance. I also coordinate with the Oklahoma Horse Racing Commission and the State Auditor and Inspector's Office in an effort to re-organize the GCU.

Conclusion.

22. I put as much of my time into my Open Records Act responsibilities as possible. I balance my Open Records Act responsibilities as wisely as possible with my duties to other essential duties assigned to me by the Governor and the General Counsel.

FURTHER AFIANT SAYETH NOT.


Dated this 18th day of March 2015.


Jennifer E. Chance

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

My Commission Expires:
9-24-2018

My Commission Number:
14008556



Notary Public

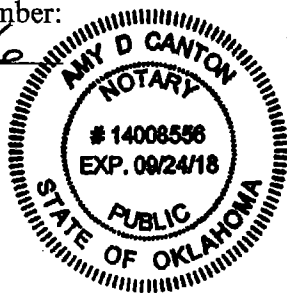


EXHIBIT 3

EXHIBIT 3

(ORDER LIST: 574 U.S.)

WEDNESDAY, JANUARY 28, 2015

ORDER IN PENDING CASE

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

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 3