IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

ZIVA BRANSTETTER and BH MEDIA GROUP INC. d/b/a TULSA WORLD,	)	
Plaintiffs,	)	
vs.	)	**Case No. CV-2014-2372**
MARY FALLIN, in her official capacity as GOVENOR OF THE STATE OF OKLAHOMA; MICHAEL C. THOMPSON, in his official capacity as COMMISSIONER OF THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,	)	SET FOR HEARING BEFORE JUDGE Parish THE 17 DAY OF April 2015 AT 9:00 a.m.
Defendants.	)	

MOTION TO DISMISS OF GOVERNOR FALLIN AND ALTERNATIVE MOTION FOR SUMMARY DISPOSITION OF LEGAL ISSUES

RESPECTFULLY SUBMITTED THIS 9th DAY OF FEBRUARY, 2015.

Respectfully submitted,

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ORBISON & LEWIS

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ATTORNEYS FOR DEFENDANT
MARY FALLIN, in her official capacity as
GOVERNOR OF THE STATE OF OKLAHOMA

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MOTION TO DISMISS OF GOVERNOR FALLIN AND ALTERNATIVE MOTION FOR SUMMARY DISPOSITION OF LEGAL ISSUES

The Honorable Mary Fallin, Governor of Oklahoma, Defendant herein, respectfully moves to dismiss this case against her pursuant to 12 O.S. § 2012(b)(1) and (6) because the Court lacks jurisdiction over the subject matter of this case and because the Petition fails to state a claim upon which relief can be granted. Alternatively, Governor Fallin moves for summary disposition of legal issues addressed herein pursuant to District Court Rule 13. Grounds for this motion appear in the following brief.

BRIEF SUPPORTING MOTION TO DISMISS AND FOR SUMMARY DISPOSITION OF LEGAL ISSUES

1. **Plaintiffs' allegations against Governor Fallin concede their request is in line for processing.**

Plaintiffs Ziva Branstetter (Branstetter) and the Tulsa World (World) claim that they have made Open Records Act requests to both Governor Fallin and the Oklahoma Department of Public Safety, which, they say, have not been complied with. This motion addresses only their claims against Governor Fallin.

Plaintiffs allege that they made an Open Records Act request on May 1, 2014 requesting from the Governor:

> *All records*, including emails, *associated with* the execution of Clayton Locket and Charles Warner dating from March 1 to the present.
>
> I agree to limit my request to emails (whether on a personal email account or state email account) to email communications between the Governor's office and DOC Director Robert Patton, Jerry Massie or Anita Trammel; DPS Commissioner Michael Thompson; the governor's legal staff including Steve Mullins; Denise Northrup; Attorney General Scott Pruitt or Melissa McLawhorn Houston (or assistants acting on their behalf), and of course any emails from the governor herself. I also request any communications between the governor's office and the

> state Supreme Court justices or staff acting on their behalf. Please make sure to include any attachments to the email that are responsive to this request.

Petition, ¶ 16 and Ex. A (emphasis added).

Plaintiffs allege that the Governor's office responded to their request the next day saying:

> The office of Governor Mary Fallin has received your Open Records Request and placed it in the queue of Open Record Requests. Your request number is 2014-016. I have attached a copy of your request below please let me know if that is not a correct copy of your request.
>
> Governor Mary Fallin and staff emails re: Execution of Clayton Lockett and Charles Warner from March 1, 2014 to May 1, 2014.

Petition, ¶ 17 and Ex. B. Plaintiffs allege that, as of the filing of their Petition, Governor Fallin has not produced any records in response to her May 1 Open Records Act request. Petition, ¶ 20. Plaintiffs gloss over their concession that the Governor has placed their request in line for processing by dressing their grievance up in words like "withholding" (Paragraphs 38, 40, 43, 44), "failed to provide" (Paragraph 43), and finally "denied" (Paragraph 15) and "denial" (Paragraph 45). Despite their unsupportable use of "denied" or "denial," Plaintiffs do not claim the Governor's office has said it will not produce the requested records, or any of them since Plaintiffs must concede, and have conceded, that their request is in line for processing. The Governor's office intends to provide records as required and limited by the Act. The issue here is not whether the Governor's office will provide the records the law obligates it to provide, but *when,* consistent with the other duties of that office, it will be able to do so.

Plaintiffs seek four specific types of relief. First, they seek a declaration that they have a right to the requested information under Art. II, § 1 of the Oklahoma Constitution. Second, they seek a declaration, pursuant to 51 O.S. § 24A.17(B), that the records sought are public records for the purposes of the Open Records Act, and that Plaintiffs are entitled to prompt disclosure of the requested records. Third, Plaintiffs seek an injunction, pursuant to 51 O.S. § 24A.17(B), or

writ of mandamus pursuant to 12 O.S. §§ 1451 *et seq.*, requiring Governor Fallin *immediately* to disclose all records requested by Plaintiffs pursuant to the Open Records Act. Finally, Plaintiffs seek reasonable attorneys' fees in this action pursuant to 12 [sic: 51] § 24A.17(B)(2). Plaintiffs also seek such other relief as the Court deems just and proper.

2. Article II, Section 1 of the Oklahoma Constitution does not support relief for Plaintiffs.

Plaintiffs claim Art. II, Section 1 of Oklahoma's Constitution provides them with a right to the documents they seek, evidently on terms more favorable to them than the Oklahoma Open Records Act. 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.

By its terms Art. II, § 1 says nothing specifically about public access to public records. It specifies neither what records are open to the public, nor what records remain confidential or privileged. It does not specify how to access those records, or how cost of production is to be allocated. Rather, Art. II, § 1 states what most people take as fundamental general truths. Political power inheres in the people. Government is instituted for the protection, security, and benefit of the people, and to promote their general welfare. The people have the right to alter or reform their government whenever the public good requires it. While the Plaintiffs enjoy the right to exercise political power, the right to enjoy the benefits of their government, and the right

to exercise their political power to try to reform their government, they have no *constitutionally conferred* right to access to public records under Art. II, § 1.[1]

As distinguished from Art. II § 1, 51 O.S. § 24A.2 expressly states that purpose of the Open Records Act "is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." The balance of the Act contains the circumstances under which the public is to get access to governmental records, and will be discussed below.

If the Constitution itself ensured a right to access to public records, the Open Records Act would have been unnecessary. But it was necessary. It was necessary to give specific content to the general recognition that that political power inheres in the people. In effect, the people used their inherent political power to establish and set the terms of a legal right of access to public records not found expressly in the Constitution. However, Plaintiffs' claim that they have an entitlement to the public records they seek based upon Art. II § 1 *alone* fails to state a claim upon which relief can be granted. A petition can be dismissed for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory. *May v. Mid-Century Insurance Co.,* 2006 OK 100, ¶ 10, *151* P.3d 132, 136. Because there is no cognizable right to the requested records under Art. II § 1 *alone,* Plaintiffs have not raised a cognizable issue sufficient to establish subject matter jurisdiction and the Court should dismiss Plaintiffs' first cause of action and they are not entitled to any declaratory judgment on it.

3. The face of Plaintiffs' Petition demonstrates they are not entitled to relief under the Open Records Act.

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[1] As they are well situated to do, Plaintiffs have exercised their journalistic and political power to bring attention to circumstances of the Lockett execution. Ms. Branstetter has written dozens of stories for the newspaper relating to the execution. Petition Paragraph 13 and n. 4.

Nothing contained in Plaintiffs' factual allegations or the attached correspondence indicates that the Governor, or anyone else acting for her, refused to produce the records that Plaintiffs requested. Quite the contrary, Plaintiff concedes the Governor's office acknowledged receipt of the request and put it in line for processing, giving it number 2014-016, indicating the office had received fifteen previous requests before Plaintiffs' in 2014.

Plaintiffs have not requested only records that can be easily obtained by pulling them off the shelf, out of a file drawer, or printing them from a computer. Rather, an elaborate search will have to be made to find the requested records, which Plaintiffs defines as "*[a]ll records*, including emails, *associated with* the execution of Clayton Locket and Charles Warner dating from March 1 to the present." Petition, ¶ 16 and Ex. A (emphasis added). Plaintiffs later agree to limit their email request to emails between several named officials in the Department of Corrections and the Department of Public Safety, including counsel in the Governor's office and the Attorney General's office, as well as the Governor's Chief of Staff.

Contrary to Plaintiff's assertion, its request is not for "specified public records." Petition, ¶ 16. Instead, it calls for "all records" within the Governor's office, *associated* with two executions (one of which did not occur), but limiting somewhat the scope of the emails requested. However, by using "all" and "associated" to describe the records sought, Plaintiffs cast a wide net. In addition to a search of paper records, given the prevalence of electronic mail in modern communication, it will be necessary for staff in the Governor's office, or their Information Technology support staff, to devise search terms to try to locate responsive emails in the Governor's office system. This process will doubtless yield a large number of "hits" which contain one or more of the designated search terms. Staff or attorneys will have to examine each of these many "hits" to see if each is responsive to the request. Further, a staff attorney will

have to review the "hits" to see if they contain information subject to the attorney client privilege or work product protection which are exempt from production under the Act under 51 O.S. § 24A.5(1)(a). This is a real possibility since Plaintiffs asked for emails of the Governor, her General Counsel, and the Attorney General and his assistants. In addition, counsel will have to review for records which, if released, would constitute a clearly unwarranted invasion of personal privacy within the terms of 51 O.S. § 24A.7(A)(2) and as recognized in *Okla. Public Employees Assoc. v. State*, 2011 OK 68, 267 P.3d 838. Counsel will also have to review for responsive documents that intrude upon the deliberative process privilege recently recognized by the Supreme Court in *Vandelay Entertainment, LLC v. Fallin,* 2014 OK 109. It is certainly possible records covered by the deliberative process privilege are contained in the request, given the identity of at least some of people whose emails have been requested (General Counsel, Chief of Staff, Attorney General).

These steps are not unique to the Plaintiffs' request, but must be followed for all the requests in the queue ahead of their request. Please recall that the line had formed before Plaintiffs' request, and Plaintiffs are not first in line. Some of those other requests ahead of Plaintiffs in line are small, discrete requests, while others are quite large. The Governor's office must process all these requests with limited staff, all the while conducting the other essential functions of the Governor's office now in the midst of a legislative session.

4. **Plaintiff wants to cut to the front of the line ahead of other citizens who requested records before them.**

The Governor's office did not tell Plaintiffs "no" on any of their requests. Rather, it informed Plaintiffs that their request was in line. Plaintiffs asks the Court to make other citizens who asked for records before Plaintiffs wait while the Governor's staff creates appropriate searches to find records responsive to their requests and manually checks the resulting records

for responsiveness and privilege. Plaintiffs may think their requests are more important than any other request made by any other citizen to the Governor's office. As demonstrated below, however, the Governor is entitled to respond to requests on a "first come, first served" method, and cannot be compelled to show favoritism either for or against these Plaintiffs. The issue is one of limited resources to search for and find records responsive to Plaintiffs' request, and the reasonable time it takes to locate and produce the requested records, consistent with the need to respond to other requests received earlier, and to perform the other essential functions of the Governor's office.

The functions of the Governor's office include (1) reviewing administrative rules from all the various state agencies, (2) reviewing and passing on recommended pardons, paroles, or requests for clemency, (3) reviewing proposed legislation during the Legislative session, and signing or vetoing legislation that passes both houses of the Legislature, (5) appointing members to various state boards, agencies, and commissions, (6) serving as Chief Executive and making and executing policy on a myriad of complex issues such as budgeting, education, corrections, health care, child welfare, environmental matters, and economic development. These crucial matters, and others, along with production of public records on request, occupy the time of the Governor and her staff.

5. The Open Records Act offers a remedy only for denial of requested records, and allows public bodies to establish reasonable procedures to prevent excessive disruptions of their essential functions.

The Open Record Act provides for public access to a wide array of records and creates legal remedies when requests for documents are improperly denied. The Act provides:

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. § 24A.17(B)(1)(emphasis added). Neither the Governor nor any of her staff have denied Plaintiffs any records prior to the filing of this suit. Plaintiffs, despite overstating their case with words like "denied" and "denial," have merely been told they must wait their turn before the Governor's staff can process their requests. Therefore, a denial of records is a prerequisite to suit and *under the plain language of the Act, Plaintiffs may not bring this suit.* Indeed, until a substantial search is conducted based upon Plaintiffs' requests, it is uncertain which particular records, or how many particular records, fall within Plaintiffs' request.

When the Open Records Act was passed almost 30 years ago in 1985 the world of "records" was much different than it is today. The world of electronically stored information was in its infancy, and most records were still on paper and kept in filing cabinets. In those days it was unlikely that a records request of a few sentences could sweep up thousands of records, both paper and electronically stored. For many years, if not from the original enactment of the Open Records Act, that Act gave a remedy for records that were "denied." 51 O.S. § 24A.17. The Legislature had not seen fit to create a remedy for "delayed" production of records, though it could have done so at any time.

In essence, the Open Records Act creates a right to access to certain public records, and a remedy for the violation of that right (denial of requested records). When a statute creates both a right and a remedy for its enforcement the statutory remedy is exclusive. *R.R. Tway v. Oklahoma Tax Commission,* 1995 OK 129, ¶ 25, 910 P.2d 972, 976, citing *Tate v. Browning-Ferris, Inc.,* 1992 OK 72, ¶ 11, 833 P.2d 1218, 1226-27, and n. 36. For the Court to create a new remedy (for an allegedly *delayed* production of records) where the Legislature has only created a

remedy for *denied* records, would be improper and exceed the Court's jurisdiction. The Court has jurisdiction to hear cases alleging a public officer has said "no" to an Open Records Act request, but not to hear a case in which the officer is alleged to have said "not now, please wait your turn."

The Act also provides a public body *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. § 24A.5(5). The Plaintiff cannot dispute that the Governor's office performs essential functions for the public at all times, and especially does so leading up to and during the Legislative session. The Act specifically authorizes public agencies to establish reasonable procedures to prevent excessive disruptions to its essential functions. The Governor's Open Record Act "queue" is just such a reasonable procedure to manage a heavy volume of Open Records Act requests with the resources available, while still meeting the office's other pressing demands and performing its essential functions.

In its recent opinion upholding the Governor's deliberative process privilege, the Supreme Court recognized that "[i]n using the word 'supreme' to modify the term 'executive power,' we believe the people intended to vest the Governor with the complete or full-range of executive powers that were recognized at the time the Oklahoma Constitution was adopted. *Vandelay,* 2014 OK 109, ¶ 12. The Court also noted both the Constitution and Oklahoma statues confer a broad range of discretion upon the Governor. *Id.*, ¶¶ 15-16. The Open Records Act expressly provides that the Governor "may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions." The word "may" of course is generally understood to be a permissive term, itself conferring discretion to do a thing or not do it. *Tate,* 1992 OK 72, ¶ 16, 833 P.2d at 1229. The

Act therefore confers upon the Governor—our supreme Executive—the discretion to establish a reasonable procedure (1) to protect the integrity and organization of the records, and (2) to prevent excessive disruptions of [the agency's] essential functions. This statute contains a double grant of discretion: (1) what the reasonable procedure should be to avoid excessive disruptions of essential functions, and (2) how much disruption is "excessive," given the high volume of crucial public business to be done in the Governor's office.

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. In the related but distinct context of the Governor's deliberative process privilege, the Supreme Court in *Vandelay* stated "[t]he Governor's need for confidential advice in deliberation of policy and decision-making is just as important to '[the people's] protection, security, and benefit, and to promote their general welfare,' as the people's access to information." *Vandelay,* 2014 OK 109, ¶ 27. Similarly, the Governor's discretionary and reasonable procedure to prevent disruptions of the essential functions of her office is just as important to the people's protection, security, benefit, and general welfare, as the people's access to information. The Governor's procedure in this case serves the public and allows information

to be accessed more freely by the public than in *Vandelay* (which created a *permanent* qualified privilege making records confidential) because the Governor's procedure, in Plaintiff's view, only *delays* production of records (fulfilling requests in the order received and as resources permit) in order not to interfere with other important public work. Clearly, the Governor's office needs to perform its essential functions in order to serve the public interest. The Governor has instituted a reasonable procedure to allow it to do so, while fulfilling its obligations under the Open Records Act, all as allowed by the Act itself.

Further, by analogy, the Court should know that a federal court has denied attorney fees under the federal Freedom of Information Act involving the application of a "first in-first out" FOIA response system used by the FBI. In *Bricker v. Federal Bureau of Investigation,* 51 F.Supp.2d 1, 4 (D.D.C. 1999) the court denied plaintiffs' attorney fees because it found that, at most, their case "hurried" along the production of requested information. In *Bricker* the Plaintiffs made FOIA request in May, 1995 and filed suit in November, 1997, having yet received none of the requested documents. *Id., at* 2. Shortly thereafter, the FBI produced 39 pages of documents and then on May 8, 1998, the FBI released another 243 pages of information and moved for summary judgment, which was ultimately granted. *Id.,* at 3. In response to Plaintiffs' request for attorney fees, the FBI asserted that the plaintiffs' request had finally reached the "top of the pile" in the agency's processing queue and that all responsive, nonprivileged documents would have been released to the plaintiffs in more or less the same time frame without the litigation. *Id.* The court noted that both its Court of Appeals and Congress had recognized the problem of administrative backlog in FOIA responses, but held that where the agency is reasonably responsive to inquiries about the status of the request and processes the request fairly according to the "first in, first out" protocol, the courts should require

some showing of improper conduct or purpose (not present in that case) before awarding fees and costs against the agency on the basis of delay alone. *Id.*, at 4. We bring this case to the Court's attention not to validate the length of delay in responding to a federal FOIA request in that case, which will not be Plaintiff's experience in the present matter, but to show the Court that a "first in-first out" queue system, like the one adopted by the Governor's office, is a legitimate one used by other agencies in responding to record requests from the public.

6. **Plaintiffs fail to state a claim for writ of mandamus because (1) the Governor does not have a mandatory duty to provide Plaintiffs records ahead of those who asked earlier, and, (2) if any remedy is called for, it is available under the Open Records Act.**

Ordinarily mandamus will not issue to compel performance of a discretionary duty in a certain way. *Wadley v. City of Purcell,* 1979 OK CIV APP 50, ¶ 12, 601 P.2d 751, citing *State Highway Commission v. Green-Boots Const. Co.*, 1947 OK 221, ¶ 20, 187 P.2d 209, 214. The rule is well established that a writ of mandamus may not lawfully issue to control a decision of an officer vested with discretion (in this case as to the order and timing of record release), or to review, correct, or reverse an erroneous decision of such officer, even though there may be no other method of review or correction provided by law. *Id.* Because a public body *may establish reasonable procedures* which protect the integrity and organization of its records and *prevent excessive disruptions of its essential functions*, 51 O.S. § 24A.5(5), the Open Record Act does not mandate the time, means, or method whereby the Governor must release public records. Rather, she may exercise her discretion to create a reasonable procedure to release such records in a way that does not cause excessive disruptions of the essential functions of her office. Because the Act itself gives her discretion in the manner of the release of public records, a writ of mandamus is not available to control the exercise of her discretion.

Mandamus is also unavailable because the Open Records Act itself provides injunctive and declaratory relief in appropriate cases. A writ of mandamus may not be issued in any case where there is a *plain and adequate remedy in the ordinary course of the law.* 12 O.S. § 1452. Under the Open Record Act a person denied access to a requested public record 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. § 24A.17(B)(1). Thus, Plaintiffs have available to them, if they prove their case, "a plain and adequate remedy in the ordinary course of law" that renders a writ of mandamus unavailable.

7. **This Court lacks subject matter jurisdiction because the question presented is not justiciable since the face of the Petition demonstrates no denial of requested public records.**

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. A party may question the subject matter jurisdiction of the court at any time: [w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. 12 O.S. Section 2012(F)(3). The question at present is whether Plaintiffs' Petition alleges a *justiciable* matter sufficient to confer subject matter jurisdiction on this Court. It does not.

Subject matter jurisdiction is essential; it is the power and authority of a court to hear and determine causes of the kind in question. *In re A.N.O.,* 2004 OK 33, ¶ 9, 91 P.3d 646, 649.

Subject matter jurisdiction of the court is not invoked by proper pleadings to hear and determine a cause where no petition meeting statutory requirements is filed. *Id.* ¶ ¶ 12-13, 91 P.3d at 650. In the present case, the Petition candidly admits, not a *denial* of requested records (despite their extravagance in using that word), but that Plaintiffs' request has been placed in line for response, creating a *delay* unacceptable to Plaintiffs, when the statute only creates a remedy for *denial* of records. 51 O.S. § 24A.17(B)(1).

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.

Plaintiff's Open Records Act claim is neither ripe nor definite and concrete, and thus is not justiciable, because it requires the Court to address a hypothetical question and speculate on whether any responsive public records will actually be *denied* by the Governor's office. If, hypothetically, production of some records is denied the Court must further speculate about whether a legal basis such as attorney-client privilege, work product protection, or the recently recognized deliberative process privilege justifies confidentiality of any record whose release is actually *denied.* Thus, the Court cannot issue the requested declaration that the records requested are public records, not knowing which particular records are responsive, and whether any privilege or legal basis exists to withhold them for production. For the same reason, the Court cannot order immediate production of the requested records as sought by Plaintiffs. All of

this is conjectural because at the present time there is no basis to believe the Plaintiffs and the Governor have, or will have, adverse legal interests once Plaintiffs' request is addressed in turn and responded to.[2]

We have demonstrated above that the Open Records Act provides a civil remedy of injunction or declaratory judgment in cases in which a public agency *denies* access to requested public records, but not for simple *delay* of production. 51 O.S. § 24A.17(B)(1). The Court must examine the plain language of the statute, and, if the wording in a statute is plain, clear and unambiguous then the plain meaning of the words used must be judicially accepted as expressing the intent of the Legislature. *State of Oklahoma, ex rel., Board of Regents v. Lucas,* 2013 OK 14, ¶ 15, 297 P.3d 378, 386. In *Lucas* the Court held that under the APA no appellate jurisdiction existed in the District Court unless the University expelled a student; mere suspension did not require the procedures of Article II of the APA, and consequently the District Court lacked appellate jurisdiction. *Id.* ¶¶ 45-46, 297 P.3d at 398. Consequently, the Supreme Court prohibited the District Court from going forward with an APA appeal of University discipline of suspension, as opposed to expulsion. *Id.*

Similarly, this Court would have jurisdiction to adjudicate a claim of *denial* of public

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[2] While federal courts are courts of limited jurisdiction, their practices are instructive. Federal courts have long recognized that it is reasonable and necessary to evaluate whether a complaint states any claim of substance which would invoke the jurisdiction of the Court. The United States Supreme Court has stated, "[T]he federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,'or 'no longer open to discussion.'" *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted).

A claim so attenuated and unsubstantial as to be absolutely devoid of merit cannot be a "justiciable matter." In defining what is justiciable for purposes of federal court jurisdiction, the United States Supreme Court has stated, "the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962).

records, but lacks jurisdiction to adjudicate a claim, as here, that on its face admits that the Governor's office has placed Plaintiffs' request in line for processing and has, at most, allegedly delayed production but not denied it. Denial, like expulsion in *Lucas,* is the jurisdictional prerequisite allegation for this Court to entertain Plaintiffs' Open Records Act claim.

Plaintiffs' claim under Art. II Section 1, and for a writ of Mandamus are equally unavailing to state justiciable claims that establish subject matter jurisdiction. The Constitutional claim that Art. II, Section 1 establishes a right to specific public records on demand is simply insubstantial on the text of the Constitution itself. No claim is stated and the Court has nothing of substance to adjudicate. The Mandamus claim is undercut by the terms of the Open Records Act. The Act both grants the Governor discretion to institute a reasonable system to respond to Open Records Act requests and creates a civil remedy for violations of the Act. The Governor's inherent authority to exercise discretion in the conduct of the public business for the public good also defeats a Mandamus claim. No justiciable claim is stated and no subject matter jurisdiction is created.

CONCLUSION

The Court should dismiss this action because the Governor's office has not denied the requested records. The Petition itself demonstrates that the Governor's office has not denied Plaintiffs' request for public records, but is processing that request in an orderly fashion according to a reasonable procedure implemented as permitted by the Act, and consistent with the limits of staff and their other essential duties on behalf of the public. Thus, Plaintiff's Petition fails to state a claim upon which relief can be granted. More importantly, because Plaintiffs candidly do not plead a denial of records, they present no justiciable issue that is ripe

for the Court's consideration. The Court therefore lacks subject matter jurisdiction and should dismiss the case on that basis as well.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2015, a true and correct copy of the foregoing instrument was mailed, postage paid, to:

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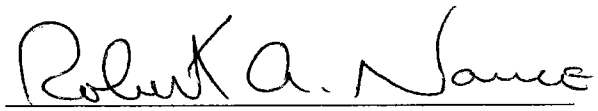

Robert A. Nance