

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. CV-14-2372

Judge Patricia G. Parrish

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,  
SUMMARY ADJUDICATION, AND SUPPORTING BRIEF**

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Dated: March 3, 2015

Respectfully submitted,

Robert D. Nelon  
Hall Estill Hardwick Gable Golden &  
Nelson  
Chase Tower, Suite 2900  
100 N. Broadway  
Oklahoma City, OK 73102  
405.553.2805 (Telephone)  
405.553.2855 (Facsimile)  
bnelon@hallestill.com

Katie Townsend (*Pro Hac Vice*)  
The Reporters Committee for Freedom of  
the Press  
1156 15th St. NW  
Washington, DC 20005  
202.795.9300 (Telephone)  
202.795.9310 (Facsimile)  
ktownsend@rcfp.org

*Counsel for Plaintiffs*

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## INTRODUCTION

Plaintiffs Ziva Branstetter (“Branstetter”) and BH Media Group Inc. d/b/a Tulsa World (“*Tulsa World*”) (“Plaintiffs”) hereby move this Court for summary judgment or, in the alternative, summary adjudication, pursuant to District Court Rule 13 on the grounds that Governor Mary Fallin (“Fallin”) and Michael C. Thompson, Commissioner of the Department of Public Safety (“Thompson”) (“Defendants”) are in violation of the Open Records Act, Okla. Stat. tit. 51, §§24A.1, *et seq.* (“ORA”) and Article II, Section 1 of the Oklahoma Constitution.

This case involves the rights of the press and the public to access government records concerning how the death penalty—“the most extreme sanction available to the State,” *Atkins v. Virginia*, 536 U.S. 304, 319 (2001)—is carried out. For the past more than nine months Branstetter, a reporter and Enterprise Editor for *Tulsa World*, has attempted to obtain access to government records from the office of the Governor and the Department of Public Safety (“DPS”) relating to the April 29, 2014 botched execution of Clayton Lockett (“Lockett”). There is no dispute that the records Branstetter has requested are “public records” within the meaning of the ORA. *See* ORA § 24A.3(1). Nor is there any question that those records pertain to a matter of pressing concern for the people of Oklahoma. Indeed, in the period of time since the Petition in this case was filed, condemned inmate Charles Warner (“Warner”) was executed, notwithstanding lingering questions about the execution method used by the State,<sup>1</sup> and the U.S. Supreme Court granted *certiorari* in *Glossip, et al. v. Gross, et al.* (No. 14-7955) (“*Glossip*”), a challenge to Oklahoma’s lethal injection protocol on federal constitutional grounds.<sup>2</sup>

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<sup>1</sup> *See* Cary Aspinwall, “Minute by minute: The execution of Charles Warner,” *Tulsa World* (Jan. 16, 2015) available at [http://www.tulsaworld.com/news/crimewatch/minute-by-minute-the-execution-of-charles-warner/article\\_ea053bce-33e2-54af-876a-5d51a3b9ae52.html](http://www.tulsaworld.com/news/crimewatch/minute-by-minute-the-execution-of-charles-warner/article_ea053bce-33e2-54af-876a-5d51a3b9ae52.html).

<sup>2</sup> *See* Ziva Branstetter and Cary Aspinwall, “Supreme Court agrees to hear Oklahoma lethal injection challenge,” *Tulsa World* (Jan. 24, 2015) available at [http://www.tulsaworld.com/news/courts/supreme-court-agrees-to-review-oklahoma-lethal-injection-challenge/article\\_933584a7-3066-5aa0-ab8c-f0c0dde6d572.html](http://www.tulsaworld.com/news/courts/supreme-court-agrees-to-review-oklahoma-lethal-injection-challenge/article_933584a7-3066-5aa0-ab8c-f0c0dde6d572.html).

Despite Branstetter’s clear and undisputed right to access the records she has requested under Oklahoma law, and the public’s need for timely access to information about the manner in which the State has carried out executions, the Defendants have, to date, refused to release the records sought by Plaintiffs. Defendants withholding of those records for months on end is, on its face, a clear violation of the mandates of the ORA and the Oklahoma Constitution.

Under the ORA, Defendants “*must provide prompt, reasonable access*” to their records. ORA §24A.5(5) (emphasis added). Yet, it has been more than *nine months* since Branstetter submitted the first of her requests to the Governor’s office and the Department of Public Safety (“DPS”) for public records relating to Lockett’s execution. Defendants have not only failed to comply with their own self-imposed “estimates” for providing access to the records at issue, they have continued to withhold documents—including transcripts of interviews of Fallin, Thompson, and other government officials—that were reviewed by attorneys representing the State, and redacted to address any privileged information, months ago. This is neither “prompt” nor “reasonable” access by any measure, and it constitutes a denial of access that entitles Plaintiffs to relief under the ORA. In addition, Defendants’ withholding of the records at issue has deprived Plaintiffs, and all Oklahomans, of their right to access information they need to exercise their right to self-governance; the people of Oklahoma are entitled to meaningfully participate in setting the State’s policy when it comes to the death penalty, and they require the information sought by Plaintiffs in order to do so. Defendants’ refusal to release the records requested by Branstetter is, accordingly, not only a violation of the ORA, it is also an infringement of the “inherent right” of citizens “to know and be fully informed about their government” that is “recognize[d] and guarantee[d]” by the Oklahoma Constitution, ORA §24A.2; Okla. Const., Art. II, §1. That constitutional guarantee provides a separate and independent basis for relief here.

Because there is no substantial controversy as to any material fact, Plaintiffs are entitled to relief as a matter of law. For the reasons set forth herein, the Court should grant summary judgment or, in the alternative, summary disposition of issues in favor of Plaintiffs pursuant to District Court Rule 13.

#### STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendant Fallin is the Governor of the State of Oklahoma and a “public official” within the meaning of ORA §24A.3(4).<sup>3</sup>

2. Defendant Thompson is the Commissioner of DPS and a “public official” within the meaning of ORA §24A.3(4).

3. The Governor’s office is a “public body” within the meaning of ORA §24A.3(2).

4. DPS is a “public body” within the meaning of the ORA §24A.3(2).

5. On or about April 30, 2014, Fallin issued an executive order appointing Thompson to conduct a review of the events leading up to and during the execution of Clayton Lockett (the “DPS Investigation”). See Affidavit of Ziva Branstetter (“Branstetter Aff.”) (attached as Exhibit 1), ¶9.

6. As part of the DPS Investigation, DPS conducted more than 100 interviews of government officials and other persons who were involved with and/or witnessed Lockett’s execution. See Branstetter Aff., ¶¶10–11 and Ex. D. All of those interviews were completed by August 12, 2014. *Id.*

7. On or about May 1, 2014, Branstetter sent the Governor’s office a request under the ORA for “[a]ll records, including emails, associated with the execution of Clayton Lockett and Charles Warner dating from March 1 to the present.” In submitting that request, Branstetter

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<sup>3</sup> Plaintiffs respectfully request that the Court take judicial notice of all facts, definitions, and other matters cited in their brief that are the subject of judicial notice under Okla. Stat. tit. 12, §§2201–2203.

“agree[d] to limit [the] 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 Trammell; 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,” as well as “any communications between the governor’s office and the state Supreme Court justices or staff acting on their behalf.” Branstetter Aff., ¶12 and Ex. A.

8. On or about May 2, 2014, the Governor’s office responded via email to Branstetter’s May 1 ORA request and stated that it had been “placed [] in the queue of Open Record Requests” and assigned number 2014-016. Branstetter Aff., ¶13 and Ex. B.

9. As of the date of this Motion, more than nine months have passed since Branstetter’s May 1 ORA request was submitted, and Plaintiffs have not been given access to the requested records. Branstetter Aff., ¶¶14, 16.

10. On or about May 5, 2014, Branstetter sent DPS an ORA request for “all email to or from Commissioner Michael Thompson and Steve Krise or assistants acting on their behalf—regardless of who sent or received these emails—regarding the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1.” Branstetter Aff., ¶17 and Ex. C.

11. As of the date of this Motion, more than nine months have passed since Branstetter’s May 5 ORA request was submitted, and Plaintiffs have not been given access to the requested records. Branstetter Aff., ¶¶20, 22.

12. On or about September 4, 2014, Branstetter submitted an ORA request to DPS for “copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including Commissioner Michael

Thompson,” and “copies of statements by the paramedic and physician attending the execution.”  
Branstetter Aff., ¶23 and Ex. E; *see also id.*, ¶24 and Ex. F.

13. As of the date of this Motion, more than five months have passed since Branstetter’s September 4 ORA request was submitted, and Plaintiffs have not been given access to the requested records. Branstetter Aff., ¶¶ 26, 28.

14. On or about November 17, 2014, Branstetter again requested that DPS provide copies of transcripts of interviews conducted as part of the DPS Investigation, specifically requesting “copies of all transcripts created in connection with the Clayton Lockett investigation in electronic format under the Open Records Act.” Branstetter Aff., ¶ 30 and Ex. G.

15. As of the date of this Motion, more than three months have passed since Branstetter’s November 17 ORA request was submitted, and Plaintiffs have not been given access to the requested records. Branstetter Aff., ¶¶32, 33.

16. Charles Warner was executed by the state of Oklahoma on January 15, 2015. *See supra* note 1; Branstetter Aff., ¶8.

17. On January 23, 2015, the Supreme Court granted *certiorari* in *Glossip et al. v. Gross et al.*, No., 14-6244. *See supra* note 2.

18. As of the date of this Motion, the Oklahoma Legislature is considering legislation concerning the procedures and manner in which executions are carried out by the State.<sup>4</sup>

#### LEGAL STANDARD

Motions for summary judgment and summary disposition are governed by Rule 13 of the Rules for District Courts of Oklahoma. *See* Okla. Stat. tit. 12, Ch. 2, Appx., Rule 13. As specified in Rule 13, summary judgment is proper if it appears to the Court that there is no

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<sup>4</sup> SB 794, available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%20794>, HB 1879, available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201879>.

substantial controversy as to any material fact, as shown by the affidavits and discovery materials submitted with the motion, and that one of the parties is entitled to judgment as a matter of law. *Id.*; see also *Patterson v. Beall*, 2000 OK 92, ¶14, 19 P.3d 839, 844.

### ARGUMENT AND AUTHORITIES

**I. The undisputed facts establish that Defendants are in violation of the ORA.**

**a. The denial of “prompt” or “reasonable” access to public records is a denial of access that entitles Plaintiffs to relief.**

Under the ORA, all records of public bodies and public officials “shall be open” for inspection or copying during regular business hours. ORA §24A.5; see also *id.* (requiring public bodies to have at least one person available at all times to release records during regular business hours). A public body or official in receipt of an open records request “*must provide prompt, reasonable access to its records . . .*” *Id.* at §24A.5(5) (emphasis added). As the Oklahoma Attorney General has explained:

There is no provision in the [ORA] for a public body to “withhold” records for any amount of time, however small. The duty to provide prompt and reasonable access is complied with only when a public body properly attends to its duty to provide a record. [ . . . ]

This generally may include only the time required to locate and compile such public records.

1999 OK AG 59, ¶¶11, 15. In order to ensure that these mandates are complied with, the ORA provides that any requester who is “denied access” to records may file a lawsuit seeking declaratory and/or injunctive relief. ORA §24A.17.

While “prompt” is not expressly defined in the ORA, it is a commonly used word with a well-accepted meaning. *Cf. Edmondson v. Pearce*, 2004 OK 23, ¶72, 91 P.3d 605, 637 (stating that absent a specific definition, “words in a statute are to be understood in their ordinary sense”). For example, Merriam Webster defines “prompt” to mean “performed readily or immediately.” <http://www.merriam-webster.com/dictionary/prompt> (last accessed Feb. 17,

2015). And this understanding of “prompt” was implicitly endorsed by the Oklahoma Supreme Court in *In re University Hospitals Authority*, where it determined that a government agency did not violate the ORA when it made a public record “available to [requesters] *as soon as it came into existence.*” 1997 OK 162, ¶16, 953 P.2d 314, 320 (emphasis added).

Ohio’s Supreme Court, in interpreting its own open records law’s requirement that public records be “promptly” made available in response to a request, concluded that “promptly” meant “without delay and with reasonable speed”. *State ex rel. Wadd v. City of Cleveland*, 689 N.E.2d 25, 28 (Ohio 1998) (citation omitted).<sup>5</sup> In that case, Ohio’s highest court held that an agency’s delay of 24 days meant the records were not provided “promptly,” and granted a writ of mandamus requiring that access be provided within eight days. *Id.* at 29; *see also State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 776 N.E.2d 82 (Ohio 2002) (finding that a delay of six days did not satisfy the requirement that records be provided “promptly”). Similarly, the United States Court of Appeals for the D.C. Circuit has interpreted the federal Freedom of Information Act’s requirement that an agency make records “promptly available,” as “typically” meaning “within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).<sup>6</sup>

A delay of six or nine months in making public records available in response to a straightforward request for access is neither “prompt” nor “reasonable”—let alone both. *See* Black’s Law Dictionary 1138 (5th ed. 1979) (defining “reasonable” to mean, *inter alia*, “proper” or “suitable under the circumstances”). And a denial of either “prompt” or “reasonable” access to public records—whether characterized as a constructive denial, or simply a denial—entitles

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<sup>5</sup> The Oklahoma Supreme Court has looked to other state court’s interpretations of their open records laws, as well as interpretations of the federal Freedom of Information Act (“FOIA”), for guidance in interpreting the ORA. *See Okla. Pub. Empls. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶27, 267 P.3d 838, 848.

<sup>6</sup> Under FOIA, federal agencies are required to make a “determin[ation]” as to whether or not to comply with a request for public records within 20 days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i).

the requester to relief under ORA §24.A.17 ( “Any person denied access to records of a public body or public official” may “bring a civil suit for declaratory or injunctive relief, or both. . .”).

First, the plain language of ORA §24A.17 authorizes a requester to file a lawsuit whenever “access” has been “denied,” expressly or otherwise. The word “denied” is commonly understood to mean both (1) “to refuse to give (something) to someone” and (2) “to prevent someone from having or receiving (something)”. *See* Merriam Webster, <http://www.merriam-webster.com/dictionary/deny> (last accessed Feb. 17, 2014). Thus, preventing the public from having access to records falls well within the accepted meaning of the phrase “den[ying] access.”

Moreover, the term “denied” in ORA §24A.17 embraces the concept of a constructive denial, which is well-recognized in open records laws. *See, e.g.*, 5 U.S.C. §552(a)(6)(C)(i) (stating that any person shall be deemed to have exhausted their administrative remedies if the agency fails to comply within the applicable time limit, and is therefore authorized to sue); Ark. Code Ann. § 39-121.01(E) (stating that “[a]ccess to a public record is deemed denied if a custodian fails to promptly respond to a request for production of a public record . . .”). And it is likewise a concept well-recognized under Oklahoma law. In *Robertson v. United States Fidelity & Guarantee Company*, for example, the Oklahoma Supreme Court analyzed the requirements of Okla. Stat. tit. 36, §3636, which requires that insurance companies offer uninsured motorist coverage. 1992 OK 113, ¶12, 836 P.2d 1294, 1296. The court held that an insurance company’s failure to offer such coverage—and, thus, to “perform [its] statutory duty”—was a “constructive denial” of the plaintiff’s application for such coverage, even though no express denial was ever issued. *Id.* ¶11, 836 P.2d at 1297. It reasoned that, to conclude otherwise, “would frustrate the purpose of the statute . . . and would permit the insurance companies to benefit from their own noncompliance with the law.” *Id.* at ¶15, 836 P.2d at 1297.

In short, a constructive denial of access is a denial of access within the meaning of ORA §24A.17. To conclude otherwise would frustrate the purpose of the ORA, and would permit public bodies and government officials like Defendants “to benefit from their own noncompliance with the law.” *Robertson*, 1992 OK 113, at ¶15, 836 P.2d at 1297. Indeed, not only would such an interpretation allow for public records to be withheld for “processing” for lengthy, indefinite periods of time, it would enable public bodies and officials to simply ignore public records requests entirely, and to do so with impunity. Such a result could not have been intended by the Legislature when it enacted the ORA. *See Hogg v. Okla. Cnty. Juvenile Bureau*, 2012 OK 107, ¶7, 292 P.3d 29, 33 (stating that courts should “give a sensible construction when interpreting statutes and not presume that the legislature intended an absurd result.”).<sup>7</sup>

Here, as set forth immediately below, the undisputed facts establish that Defendants have denied—and continue to deny—Plaintiffs access to their records as mandated by statute. Accordingly, as a matter of law, Plaintiffs are entitled to relief, including declaratory and injunctive relief as provided in ORA §24A.17.<sup>8</sup>

**b. The Governor has violated—and continues to violate—the ORA by denying Plaintiffs access to the records at issue.**

It is undisputed that the Governor is a public official, and her office a public body, subject to the ORA. *See* ORA §24.A.3(2)–(4). It is also undisputed that on May 1, 2014, Branstetter submitted a written request under the ORA to the Governor’s office for access to

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<sup>7</sup> Indeed this same “Catch-22” was expressly recognized—and rejected—by the D.C. Circuit in the context of FOIA. As the D.C. Circuit explained in *Citizens for Responsibility & Ethics in Wash.*, under such a theory “an agency could respond to a request. . . by simply stating, in essence, that it will produce documents and claim exemptions over withheld documents in the future. Then, the agency could process the request at its leisure, free from any timelines. . . . Although the agency may desire to keep FOIA requests bottled up in limbo for months or years on end, the statute simply does not countenance such a system. . . .” 711 F.3d at 186–87.

<sup>8</sup> As set forth in Section IV, below, the remedies expressly enumerated in ORA §24A.17 are not the exclusive remedies available to Plaintiffs under Oklahoma law.

specific public records including email from the accounts of a handful of specified people, including the Governor, relating to two specific events—the executions of Lockett and Warner—created after March 1, 2014. Fact No. 7; *see also* ORA §24.A.3(1) (defining public “record”). It is further undisputed that, despite the passage of more than nine months, Branstetter has not been given access to any of the records she requested. Fact No. 9.

Even if Fallin’s withholding of the records at issue for more than nine months could somehow be deemed consistent with the Governor’s obligation to provide “prompt” access to public records—which it cannot—it is patently unreasonable. Branstetter’s request was not complex, burdensome, or novel in any way; in fact, Branstetter even further limited her request to email records created after March 1. Fact No. 7. Yet—notwithstanding the straightforward nature of Branstetter’s request and the fact that, at the time the request was made, there were *at most* 15 ORA requests “in line” ahead of it—as of the filing of Fallin’s Motion to Dismiss and Alternative Motion for Summary Disposition of Legal Issues (“Fallin’s Motion”), her office had yet to even *begin* “processing” that request. Fact No. 8 (the Governor’s office assigned the request number 2014-016); Fallin’s Mot. at 5 (explaining that the number 2014–016 means that 15 other requests were made before Branstetter’s); *see also, e.g., id.* at 5–6 (acknowledging that the Governor’s office had not yet begun to “process” Branstetter’s request). The abject failure of the Governor’s office to “properly attend[] to its duty to provide a record” fails, on its face, to satisfy the obligation to provide “reasonable” access. 1999 OK AG 59, ¶¶11, 15. For that reason too, Plaintiffs are entitled to relief as a matter of law.

**c. DPS has violated—and continues to violate—the ORA by denying Plaintiffs access to the records at issue.**

It is undisputed that Thompson is a public official, and DPS a public body, subject to the ORA. *See* ORA §24.A.3(2)–(4). It is also undisputed that, in the aftermath of Lockett’s botched

execution, Branstetter submitted two written requests for public records under the ORA to DPS: (1) a May 5, 2014 request for “all email to or from [Thompson] and Steve Krise or assistants acting on their behalf” regarding “the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1,” Fact No. 10, and (2) a September 4, 2014, request for “copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including [Thompson],” and “copies of statements by the paramedic and physician attending the execution,” Fact No. 12. *See also* ORA §24.A.3(1) (defining public “record”). It is further undisputed that those requests have been pending for more than nine and five months, respectively, Fact Nos. 11 and 13—time periods that in no way comport with the ORA’s mandate that access to records be “prompt.” ORA § 24A.5(5).

Even if DPS’s withholding of the records at issue for almost six (let alone nine) months could somehow be deemed consistent with DPS’s obligation to provide “prompt” access to public records—which it cannot—it is patently unreasonable. Indeed, the nine months that have passed since Branstetter submitted her May 5 request does not even comport with DPS’s *own* standards; approximately three months after that request was submitted, DPS estimated that it would take, at most, another three months for it to release the records Branstetter first requested within days of Lockett’s execution. Branstetter Aff. ¶19 and Ex. D.<sup>9</sup> And DPS’s continued withholding of documents responsive to Branstetter’s September 4 request—which she reiterated

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<sup>9</sup> Despite this and other representations that were made to Branstetter over the course of the last many months, Thompson’s Motion to Dismiss indicated that, at least as of the filing of that Motion, DPS may not have even begun to “process” Branstetter’s May 5 request. For example, Thompson’s Motion states that “[u]ntil a substantial search is conducted . . . , it is uncertain which particular records, or how many particular records, fall within Plaintiffs’ request.” Thompson’s Mot. at 8; *id.* at 6 (stating that “a considerable search will have to be made to find the requested records”). On August 12, more than six months ago, Branstetter was told that DPS’s legal division was conducting a review to determine whether any of the records requested by Branstetter were exempt from disclosure. Branstetter Aff. ¶19 and Ex. D. These flatly contradictory representations further demonstrate that Plaintiffs have been denied both “prompt” and “reasonable” access to DPS’s records.

on November 17—is particularly inexcusable. Among other things, Branstetter sought transcripts of interviews (including her own) gathered in connection with the DPS Investigation into the botched Lockett execution. Fact Nos. 12 and 14. DPS gathered, redacted, and produced those records in November of last year pursuant to a federal court order in *Warner, et. al v. Gross, et. al*, No. CIV-14-665F (W.D. Okla., filed June 25, 2014) (“*Warner*”), a civil lawsuit then pending in the United States District Court for the Western District of Oklahoma. Branstetter Aff. ¶29. Indeed, in her November 17 email to DPS, Branstetter simply asked for immediate access to the exact same records that DPS had already provided in that case—records that she had initially requested back in September. Fact Nos. 12 and 14.

**II. The undisputed facts establish that Defendants are in violation of the Oklahoma Constitution.**

Article II, Section 1 of the Oklahoma Constitution provides that:

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 . . . .

Okla Const. Art II, §1. This provision is a clear expression of the democratic nature of Oklahoma’s government; it affirms that the people are the source of the State’s authority, and guarantees the right of the people to govern themselves, including to alter or reform their government. *See id.* Contrary to Defendants’ arguments, this inherent right to self-governance guaranteed by the Oklahoma Constitution includes an independent right of the people to receive information necessary to meaningfully participate in the democratic process.

In enacting the ORA, the Legislature expressly recognized this independent right:

As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the *inherent right to know and be fully informed about their government*.

ORA §24A.2 (emphasis added); *see also Okla. Pub. Employees. Ass’n v. State ex rel. Okla.*

*Office of Pers. Mgmt.*, 2011 OK 68, ¶36, 267 P.3d 838, 851 (“Openness in government is essential to the functioning of a democracy. . . . In order to verify accountability, the public must have access to government files.”).

In a recent opinion, Justice Edmondson of the Oklahoma Supreme Court, joined by Chief Justice Colbert, made clear that the ORA is not the source of the right of the people to access public records, nor does it provide the exclusive remedies when access is denied. In *Shadid v. Hammon*, 2013 OK 103, 315 P.3d 1008, a case involving access to court records, Justice Edmondson explained that “[t]he right of the People for access to public documents exists independent of the [ORA], and since the Open Records Act did not *create* a right, the remedy provided by §24A.17 should not be deemed the exclusive remedy . . . .” *Id.* at ¶13, 315 P.3d at 1014. (Edmondson, J. concurring in part and dissenting in part) (emphasis in original).

The records being withheld by Defendants pertains to government action of the highest order. The results of the DPS Investigation into the botched Lockett execution and other information about the manner in which the State carries out executions is of critical importance to the people of Oklahoma. Not only is the U.S. Supreme Court currently considering whether the execution protocol followed by the State complies with federal constitutional requirements, but the Oklahoma Legislature is also currently considering bills that would approve alternative methods of execution.<sup>10</sup> If the citizens of Oklahoma are to meaningfully oversee and participate in the democratic process with respect to capital punishment within this State, they must be fully informed about the manner in which it is being meted out. The records sought by Plaintiffs—a reporter and a newspaper—for the purpose of fulfilling their role in keeping the public informed about the actions of government, are records that citizens have a constitutional right to obtain.

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<sup>10</sup> See *supra* notes 2 and 4; Barbara Hoberock, Bills advance in Oklahoma that would allow executions by nitrogen hypoxia or even electrocution, *Tulsa World* (Feb. 11, 2015), <http://perma.cc/2PPG-7U6Y>.

Defendants' withholding of those records violates not only the ORA but the Oklahoma Constitution as well, and, for that reason too, Plaintiffs are entitled to relief as a matter of law.<sup>11</sup>

**III. Defendants cannot lawfully establish “procedures” for responding to ORA requests that effectively deprive the public of access to records.**

**a. Any “procedures” employed by Defendants must comply with both the ORA’s mandates and constitutional requirements.**

The ORA provides that public bodies may “establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions.” ORA §24A.5(5). Defendants, in support of their pending motions to dismiss and alternative motions for summary disposition (“Defendants’ Motions”), have argued that this provision authorizes them to process ORA requests in any order and manner they choose, and however slowly they see fit. *See* Fallin’s Mot. at 6–12; Thompson’s Mot. at 9–12.

That Defendants are authorized to set up “reasonable procedures” for responding to ORA requests, however, does not relieve them of their obligation to comply with the ORA’s requirements. Among other things, all records of Defendants must “be open” to any person for inspection or copying, and Defendants are required to have at least one person available at all times to release records during regular business hours. *Id.* at §24A.5(6). Put simply, while Defendants are permitted to establish “reasonable procedures” for responding to ORA requests designed to “prevent excessive disruptions of [the] essential functions” of their offices, *id.* at §24A.5(5), they must still “provide prompt, reasonable access” to their records.

Moreover, in order to pass constitutional muster, any procedures established by Defendants for complying with requests for access to public records cannot infringe upon the

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<sup>11</sup> Even if the Oklahoma Constitution did not create a right to access to public records independent of the ORA—which it does—the ORA would still need to be interpreted in conformity with constitutional guarantees. The ORA was designed to ensure that the people of Oklahoma would be able to “efficiently and intelligently exercise” the “inherent political power” guaranteed to them by the Constitution. Any interpretation of the ORA’s provisions, including its mandate that access to public records be “prompt” and “reasonable,” must comport with this legislative purpose and ensure meaningful participation in the democratic process.

right to self-government guaranteed by Oklahoma's constitution. Okla. Const. Art II, §1. Defendants have no authority to establish a method for responding to requests for public records that deprives the people of Oklahoma of their constitutionally recognized "inherent right to know and be fully informed about their government." ORA §24A.2; Okla. Const. Art II, §1.

Accordingly, the assertions made throughout Defendants' Motions about the manner in which they have purportedly chosen to respond to public records requests, and the supposed inconvenience of providing the public timely and meaningful access to government records are no defense to Plaintiffs' claims. *See Wadd*, 689 N.E.2d at 29 (stating that "no pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the respondent to evade the public's right to inspect and obtain a copy of public records within a reasonable time") (citations omitted). To the contrary, as set forth below, they underscore the need for this Court to issue appropriate relief.

**b. A pattern and practice of extensive delay in responding to public records requests is itself unconstitutional and a violation of the ORA that warrants appropriate relief.**

Far from articulating a defense to the claims asserted by Plaintiffs, the positions taken by Defendants in this case only offer further support for Plaintiffs' entitlement to relief. Defendants do not argue that they have complied with the ORA's mandate to provide "prompt, reasonable" access to the public records at issue here. Instead, Defendants argue in support of their Motions that it is *not their practice* to provide "prompt, reasonable" access to their records in response to *any* ORA request and, thus, that Plaintiffs are in the same position as all other Oklahomans who have ORA requests that remain pending for months, and even years. That Defendants admittedly have a pattern and practice of effectively denying access to public records, however, is *itself* a violation of the ORA and the Oklahoma Constitution—not a defense to Plaintiffs' claims.

According to Defendants, they “process” ORA requests one at a time, on a mostly “first come, first served” basis.<sup>12</sup> See Thompson’s Mot. at 6–8; Fallin’s Mot. at 5–7. And, because Defendants take as long as they like to respond to each request in the “queue,” a request—like the May 2 request Branstetter submitted to the Governor’s office—can simply sit in the “queue” for months, if not indefinitely, without any action being taken to process it. See, e.g., Fallin’s Mot. at 5–7 (conceding that, as of the filing of Fallin’s Motion, the Governor’s office had not yet searched for the requested records, and instructing the Court to “[p]lease recall that the line had formed before Plaintiffs’ request, and Plaintiffs are not first in line.”) That Defendants have adopted a system for responding to ORA requests designed to create excessive delay is borne out by the record. Not only has Branstetter experienced substantial months-long delays in obtaining public records under the ORA from Fallin, a log prepared by the Governor’s office indicates that it has not responded to a single ORA request *since August 8, 2014*. Branstetter Aff., Ex. K.

Any argument on the part of Defendants that it is too burdensome to comply with the ORA’s mandate to provide “prompt, reasonable” access to their records is, as set forth above, no defense to Plaintiffs’ claims. Defendants cannot lawfully devise procedures for processing ORA requests that fail to satisfy constitutional and statutory mandates. If Defendants believe their offices lack sufficient resources to satisfy those requirements, they should direct those concerns to the Legislature—not to this Court. In any event, any such argument would—in addition to being legally meritless—also be factually baseless. As Branstetter details in her concurrently filed affidavit, prior administrations did not share Governor Fallin’s purported inability to both

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<sup>12</sup> The record makes clear that Defendants do not, as they suggest, *always* utilize a “first come, first served” method for processing ORA requests. Thompson’s Mot. at 7; Fallin’s Mot. at 7. Thompson’s Motion states that DPS will respond “to a simple request early and out of order, rather than making the requester wait.” *Id.* at p. 6, fn. 4. The Governor’s office recently responded to an ORA request submitted by Branstetter, notwithstanding the fact that her earlier May 2 request that is at issue in this case is still pending. Branstetter Aff. ¶¶35-37. And the open records request log supplied by Fallin’s office (Branstetter Aff., Ex. K) shows that the Governor’s office responded to records request 2014–007— that was “queued up” on March 27, 2014—by supplying 2618 documents just 22 days later, on April 18, 2014, before processing any of the six requests submitted before it.

fulfill her obligations under the ORA and carry out her other responsibilities as Governor. Branstetter Aff. ¶¶2–4; cf. Fallin’s Mot. at 7 (listing other responsibilities of the Governor and her office). Moreover, Fallin’s record in other ORA matters like this one belies any claim that her office is *unable* to process Branstetter’s request—or anyone else’s request—promptly. Last year, an organization filed a petition for relief under the ORA in connection with a request that had been pending with the Governor’s office for four months. See Pet. For Decl. and Injunctive Relief at 3, *Take Shelter Oklahoma v. Fallin*, No. CV-2014-374 (District Court of Oklahoma County, filed March 4, 2014, assigned to Judge Barbara Swinton) (“*Take Shelter Oklahoma*”). Fallin moved to dismiss on largely the same grounds she has asserted in this case, arguing that her office had not “denied access” to the records under the ORA, but merely had yet to process the request. See Mot. to Dismiss, *Take Shelter Oklahoma* (copy attached as Exhibit 2). At the time Fallin’s motion to dismiss in that case was filed, the Governor’s office asserted that it had 14 ORA requests in “line” to be processed before the plaintiff’s, and stated that more than 20,000 to 30,000 documents would need to be reviewed to process those requests. *Id.* at 4. Less than three months later, however, Fallin moved to dismiss again, this time on the ground that her office had supplied the requested records. Suggestion of Mootness and Request for Dismissal, *Take Shelter Oklahoma* (copy attached as Exhibit 3).

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. To the contrary, under the Oklahoma Constitution, the Governor “shall cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law,” Okla. Const., Art. VI, §8, and Thompson, as a public officer, likewise has a duty to support and obey the Oklahoma Constitution, Okla. Const., Art.


XV, §1. That Defendants are engaged in a pattern and practice of ignoring their obligations to provide the public with meaningful access to government records, to the detriment of Plaintiffs and all Oklahomans, only underscores the necessity of appropriate relief from this Court.

### CONCLUSION

For all the reasons set forth herein, Plaintiffs are entitled to judgment as a matter of law, or summary adjudication, in their favor. Accordingly, the Court should issue declaratory and/or injunctive relief requiring Defendants to produce the public records requested by Branstetter forthwith, and award Plaintiffs reasonable attorney's fees, under the ORA. *See* ORA §21.A.17. In addition, the Court should issue a writ of mandamus requiring Defendants to hereafter comply with their duties under the Oklahoma Constitution and the ORA. *See* Okla. Stat. tit. 12, §1451 (stating that a writ of mandamus may issue "to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station . . .").

Dated: March 3, 2015

Respectfully submitted,

By: 

Robert D. Nelon  
Hall Estill Hardwick Gable Golden &  
Nelson  
Chase Tower, Suite 2900  
100 N. Broadway  
Oklahoma City, OK 73102  
405.553.2805 (Telephone)  
405.553.2855 (Facsimile)  
bnelon@hallestill.com


Katie Townsend (*Pro Hac Vice*)  
The Reporters Committee for Freedom of  
the Press  
1156 15th St. NW  
Washington, DC 20005  
202.795.9300 (Telephone)  
202.795.9310 (Facsimile)  
ktownsend@rcfp.org  
*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

This is to certify that on March 3, 2015 a true and correct copy of the foregoing instrument was transmitted electronically and mailed, postage prepaid, to the following counsel of record:

Robert A. Nance  
Riggs, Abney, Neal, Turpen, Orbison & Lewis  
528 NW 12th Street  
Oklahoma City, OK 73102

Stephanie L. Theban  
Riggs, Abney, Neal, Turpen, Orbison & Lewis  
502 West Sixth Street  
Frisco Building  
Tulsa, OK 74119

  
\_\_\_\_\_  
Robert D. Nelon

1083591.1:999904:01820

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

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

**Plaintiffs,**

**v.**

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

**Defendants.**

**Case No. CV-14-2372  
Judge Patricia G. Parrish**

**AFFIDAVIT OF ZIVA BRANSTETTER IN SUPPORT OF PLAINTIFFS' MOTION FOR  
SUMMARY DISPOSITION (PURSUANT TO DISTRICT COURT RULE 13)**

I, Ziva Branstetter, being first duly sworn, upon oath, deposes and says as follows:

1. I am a reporter and Enterprise Editor for *Tulsa World*, the daily newspaper for the city of Tulsa, Oklahoma, and am a plaintiff in the above-captioned case. I have worked at *Tulsa World* for the last 21 years. I cover a variety of state government issues, including prisons, the criminal justice system, state oversight of healthcare facilities, and issues surrounding government transparency.

2. I make frequent use of the Oklahoma Open Records Act, Okla. Stat. tit. 51, §§ 24A.1, *et seq.* ("ORA") to gather information for my reporting.

3. In my personal experiences of sending ORA requests over the last three years, the current administration of Governor Mary Fallin has been unreasonably slow in responding to my requests. For example, in April 2013, I requested email regarding a \$6 million federal penalty against the state by the federal government. The Governor's office responded in February 2014, nearly one year later, with a one-page letter stating it had no email responsive to my request.



Meanwhile, the Governor's office provided thousands of pages of records in response to other requests well before that date. Three of the requests were submitted after mine, according to the Governor's log. In another case, I directed reporters working with me on a project to request email related to the Justice Reinvestment Initiative, a comprehensive prison reform law that the Governor's office initially supported but then refused to fund. *Tulsa World* did not receive those records until 15 months later.

4. Under previous administrations, I did not experience such delays. To my knowledge, there was no lengthy legal review of records before they were given to me, nor did I encounter claims of executive privilege. Under Gov. Brad Henry we would request records and receive them via email within a day or two on most requests and perhaps a few weeks on larger requests for data. Gov. Frank Keating's office was similarly easy to deal with on Open Records Act requests. I can recall no single request that took months or a year.

5. As a reporter for *Tulsa World*, I have spent considerable time covering executions carried out by the State, including the executions of Clayton Lockett and Charles Warner.

6. I was one of the twelve media witnesses to attend the botched execution of Clayton Lockett on April 29, 2014. I watched as Lockett was declared unconscious but then spent three minutes mumbling, rising up, and writhing on the gurney. Then, DOC officials carrying out the execution closed the blinds in the death chamber, preventing us from seeing what we were there to witness.

7. After I left the viewing chamber, I learned from Robert Patton, the Director of the Department of Corrections ("DOC"), that Clayton Lockett had died from what he believed to be a heart attack. Patton said that Lockett's "line failed" and that "his vein exploded."

8. Charles Warner, who was also scheduled to be executed on April 29, 2014, had

his execution delayed due to the Lockett incident. Warner was executed by the State on January 15, 2015. *Tulsa World* was not among the witnesses chosen to view Warner's execution. DOC cut the number of media witnesses by more than half following the Lockett execution.

9. On or about April 30, 2014, Governor Fallin issued an executive order appointing Michael Thompson, the Commissioner for the Department of Public Safety ("DPS"), to conduct a review of the events leading up to and during the execution of Lockett. This review (hereinafter, the "DPS Investigation") was to include an inquiry into Lockett's cause of death, and an inquiry addressing whether the DOC correctly followed the agency's current protocol for executions. In stories about that investigation, *Tulsa World* noted that Thompson was a member of Fallin's cabinet, a witness to the execution, and a former DOC employee.

10. As part of the DPS Investigation, the agency conducted over 100 interviews with various government officials and other persons who were involved with and/or witnessed Lockett's execution. Governor Fallin and Commissioner Thompson were among those interviewed by DPS. I am informed and believe that the interviews were complete as of August 12, 2014, at the latest. DPS recorded those interviews and currently possesses audio recordings and transcripts of them.

11. As a witness to Lockett's botched execution, on or about June 5, 2014, I agreed to be interviewed by DPS officials in connection with their investigation.

12. On or about May 1, 2014, I, in my role as a reporter and Enterprise Editor for *Tulsa World*, sent the Office of Governor Fallin an ORA request for "[a]ll records, including emails, associated with the execution of Clayton Lockett and Charles Warner dating from March 1 to the present." In my request, I "agree[d] 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 Trammell; 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," as well as "any communications between the governor's office and the state Supreme Court justices or staff acting on their behalf." A true and correct copy of my May 1, 2014 Open Records Act request is attached hereto as **Exhibit A**.

13. On or about May 2, 2014, the Office of Governor Fallin responded via email to my May 1 Open Records Act request. In that response, a true and correct copy of which is attached hereto as **Exhibit B**, the Office of the Governor stated that my request had been "placed  in the queue of Open Record Requests" and assigned the number 2014-016.

14. As of the date of this affidavit, it has been more than nine months since I submitted the May 1 Open Records Act request attached hereto as **Exhibit A**.

15. During the last nine months I have contacted the Office of the Governor on a number of occasions concerning the status of my May 1 Open Records Act request.

16. The Office of Governor Fallin has not yet produced any records in response to my May 1 Open Records Act request.

17. On or about May 5, 2014, I, in my role as a reporter and Enterprise Editor for *Tulsa World*, sent DPS a written request for specified public records under the Oklahoma Open Records Act. Specifically, in an email to Cpt. George Brown, head of DPS public affairs, I requested "all email to or from Commissioner Michael Thompson and Steve Krise or assistants acting on their behalf—regardless of who sent or received these emails—regarding the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1." A true and

correct copy of that request is attached hereto as **Exhibit C**.

18. Brown confirmed receipt of that May 5 Open Records Act request in an email to me dated on or about May 7, 2014, in which he stated that he was “waiting to hear back regarding [my] email request.”

19. On or about August 12, 2014, I received an email from Brown on behalf of the DPS stating, among other things, that the DPS’s Legal Division was “conducting a review to determine which [email responsive to my May 5 Open Records Request], if any, may contain privileged or confidential information that is not subject to an open record request.” Brown estimated that review would “take up to another three months” to complete. A true and correct copy of that August 12 email is attached hereto as **Exhibit D**.

20. As of the filing of this Complaint, it has been more than nine months since I submitted the May 5 Open Records Act request attached hereto as Exhibit C.

21. During the last approximately nine months, I have contacted DPS on a number of occasions concerning the status of my May 5 Open Records Act request.

22. As of the date of this Affidavit, DPS has not produced any records in response to my May 5 Open Records Act request.

23. On or about September 4, 2014, I, in my role as a reporter and Enterprise Editor for *Tulsa World*, submitted another written request to DPS for specified public records under the Oklahoma Open Records Act. Specifically, in an email to Brown, I requested “copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including Commissioner Michael Thompson,” and “copies of statements by the paramedic and physician attending the execution.” A true and correct copy of my September 4 Open Records Act request is attached hereto as **Exhibit E**.

24. That same day, I received a response, via email, from Brown stating that he had “received [my] official open records request dated 9/4/14 and will review it for consideration and processing.” A true and correct copy of DPS’s response to my September 4 Open Records Act request is attached hereto as **Exhibit F**.

25. On or about September 17, 2014, I, in a telephone call with Brown, inquired as to the status of my September 4 Open Records Act request to DPS. During that telephone call, Brown informed me that DPS was reviewing approximately 5,000 pages of material gathered in connection with its investigation, including transcripts of interviews. Brown further informed me that, after redacting from that material the information it was required by law to redact, DPS intended to make the material available to the public via its website.

26. As of the date of this affidavit, it has been more than five months I submitted my September 4 Open Records Act request attached hereto as **Exhibit E**.

27. Over that time period, I have contacted DPS on a number of occasions concerning the status of my September 4 Open Records Act request.

28. As of the date of this affidavit, DPS has not produced any records in response to my September 4 Open Records Act request.

29. I am informed and believe that certain material responsive to my Open Records Act requests—including transcripts of interviews of witnesses conducted in connection with the DPS Investigation—were reviewed, redacted, and produced by DPS in connection with a civil lawsuit in the United States District Court for the Western District of Oklahoma—*Warner, et. al v. Gross, et. al*, No. CIV-14-665F (W.D. Okla., filed June 25, 2014) (hereinafter the “*Warner Matter*.”). I am informed and believe that those redacted transcripts were produced to the plaintiffs in that civil litigation on or around November 15, 2014.

30. On or about November 17, 2014, I followed up on my earlier Open Records Act requests and again requested that DPS provide copies of the interview transcripts related to the DPS's Investigation, citing their production in the *Warner* Matter. Specifically, in an email to Brown, I stated: "I request copies of all transcripts created in connection with the Clayton Lockett investigation in electronic format under the Open Records Act. I know Judge Friot ordered DPS to produce them [in the *Warner* Matter] by Nov. 15 and they're already redacted. Please inform me if the documents are not in electronic format and if I need anything else to obtain them." A true and correct copy of that email is attached hereto as **Exhibit G**.

31. Notwithstanding their production in the *Warner* Matter, none of the interview transcripts related to the DPS's Investigation have been provided in response to my Open Records Act requests.

32. As of the date of this affidavit, it has been more than three months I submitted my November 17 Open Records Act request attached hereto as Exhibit G.

33. DPS has not produced any records in response to my November 17 Open Records Act request.

34. On Nov. 4, 2014, I requested a status update on my ORA requests with the Governor's Office, and received a response on November 4, 2014, stating that there were "three requests that need to be processed before [mine]." A true and correct copy of this response is attached hereto as **Exhibit H**.

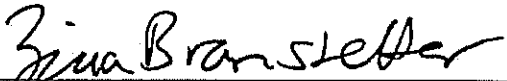
35. On or about February 23, 2015 at 10:26 AM, I submitted an Open Records Act request to the Governor's Office for "any log(s) kept by Gov. Fallin's office showing open records requests made, date, records requested and their status including date granted and any other fields of data kept dating to when such logs began." A true and correct copy of my

February 23 Open Records Act request is attached hereto as **Exhibit I**.

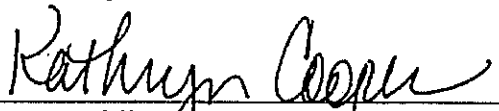
36. On February 23, 2015 at 12:35 PM I received a response from Michael McNutt at the Governor's Office providing the processing logs I requested. A true and correct copy of this email is attached hereto as **Exhibit J**.

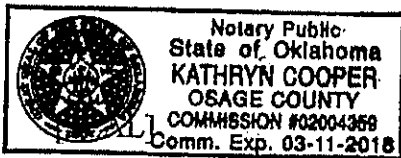
37. True and correct copies of the documents provided in response to my February 23 Open Records Act request are attached here as **Exhibit K**. Exhibit K indicates that, as of this affidavit's date, the Governor's office has not responded to an open records act request since August 8, 2014.

38. I also asked in that email for an update on my records request regarding the Lockett execution. I was told there were two large requests ahead of mine, though the log provided to me, and attached hereto as Exhibit K, shows eight requests ahead of mine.

  
Ziva Branstetter

SUBSCRIBED AND SWORN to before me this 3rd day of March, 2015.

  
Notary Public



1081999.1:999904:01820

Subject: records request

From: "Branstetter, Ziva" <Ziva.Branstetter@tulsaworld.com>

Date: 5/1/2014 6:39 PM

To: Alex Weintz <Alex.Weintz@gov.ok.gov>

Alex: Please consider this a request under the Oklahoma Open Records Act for the following:

All records, including emails, associated with the execution of Clayton Lockett 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 Trammell; 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.

Ziva Branstetter  
Tulsa World Enterprise Editor  
918.581.8306 (O); 918.520.0406  
@zivabranstetter

EXHIBIT

tabber  
1A

From: Audrey Rockwell [Audrey.Rockwell@gov.ok.gov]  
Sent: Friday, May 02, 2014 5:22 PM  
To: Branstetter, Ziva  
Subject: Acknowledgement of Open Records Request

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

EXHIBIT

1B

From: "Branstetter, Ziva" [Ziva.Branstetter@tulsaworld.com]  
Sent: 05/05/2014 07:49 AM  
To: George Brown <Gbrown@dos.state.ok.us>  
Cc: "Strain, Mike (Michael)" <Mike.Strain@tulsaworld.com>; "Worley, Joe (Joseph)" <Joe.Worley@tulsaworld.com>; "Ellerbach, Susan" <Susan.Ellerbach@tulsaworld.com>  
Subject: Information request

Good morning George: We had talked a few days ago about the investigation into the execution. You were going to find out for me whether troop Z has anyone with medical training related to IV placement, drug interaction and related issues that will -- I assume -- be part of the investigation. I also request to know whether any outside agencies or experts will be included in this investigation and if so which ones, who they are.

Finally, please consider this a records request for all email to or from Commissioner Michael Thompson and Steve Krise or assistants acting on their behalf -- regardless of who sent or received these emails -- regarding the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1.

Please be aware of the ORA's requirement that open records be provided in a prompt and reasonable time frame and that records cannot be withheld due to an ongoing investigation. If any emails contain exempt material please cite the applicable statute, redact the exempt portion of the record and provide the remainder of the record as required by the ORA.

Ziva Branstetter  
Enterprise Editor  
Tulsa World  
918-581-8306 (o)  
918-528-0406 (c)  
@zivabranstetter

EXHIBIT

tabbler  
1C

From: [GBrown@dps.state.ok.us](mailto:GBrown@dps.state.ok.us) [[GBrown@dps.state.ok.us](mailto:GBrown@dps.state.ok.us)]  
Sent: Tuesday, August 12, 2014 12:21 PM  
To: Branstetter, Ziva  
Subject: Re: Status of records request?

Ziva,  
We are working to provide an update to our investigation of the execution of convicted murderer Clayton Lockett, and hope to release that update sometime this week. As the autopsy is a key component of our investigation, we can't move forward until it is released. We have completed all interviews, well over 100, and are in the final stages of our investigation. We look forward to releasing the report as soon as possible.

In response to your May 5th records request for email correspondence:

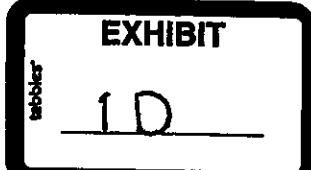
Section 24A.2 of the ORA states in part, "the agency to whom a request is made shall at all times bear the burden of establishing whether any records are protected by a confidential privilege". Therefore, our Legal Division is conducting a review to determine which ones, if any, may contain privileged or confidential information that is not subject to an open record request. This is a comprehensive review process which requires extended time.

Please note the ORA also states, "public bodies do not need to follow any procedures for providing access to public records except those specifically required by the Oklahoma Open Records Act".

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, we believe we are on track. A fair estimation, assuming nothing interferes before then, is that it will take up to another three months before completion.

If you have any questions please feel free to contact me.

Respectfully,  
Captain George Brown #47  
Commander, DPS Public Affairs  
405-425-7709



From: "Branstetter, Ziva" [Ziva.Branstetter@tulsaworld.com]  
Sent: 09/04/2014 02:33 PM  
To: George Brown <Gbrown@dps.state.ok.us>  
Cc: "Strain, Mike (Michael)" <Mike.Strain@tulsaworld.com>; "Worley, Joe (Joseph)" <Joe.Worley@tulsaworld.com>; "Ellenbach, Susan" <Susan.Ellenbach@tulsaworld.com>  
Subject: Records request

George: Please consider this a request under the Open Records Act for copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including Commissioner Michael Thompson.

Additionally, I request copies of statements by the paramedic and physician attending the execution. Please redact any identifying information including name, office locations etc. The ORA provides for redaction of exempt material from public records while requiring that the remaining document be provided.

I understand that there are transcripts of the statements but if transcripts do not exist I request the audiotapes of said interviews.

In the same spirit of transparency that DPS has pledged and displayed throughout this investigation, I believe release of full statements would enable the public to determine on its own what the witnesses said and how their views differed.

If any part of this request is denied, we request a written denial citing the reasons.

Thank you for your assistance with our request. Please let me know if you have any questions.

Ziva Branstetter  
Enterprise Editor  
Tulsa World  
918-581-8305 (o)  
918-520-0406 (c)  
@zivabranstetter

EXHIBIT

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1 E

Subject: Re: Records request

From: <GBrown@dps.state.ok.us>

Date: 9/4/2014 3:40 PM

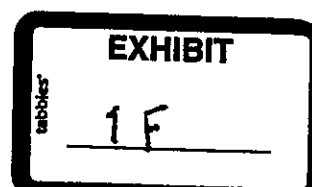
To: Ziva Branstetter <ziva.branstetter@tulsaworld.com>

CC: <PIO@dps.state.ok.us>

Mrs. Branstetter,

I have received your official open records request dated 9/4/14 and will review it for consideration and processing.

CPT George Brown #47  
Commander, OHP/DPS Public Affairs



Subject: Redacted Lockett Interview transcripts

From: <Ziva.Branstetter@tulsaworld.com>

Date: 11/17/2014 8:24 AM

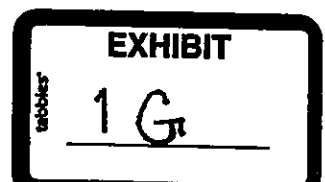
To: George Brown <Gbrown@dps.state.ok.us>

CC: Susan Ellerbach <Susan.Ellerbach@tulsaworld.com>, Mike Strain <Mike.Strain@tulsaworld.com>

George: Are you all going to be releasing the redacted interview transcripts today? I request copies of all transcripts created in connection with the Clayton Lockett investigation in electronic format under the Open Records Act. I know Judge Friot ordered DPS to produce them by Nov. 15 and they're already redacted.

Please inform me if the documents are not in electronic format and if I need to do anything else to obtain them.

Ziva Branstetter  
Enterprise Editor  
Tulsa World  
918-581-8306 (o)  
918-520-0406 (c)  
@zivabranstetter



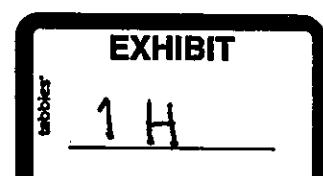
From: Michael McNutt [[Michael.McNutt@gov.ok.gov](mailto:Michael.McNutt@gov.ok.gov)<<mailto:Michael.McNutt@gov.ok.gov>>]  
Sent: Tuesday, November 04, 2014 3:10 PM  
To: Branstetter, Ziva  
Cc: Alex Weintz  
Subject: Records status

Ziva,  
Concerning your records request with the governor's office:

"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." - Alex Weintz, communications director for Governor Mary Fallin

Michael McNutt  
Press Secretary  
Office of Governor Mary Fallin  
(405) 522-8878 - phone  
(405) 464-9175 - cell  
[michael.mcnutt@gov.ok.gov](mailto:michael.mcnutt@gov.ok.gov)<<mailto:michael.mcnutt@gov.ok.gov>>

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From: Branstetter, Ziva [mailto:[Ziva.Branstetter@tulsaworld.com](mailto:Ziva.Branstetter@tulsaworld.com)]  
Sent: Monday, February 23, 2015 10:26 AM  
To: Michael McNutt  
Cc: Alex Weintz  
Subject: Re: Records status

Hi Michael ...I am checking back on this email from November in which you said there were three requests ahead of ours. Since it has been nearly four months, are there still requests ahead of ours?

Also I would like to request under the ORA any log(s) kept by Gov. Fallin's office showing open records requests made, date, records requested and their status including date granted and any other fields of data kept dating to when such logs began. Please provide the records in electronic format if they exist in that format.

Ziva Branstetter  
Enterprise Editor  
Tulsa World  
918-581-8306 (o)  
918-520-0406 (c)  
[@zivabranstetter](mailto:@zivabranstetter)

EXHIBIT

tabbles

1 I

From: Michael McNutt [[Michael.McNutt@gov.ok.gov](mailto:Michael.McNutt@gov.ok.gov)]  
Sent: Monday, February 23, 2015 12:35 PM  
To: Branstetter, Ziva  
Cc: Alex Weintz  
Subject: Records status

Ziva,

Attached is the open records log that you requested.

In it, you will see that the governor's office is working on two rather large requests dealing with endangered species and gross production taxes.

Your request dealing with the Lockhart execution is next on tap. At this point, we don't have a time estimate.

Michael

Michael McNutt  
Press Secretary  
Office of Governor Mary Fallin  
(405) 522-8878 - phone  
(405) 464-9175 - cell  
[michael.mcnutt@gov.ok.gov](mailto:michael.mcnutt@gov.ok.gov)

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Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# 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 Alshuler 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 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	Robert Cotner, OSR DOC #093780	8/7/2014	Legal	1
2014-006	3/13/2014		Clifton Adcock, OK Watch	8/8/2014	Legal	203

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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	in the works		
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	in the works		
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		

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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, Alisha Shull, OK Ecological Services Field Office	Joe Wertz, State Impact	see 2014-009		
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, Trade Wind, 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		

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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 Braustetter, Tulsa World	see 2014-011		
2014-017	5/5/2014	Autopsy report for Clayton Lockett 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	Molly Hennessy-Fiske, LA Times	see 2014-011		
2014-018	5/6/2014	Any and all communications with GMF and staff re: Nursing homes, long term care facilities, assisted living, group homes, icfmr'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	Sean Murphy, AP	see 2014-011		
2014-019	5/13/2014	Communications with the Governor Fallin and staff re: Executions of Clayton Lockett and Charles Warner	A Perfect Cause			
2014-020	5/19/2014	Communications with 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		

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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			

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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 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.	Wallace Collins, OK Democrats Art Kane, Watchdog.org			
2014-034	8/20/2014					

Request #	Date Rec'd	2014 Open Records Request	Requesting Party	Response Date	Responding Department	# of Pages in Response
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			



2014 ORA Tracking - RM

Tracking No.	Received Date & Time	Custodian	Requestor	Description	Email Search	Legal Review	IT Assistance	Response Date & Delay	Fees	Notes
2014-07	2/5/2014	Shirley Thomas	Thomas, Boxley, Greenwood, Chamberof and/or Leon Commerce Davis (Ray thomasboxley@holmail.com)	Greenwood Cantina's GreenArch - Real Estate	n/a	n/a	n/a	ready for release 2/17/14		2/11/14 notified City Clerk they are the only custodians w/ records & they can release them on this date.
2014-08	2/11/2014	Terri O'Malley	Clark for Kay Ziva Brensteler	emails & logs regarding TED Dispatch	2/13/14 Copy disk Ziva willing to accept same emails as 2014 Q5	completed for 2014 Q5	n/a	CD ready for release 2/13/14	\$6,000 response for logs	2/12/14 requested help from Communications for more info from Ziva 2/17/14 Police & Fire coordinating \$6,000 response for logs
2014-09	2/28/2014	Kerl Fothergill (David Aulry)	Mummolo DB8	emails regarding insurance	(COMBINED SEARCH HOURS: 43.09) 4/21/14 2nd search TOTAL TIME 39.41 (\$862.41) HOURS 3/20/14 discovered needed to update records search 3/4/14 version to legal TOTAL HOURS: 13 hours & 40 minutes	4/21/2014 send 4/7/2014 Unable to export files related to event	5/15/14 DVD & 5 paper pages provided for Michelle Allen	\$ 7.00		
2014-10	3/6/2014	Kerl Fothergill (Michelle Allen)	Jessie Gaswell POP	3/17/14 added request for Releation, Scardale Correspondence 1/1/13 - 5/13/14 to legal present in Mayor's Office	7/10/2014 delivered to Lloyd Wright (Mayor's Office) 7/31/14 assigned to M. McCrow 5/13/14 to legal for review	7/10/2014 CD provided to Lloyd Wright	\$ 418.50			
2014-11	3/18/2014	Karen Hanson	Roger Gaswell	Playground Mullen Rigg's Abray Analysis	8/15/14 TOTAL HOURS: 6:59 (\$197.50) 8/19/14 received from Legation Reductions: 5/16/14 subtotal hours 2:5 (\$75) eureka search & forward to Legal	3/13/2014 Rainey sent to RM for further review 5/15/14 to legal for review	4/14/14 Hanson provided certain records (see email 5/19/2014)	\$ 203.50	9/22/14 Attorney resigned from law firm no response to custodian 8/18/14 Custodian retrieved right 8/15/14 RM notified Custodian emails were ready for review release 8/14 RM emailed legal \$203.50 twenty review's still in progress	
2014-12	3/7/2014	Michael Radon	Robert (Ely Wines) Burke Web LLC Cox (Chris Intographic)	Customer Care Response Data	n/a	n/a	n/a	Redoff working w/ it to respond		6/22/14 Contacted Philip Davis re: fees & request clarification from Basgallon records 5/30/14 ask Legatice Checks 5/19/2014 solicited info from Custodians again 4/17/2014 soliciting from Custodians 3/28/14 request info from City Clerk (Custodian) 3/27/14 notify legal ORR from law firm
2014-13	3/27/2014	Albeuse Engineering/ J Miller	Planning	Correspondence, contracts & info for specific Engineering Companies over 10 years	5/19/14 quest search & export 2 hours	5/30/14 request clarification information regarding checks				

Reasons for Non-production / Delay

Tracking No.	Received Date & Time	Custodian	Requestor	Description	Email Search	Legal Review	IT Assistance	Response Date & Time	Fees	Notes
2014-14	5/8/14 Modified: 3/3/2014	Caroline Guenz	Ally	Council office records related to Massage	to email search conducted by RM, pending Marsh's agreement to pay search fees			7/2/2014 Drew Reese made a CD available w/ records. (email 7/2/2014 @ 11:44 AM) Pending agreement to pay \$36.00 search fees.		
2014-15	4/10/2014	Michelle Allen	Rick	Parking Meter Records	n/a			5/9/2014 Chad responded 5/12/2014 Kelly 5/13/2014 Kelly response provided	\$6 plus for Contract CD	
2014-16	4/22/2014	Reichman, PEK, Kay, Kitrell, TFD, Tamara	SR Krishnaprasad, PSJ, Dallas, TX	Code violations	n/a			Requested denied / April 14 Legal advice		mailed letter
2014-17	4/22/2014	Athenette Debesse ES, Cheryl Reichman, PEK, Kay, Kitrell, TFD, Desiree Quattris, WS, Tamara	Robert Basking, Professionals	Phase I ESA	n/a			Requested denied / April 14 Legal advice		mailed letter
2014-18	6/2/2014	Tracie Lewis (replaced Rodi Hummel)	Michael Riber	AFSCME	6/18/14 SD#221 5-45 ask if it available w/ combining export files, conduct review, forward to legal (1 hour) 6/22/2014 export files regarding parameters of	3/19/14 Legal Review Completed (Hinchey) 6/3/14 Files to Legal 6/8/2014 files to review 6/2/2014 review, forward to legal (1 hour) 6/22/2014 export files regarding parameters of		9/11/14 Available to TPO from RM (wzm) \$51.00 request		8/6/14 Hinchey confirmed reviews pending, 8/8/14 RM emailed Legals to verify they are still under review 8/11/14 JAH responded via email 6/22/2014 leave voicemail for JAH re parameters of
2014-19	5/6/2014	Keith Elstuge, Mike Klar, WZM	Councilor, Bynum	Budget revenue projection (Budget)	emails 5/17/14 2014 budget revenue projection (Budget)	7/8/2014 Email available 6/6/2014 ps files to legal (Newly)	6/18/14 SD#221 5-45 ask if it available w/ combining duplication 6/20/14 Ray's office having trouble opening PS files (PST) scan/convert desktop WZM deleted files & folder	7/21/2014 N/A		7/8/2014 Legal completed review & records provided to NPK to Council after it was discovered that WZM & WZM thought Aubry took them 7/8/2014 delivered files to David Aubry 6/6/2014 delivered unreviewed files to Bobjcha
2014-20	5/6/2014	David Aubry, Kerl F. Hegerl, WZM	Councilor, Bynum	Budget revenue projection (majors office)	emails 5/17/14 2014 budget revenue projection (majors office)	6/6/2014 reviewed files & forward to legal (85 minutes) 6/6/14 exported files (55 minutes) to legal				

2014 ORA Tracking - RM

Tracking No.	Received Date & Time	Custodian	Requestor	Description	Email Search	Legal Review	IT Assistance	Response Date & Time	Fees	Notes
2014-21	5/8/2014	Franklin, Wm	Quarles, W.S.	EGS Texas Phase I ESA						
2014-22	5/20/14	Wzm	Quarles, W.S.	EGS Texas Phase I ESA						
2014-23	6/4/2014	Quarles (Wzm)	Quarles, W.S.	Utility						
2014-24	6/5/2014	Debose (wzm)	Quarles, W.S.	Various eng. contractor emails & Barrell Moorman						
2014-25	6/24/2014	Wzm	Quarles, W.S.	Various eng. contractor emails & Barrell Moorman						
2014-26	6/24/2014	Wzm	Quarles, W.S.	Various eng. contractor emails & Barrell Moorman						
2014-27	7/7/2014	unk	Quarles, W.S.	Various eng. contractor emails & Barrell Moorman						
2014-28	7/16/2014	Wzm	Quarles, W.S.	Various eng. contractor emails & Barrell Moorman						
2014-29	7/24/2014	Binu Abraham	Steven P. Flowers, Attorney	Revenue Discovery Systems & Sales Tax Audit Info						
2014-30	7/31/2014	MacLeod	Tulia Strain	Revenue Discovery Systems & Sales Tax Audit Info						

Reasons for Non-production / Delay

Legal Review IT Assistance

Email Search

Description

Requestor

Custodian

Tracking No.

Response Date & Time

Fees

Notes

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2014 ORA Tracking - RM

Tracking No.	Received Date & Time	Custodian	Requestor	Description	Email Search	Legal Review	IT Assistance	Response Date & Time	Fees	Notes
2014-31	8/18/2014	Alison Webb, Maria HR (Michelle Carter)	Ch 2	Emails in folder: Lawson & Erica Felix	TOTAL 3.92 hrs (\$117.50) 8/20/14 sent and received back 8/20/14 end search. 8/18/14 from legal (Rainey) began search	8/20/14 sent and received back from legal (Rainey)		8/20/14 reviewed by Dep. & Released by Michelle Allen	\$0.00	
2014-32	8/19/2014	James Moore, Aly	City Council	Financial Inquiries						Forwarded to City Council for processing
2014-33	8/22/2014	S. Gray (Alison Webb)	Ch 2	Employees	TOTAL 3.57 hrs (\$110) 10/13-10/12 Redact attachments 9/14-9/28 Export Search	10/14/14 received Outlook review from Rainey 9/18/14 Rainey 9/19/14 SB# 223602 attachments closed but sends to legal 9/14/2014 sarllig work around. Legal 9/14/14 IE		10/2/14 Emails sent to HR	\$193.50	11-10-2014 made copy for Communications (Mr. Allen)
2014-34	8/22/2014	S. Gray (Alison Webb)	Ch 2	Employees	TOTAL 8.25 hrs (\$255) 10/13-10/15 Redactions 3.75 hrs (\$112.50) 10/13-10/15 Redactions 9/21 Export Search 2.50 hrs (\$75)	10/2/14 sent to Legal (Rainey) assigned		10/15/14 emails to HR	\$193.50	9/22/14 Don Paul modified request. 2014-33 plus additional emails July-August
2014-35	8/22/2014	Saran Palmer, Lauren TARE, Pravee, Branda	Legal	Documents re: American Waste Control	TOTAL 7.50 hrs (\$225) Legal 10/30/14 American Waste Control 10/16-10/30 email search	10/2/14 sent to Legal (Rainey) assigned		released to Sara Palmer 10/15		Made available to custodian 1/16/2015 10/22/2014 wzm calling (let message) to call to arrange to provide contract & inform him that if firm is the contact of invoice
2014-36	10/20/2014	Larry Hood, Jane Platt	City Clerk	ONG Contracts & Invoice	TOTAL 1.00 hrs (\$30) Legal 10/30/14	1/5/2015 received from legal				
2014-37	10/30/2014	John Snyder & Brackhugger	Hotel	correspondence	TOTAL Search time 6.47 hours (\$195) Legal for review file	12/1/14 returned from Erica Grayson 1/20/14 sent to legal for review file		1/12/2015 emailed Leighly that DVD available	\$500	10/31/14 left vm w/ Leighly to acknowledge receipt of request, approx 2:45 PM 10/30/14. Emailed request to Leighly re: \$500 RC's
2014-38	11/03/2014	Arpanelle Diboss (wzm)		(no written records)						12/5/14 3rd email regarding written records 12/2/14 2nd email regarding written records
2014-38	9/17/2014	Mark Hogan, Melissa Stone		(no written records)						12/2/14 2nd email regarding written records
2014-38	11/3/2014	Adelaine Russ		(no written records)						12/2/14 2nd email regarding written records
2014-38	11/3/2014	Kathryn Ayres		(no written records)						12/2/14 2nd email regarding written records
2014-38	11/3/2014	MRO		(no written records)						12/2/14 2nd email regarding written records

11/03/2014  
wzm  
9/17/2014  
TPD)

Capt. Tippler/Major Hummel

Richard Clark, Ch 6

911 calls

polices on releasing

11/3/2014 Quest 30 min.

TOTAL search 17.42 hrs (\$522.50), 11/4/2014-2/2/15 sent to legal

2014 ORA Tracking - RM

Reasons for Non-production / Delay

Tracking No.	Received Date & Time	Custodian	Requestor	Description	Email Search	Legal Review	IT Assistance	Response Date & Time	Fees	Notes
2014-39	11/9/2014	Michelle Allen & Streets & Stormwater	Jamel Wade & Tolsa World	TARE&SS Dept emails	TOTAL search 1hr 40 min 2/16/16 resolved 2/9/16 Email search 26 min 2/6/2015 0 hrs 2/9/2015 search min 2/6/2015 0 hrs	Legal	SD#240811 Outlook became nonresponsive, opened & closed 2/13/2015	Available to Department & Communications 2/17/15		(Communications provided response 2/17/15)
2014-40	12/10/2014	Angenette Debose, David Auffy, Brenda Updike (wzm)	Bill Leighty	Sidewalk/Riverside/ADA	TOTAL search 6hrs 15min 2/17/2015 sent (\$187.50) 2/10/15-2/17/15 to Legal					
2014-41 & MAC 838646	12/15/2014	Kim MacLeod, Paul Zachary, Tamara Franklin, WZM	Herb Beattie	Sidewalk/Riverside						



FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

MAR 27 2014

TIM RHODES  
COURT CLERK

30

TAKE SHELTER OKLAHOMA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
MARY FALLIN, in her official capacity )  
as GOVERNOR OF THE STATE OF )  
OKLAHOMA, STATE OF )  
OKLAHOMA *ex rel.* OFFICE OF THE )  
GOVERNOR, )  
)  
Defendants. )

Case No. CV-2014-374

MOTION TO DISMISS

The Honorable Mary Fallin, Governor of Oklahoma, respectfully moves to dismiss this case pursuant to 12 O.S. § 2012(b)(6) because the Petition filed herein fails to state a claim of violation of the Open Records Act upon which relief can be granted. Grounds for this motion appear in the following supporting Brief.

BRIEF SUPPORTING MOTION TO DISMISS

**1. Plaintiff's Petition overreaches the basic facts alleged.**

This Petition is similar, and perhaps a *verbatim* copy, of an earlier Petition filed by two individuals against the Governor in this Court's case number CV-2014-163.<sup>1</sup> The Governor moved to dismiss that case on February 24, 2014. Plaintiff Take Shelter Oklahoma filed this case on March 3, 2014, and the two individual Plaintiffs in CV-2104-163 moved to dismiss their case the next day, on March 4, 2014. While the Petition in this matter repeatedly refers to

<sup>1</sup> The earlier case sought a writ of mandamus as well as injunctive and declaratory relief. The present case seeks no such writ.



“Plaintiffs,” we assume from the caption that Take Shelter Oklahoma is the only Plaintiff actually bringing this suit, and respond accordingly.

The Petition suffers from a confusing inconsistency. The introductory paragraph claims Plaintiff seeks temporary and permanent injunctive relief, and certain declaratory relief, while the Prayer seeks only declaratory relief by a judicial declaration “recognizing Plaintiff’s right to access to *all* public records within the possession or control of Governor Fallin or the Office of the Governor, unless exempted from release by a specific provision of the Oklahoma Open Records Act.” Petition, p. 4, ¶ 15 (emphasis added). Plaintiff made an Open Records Act request to the Governor, described below, which did not call for production of *all* records in the Governor’s possession, less those exempted from the provisions of the Act. At the present time, Plaintiff seeks no temporary injunctive relief.

Taking the Petition at its broadest scope, Plaintiff seek temporary and permanent injunctions to prohibit the Governor and her employees from “continuing to deny access” to “specific public records” in alleged violation of the Open Records Act, 51 O.S. §§ 24.1.1 et seq. and to declare the rights and responsibilities of the parties as to records “barred from public access under color of ‘Open Records Confidentiality’, ‘Executive Privilege’, and/or ‘Deliberative Process Privilege.’” Petition, initial paragraph. Nothing in the Petition indicates Governor Fallin has asserted or will assert any such privileges in responding to the Open Records Act request. Plaintiff also asks for an order compelling production of requested documents. Petition, initial paragraph.

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. The facts as alleged by Plaintiff demonstrate that the

Governor has not denied public records to Plaintiff, even though its request was nebulous, rather than specific. Further, the Governor has not invoked any of the privileges that Plaintiff seeks to litigate. Thus, the Plaintiff has failed to state a claim under its Open Records Act theory.

“Plaintiffs” claim to have submitted on November 7, 2013 an Open Records Act request “through the advocacy organization Take Shelter Oklahoma...so as to provide supporting evidence in their argument before the Supreme Court” set by that Court’s order dated January 16, 2014, setting a hearing on February 25, 2014. Petition ¶¶ 5-6, Exhibit B. The Open Records Act request attached to the Petition makes no mention of the argument in the Supreme Court, the date of which passed before this case was filed in any event.

Plaintiff claims that the Governor’s General Counsel responded to its request by letter dated December 26, 2013 stating that their request was “placed in the ‘Open Records Act Queue.’” Petition, ¶ 7 and Exhibit C. The Governor’s General Counsel, Steven Mullins, indicated in his letter that the request was placed in the queue under two numbers, 2013-31 and 2013-32, breaking the Plaintiffs’ nebulous requests into two parts. Mr. Mullins asked counsel for Plaintiffs to call if there was any error in the formulation of Plaintiffs’ requests into the two parts. Plaintiff’s counsel wrote again on January 27, 2014, and failed to comment or inquire about Plaintiff’s place in the queue. Counsel threatened suit on January 31, 2104 if the Governor continued “to fail to provide the requested materials” by that date. Petition, Exhibit D.<sup>2</sup>

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<sup>2</sup> Plaintiff omits from its pleading that Governor Fallin’s Deputy General Counsel wrote its counsel shortly after Mr. Slane’s letter of January 27, 2014. On January 30, 2014 Deputy General Counsel Jennifer Chance wrote recounting her conversation with Mr. Slane of the previous day. Ms. Chance told Plaintiffs’ counsel that the number assigned to the Take Shelter Oklahoma request corresponds to the number of requests and the order in which they are received in a calendar year. Moreover, Ms. Chance stated that the Governor’s office prepares records in response to requests to the office and that attorney’s review those documents before their release. Ms. Chance stated that in the previous year the Governor’s office released over 80,000 pages of documents in response to open records requests. Ms. Chance explained that the

Nothing contained in Plaintiffs' factual allegations or the attached correspondence indicates that the Governor, her General Counsel, or anyone else, refused to produce the records that Plaintiffs requested. Further, the Governor has not invoked any of the privileges Plaintiff wants to challenge in this case. While some of the records responsive to Plaintiff's request potentially will be protected by the attorney-client privilege, the Governor is not invoking this privilege, or any other, in advance of examining the responsive records.

Plaintiff has not requested 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 Plaintiff defines as "all communications between the Governor, the Governor's staff and Governor's office internally and/or with the State Chamber of Oklahoma, any member of the State Chamber of Oklahoma, any legislator, the Attorney General and his office and/or staff, and any other person regarding the franchise tax, storm shelters, Take Shelter Oklahoma initiative petition, and any other related matter in regard to safety for school children and others during severe weather outbreaks and/or matters related to school security in cases of shooters and other dangerous school attacks." Petition, Exhibit A.

Contrary to Plaintiff's assertion, its request is not for "specific public records." Instead, it calls for all communications within the Governor's office, and with the outside organization the State Chamber of Oklahoma, the Chamber's members (whoever they may be), any member of the Legislature, the Attorney General and his staff, and "any other persons" pertaining to the

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office responds to open records requests in the order in which they are received, and that fourteen requests, for which the office will review "in excess of 20,000 to 30,000 documents" are ahead of this request. Ms. Chance assured Plaintiffs' counsel that "the volume of requests and the volume of document review is the sole reason for the delay in responding to your request." Though not pled by Plaintiffs, and not eligible for consideration in this Motion to Dismiss unless Plaintiff agrees to its consideration, the Court should not be under the misapprehension that the Governor's office did not respond to Mr. Slane's letter of January 27, 2014.

franchise tax (whether pertinent to Take Shelter Oklahoma's plan to finance school storm shelters or not), storm shelters (whether in schools or not), and Take Shelter Oklahoma's initiative petition. Take Shelter Oklahoma's request does not stop there. It also wants communications about "any other related matter" in regard to safety for school children "and others" during severe weather outbreaks, sweeping up communications about the safety of the entire population during severe weather. Still Take Shelter Oklahoma wants more. It also asks for communications related to school security in cases of shooters "and other dangerous school attacks."

This task would be a daunting one if it only required searching for paper records. However, 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 tens of thousands 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 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. Additionally, an attorney will have to determine if each of the responsive records is one that is specifically required by law to be kept confidential, including because of state evidentiary privileges such as the attorney-client privilege or the work product immunity from discovery pursuant to 51 O.S. § 24A.5(1)(a). These records are not covered by the Act and may not be produced.

These steps are not unique to the Take Shelter Oklahoma request, but must be followed for all the requests in the queue ahead of Take Shelter Oklahoma's request. Some of those requests are small, discrete requests, while others are quite large. The Governor's office must process all these with limited staff, all the while conducting the other essential functions of the Governor's office in the midst of a legislative session.

**2. Plaintiff wants to cut to the front of the line ahead of other citizens who have requested records.**

The General Counsel did not tell Take Shelter Oklahoma "no" on any of its requests. Rather, he informed Take Shelter Oklahoma that its request was in line. Plaintiff asks the Court to make other citizens who asked for records before Take Shelter Oklahoma wait while the Governor's staff creates appropriate searches to find records responsive to Take Shelter Oklahoma's requests and manually checks the resulting records for responsiveness and privilege. Take Shelter Oklahoma may think its requests are more important than any other request made by anyone else 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 Take Shelter Oklahoma. The issue is one of limited resources to search for and find records responsive to Plaintiff's expansive 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.

**3. The Open Records 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 Take Shelter Oklahoma any records prior to the filing of this suit. Take Shelter Oklahoma has merely been told it must wait its turn before the Governor's staff can process its wildly overbroad request. Therefore, *under the plain language of the Act, Take Shelter Oklahoma may not bring this suit.* Indeed, until a substantial search is conducted based upon Plaintiff's nebulous request, it is uncertain which particular records, or how many particular records, fall within Plaintiffs' request.

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.

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.<sup>3</sup> 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. 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.

#### CONCLUSION


The Court should dismiss this action because it is premature. The Petition itself demonstrates that the Governor’s office has not denied Take Shelter Oklahoma’s 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.

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<sup>3</sup> It may be that a search fee is called for in the case of Plaintiffs’ request. Even so, such a fee would be part of the process of providing, not refusing, responsive public records.

Respectfully submitted,

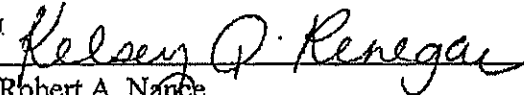
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS

  
Robert A. Nance, OBA No. 6581  
Kelsey Quillian Renegar, OBA No. 30688  
5801 Broadway Extension, Suite 101  
Oklahoma City, Oklahoma 73118  
Telephone: (405) 843-9909  
Facsimile: (405) 842-2913  
ATTORNEYS FOR DEFENDANTS

**NOTICE OF HEARING**

**YOU ARE HEREBY NOTIFIED** that a hearing has been set on the 2nd day of May, 2014 at 10:00 'clock a.m. before the Honorable Judge Swinton at the Oklahoma County Court House, Oklahoma City, Oklahoma.

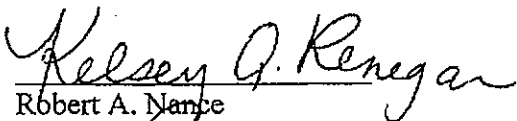
Dated this 27th day of March, 2014.

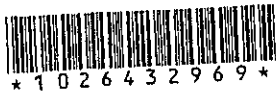
  
Robert A. Nance

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of March, 2014, a true and correct copy of the above document was mailed by certified United States mail, postage prepaid, to:

David R. Slane  
901 NW 12<sup>th</sup> Street  
Oklahoma City, OK 73106  
Facsimile: (405) 319-1802

  
Robert A. Nance



JUN 26 2014

TIM RHODES  
COURT CLERK

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

43

TAKE SHELTER OKLAHOMA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARY FALLIN, in her official capacity )  
 as GOVERNOR OF THE STATE OF )  
 OKLAHOMA, STATE OF )  
 OKLAHOMA *ex rel.* OFFICE OF THE )  
 GOVERNOR, )  
 )  
 Defendants. )

Case No. CV-2014-374

SUGGESTION OF MOOTNESS AND REQUEST FOR DISMISSAL

The Honorable Mary Fallin, Governor of Oklahoma, Defendant herein, respectfully suggests this case is moot in light of the tender on this date of the records requested by Plaintiff in its Open Record Act request. In light of the tender of the requested records no further proceedings or relief are appropriate in this case. Consequently, Governor Fallin asks the Court to dismiss this case as moot.

Respectfully Submitted,


Robert A. Nance, OBA #6581  
Kelsey Quillian Renegar, OBA #30688  
RIGGS, ABNEY, NEAL, TURPEN  
ORBISON & LEWIS  
528 N.W. 12th Street  
Oklahoma City, OK 73103  
Telephone: (405) 843-9909  
Facsimile: (405) 842-2913  
rnance@riggsabney.com  
kquillian@riggsabney.com

EXHIBIT  
3

CERTIFICATE OF MAILING

I hereby certify that on June 26, 2014, a true and correct copy of the foregoing instrument was mailed, postage paid, to:

David R. Slane  
901 NW 12<sup>th</sup> Street  
Oklahoma City, OK 73106  
Facsimile: (405) 319-1802

  
Robert A. Nance