

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

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

Plaintiffs,

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 Bryan Dixon

JAN 18 2017

RICK WARREN  
COURT CLERK

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**PLAINTIFFS' RESPONSE TO NON-PARTY "NOTICES" REGARDING PLAINTIFFS'  
MOTION FOR *IN CAMERA* REVIEW**

In its Order on Plaintiffs' Motion for *In Camera* Review, filed on December 22, 2016, the Court directed the Oklahoma Department of Public Safety ("DPS") to give notice to the Oklahoma Attorney General's Office ("AG's Office") and the Oklahoma Department of Corrections ("DOC") to file on or before December 29, 2016 any objection to DPS's disclosure of documents identified in Appendix A of Plaintiffs' Motion for *In Camera* Review. Both the AG's Office and DOC filed objections (collectively, the "Notices"). The Notices purport to assert claims of "privilege and/or confidentiality" as to certain documents in Appendix A to Plaintiff's Motion. Plaintiffs Ziva Branstetter and BH Media Group Inc. d/b/a/ *Tulsa World* (collectively, "Plaintiffs"), hereby submit this combined response to the Notices submitted by the AG's Office and DOC.

**I. Plaintiffs object to the assertion of new arguments and purported exemptions by non-party entities years into ongoing litigation.**

Neither the AG's Office nor the DOC is a party to the above-captioned case, which has been pending for more than two years. There is no provision in the Oklahoma Open Records Act, Okla. Stat. tit. 51 §§24A.1 *et seq.* ("ORA"), that permits exemptions under that Act to be asserted by a non-party to an ORA lawsuit. Although the Court allowed these non-parties to file objections

if they so desired, the fact that the Notices were submitted *years* after Plaintiffs' petition was filed, more than six months after the Department of Public Safety ("DPS") submitted a privilege log identifying all purportedly applicable exemptions, and after numerous rounds of briefing by the parties, is nevertheless highly prejudicial to Plaintiffs and to the litigation process.

Plaintiffs have been waiting more than *two years* for complete copies of the records they requested from DPS that were redacted—many extensively—by that agency. On May 6, 2016, the Court ordered DPS to provide a privilege log setting forth the legal basis for the redactions DPS made to certain records identified by Plaintiffs. DPS failed to identify any basis whatsoever for redacting a number of records (those identified in Appendix A to Plaintiffs' Motion for *In Camera* Review). DPS thus failed to satisfy its burden of demonstrating that those records are exempt under the ORA. Accordingly, those records should be released in their entirety. DPS's claim—made for the very first time at the hearing on Plaintiffs' Motion for *In Camera* Review—that the records identified in Appendix A are supposedly attorney–client privileged documents of the DOC, was not only inaccurate and legally meritless, as discussed below, but should be treated as waived because untimely.

Plaintiffs should not be prejudicially forced to face new and different arguments belatedly raised by any non–party that files a “notice” years into litigation. If a non–party entity had interests it wished to assert in a case, the proper recourse was for it to timely file a motion to intervene pursuant to Title 12, Section 2025 of the Oklahoma Statutes. Neither the AG's Office nor the DOC elected to do so in this case. Accordingly, the eleventh–hour arguments asserted by the AG's Office and the DOC should not be considered by this Court.

**II. Neither the AG's Office nor the DOC has demonstrated that the attorney–client privilege applies.**

Even assuming, *arguendo*, that the Notices could properly be considered, they fail to

demonstrate that the attorney–client privilege applies to any portion of the DPS Transcripts. To the extent that the AG’s Office and the DOC are permitted to assert claims of privilege in this case, they bear the burden of demonstrating that a privilege, in fact, applies. As set forth in Plaintiffs’ Motion for *In Camera* Review, the attorney–client privilege is “***not generally available***” for government entities. *State ex rel. Cartwright v. Oklahoma Indus. Auth.*, 1981 OK 47, ¶32, 629 P.2d 1244, 1250 (emphasis added; setting forth scope of privilege); *see also* Okla. Stat. tit. 12, §2502(D)(7). And the Notices fail to offer ***any*** support for the position that the records identified therein (1) concern “a pending investigation, claim or action” or (2) that their disclosure “will seriously impair the ability” of the entity “to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.” Okla. Stat. tit. 12, §2502(D)(7).<sup>1</sup> Indeed, ***no government entity*** in this lawsuit—including the Office of the Governor with respect to its own records—has ever made any attempt to demonstrate that these conditions to application of the attorney–client privilege are satisfied. Absent such a showing the privilege simply does not apply.

*Id.*

**III. Neither the AG’s Office nor the DOC has demonstrated that the attorney work-product privilege applies.**

Likewise, assuming *arguendo* that new arguments by the AG’s Office and the DOC can properly be considered here, these entities have failed to demonstrate that any of the material withheld by DPS is properly exempt under the work–product privilege. As set forth in Plaintiffs’ Motion for *In Camera* Review, the scope of the work–product privilege is narrow and the burden of proving its application falls on the party asserting it. *See Scott v. Peterson*, 2005 OK 84, ¶9, 126 P.3d 1232, 1235 (allocating burden); Okla. Stat. tit. 12, §3226. The Notices simply state,

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<sup>1</sup> These requirements for a government entity are *in addition to* the ordinary requirements for a document to be attorney–client privileged. *See* Pls.’ Mot. for *In Camera* Review at 12 n.8.

without more, that the records are exempt under the work-product privilege. Such bald assertions are patently insufficient and should be disregarded.

**IV. Neither the AG's Office nor the DOC has demonstrated that Section 1015(B)—the execution secrecy statute—applies.**

As set forth in Plaintiffs' Motion for *In Camera* Review, the scope of Oklahoma's execution secrecy statute is narrow. It shields the identity—and *only* the identity—of a limited group of individuals directly involved in carrying out an execution. See Okla. Stat. tit. 22, §1015(B); Pls.' Mot. for *In Camera* Review at 5–11. The Notices make no effort whatsoever to demonstrate that any portion of the records they identify meet the statutory criteria. Plaintiffs point, for example, to the claim made in both Notices that lines 16–24 of page 433 of the DPS Transcripts fall within Section 1015(B). Those lines are clearly a fairly detailed answer to a question that cannot possibly consist *entirely* of the *identities* of executioners and/or suppliers of execution drugs. See Okla. Stat. tit. 22, §1015(B); Pls.' Mot. for *In Camera* Review at 5–7. The AG's Office and the DOC, like DPS, are attempting to apply this statute far beyond the scope defined by the Oklahoma Legislature.

**V. There is no ORA exemption for "Protected Health Information."**

The AG's Office asserts that line 2 of page 783 of the DPS Transcripts is exempt as "Protected Health Information." AG's Office Notice at 3. As set forth in Plaintiffs' Motion for *In Camera* Review, the Oklahoma Supreme Court has made clear that "[u]nless a record falls within a statutorily prescribed exemption in the Act, the record must be made available for public inspection." *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶ 12, 73 P.3d 871, 875. "Protected Health Information" is not a statutorily prescribed exemption; line 2 of page 783 must be made available to Plaintiffs.

**VI. Even assuming a privilege once applied, at least some of those privilege assertions have been waived.**

First, there is no dispute that the transcripts prepared by DPS were produced to plaintiffs in the *Glossip* matter with *different* redactions than those applied to the versions released to Plaintiffs in this case. See Pls. First Am. Pet. at ¶¶ 18, 46–49; Thompson Ans. To Pls.’ First Am. Pet. at ¶¶ 17–20. Thus, even assuming *arguendo* that any of the assertions of attorney–client or work–product privilege apply to the records identified in Appendix A, they have been waived to the extent that they have been produced to non–governmental parties and thus must be released to Plaintiffs here.

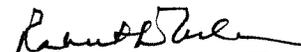
Second, to the extent that DPS is not a client for the purposes of the attorney–client privilege between DOC and the AG’s Office—as it maintained during the December 9, 2016 hearing—its possession of the Transcripts at issue here means the privilege has been waived. See, e.g., *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (privilege does not cover information supplied by auditors to agency attorneys, and privilege lost in any event when information circulated to non–attorneys inside and outside of agency).

**VII. Records for which there has been no assertion of privilege must be released.**

No entity—not DPS, DOC, or the AG’s Office—has asserted any justification for DPS’s withholding of line 18 on page 2058 of the DPS Transcripts. Accordingly, it must be released to Plaintiffs.

Dated: January 18, 2017

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

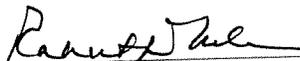
Katie Townsend (*Pro Hac Vice*)  
The Reporters Committee for  
Freedom of the Press  
1156 15th St. NW  
Washington, DC 20005  
202.795.9300 (Telephone)  
202.795.9310 (Facsimile)  
ktownsend@rcfp.org  
*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

This is to certify that on January 18, 2017 a true and correct copy of the foregoing instrument was transmitted electronically and mailed, postage prepaid, to the following counsel of record:

Jennifer E. Chance, OBA #19320  
Deputy General Counsel  
Office of the Governor Mary Fallin  
2300 N. Lincoln Blvd., Room 212  
Oklahoma City, OK 73105

Steven J. Krise, OBA #17948  
General Counsel  
Kim M. Rytter, OBA #20825  
Assistant General Counsel  
Department of Public Safety  
3600 Martin Luther King Ave.  
Oklahoma City, OK 73111

  
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