

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 Bryan Dixon

FILED IN DISTRICT COURT
OKLAHOMA COUNTY
DEC - 2 2016
RICK WARREN
COURT CLERK
40

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR *IN CAMERA* REVIEW

Plaintiffs Ziva Branstetter (“Branstetter”) and BH Media Group Inc. d/b/a/ *Tulsa World* (“*Tulsa World*”) (collectively, “Plaintiffs”), hereby submit this Reply in Support of their Motion for *In Camera* Review (hereinafter the “Motion”):

First, Defendants mostly do not dispute that *in camera* review of the records identified in Plaintiffs’ Motion is an appropriate way for the Court to evaluate the lawfulness of Defendants’ withholdings under the Open Records Act, Okla. Stat. tit. 51, §§24.A.1 *et seq.* (“ORA”).¹ Accordingly, Defendants should provide the Court with unredacted versions of the records that it argues may be withheld. Defendants’ proffered justifications for withholding those records—which should be rejected—are addressed below.

I. DPS is improperly relying on Section 1015(B).

According to the Department of Public Safety (“DPS”), it has “no independent knowledge” concerning “whether or not [those persons whose names have been redacted

¹ Governor Fallin does object to an *in camera* review of records she asserts are non-responsive because they “pre-date” the time frame specified in Plaintiffs’ request to her office. Gov.’s Resp. at 10. But as Plaintiffs’ Motion explains, the Governor’s privilege log does not include dates for the records she claims are non-responsive. *In camera* review is thus necessary to determine whether they may be withheld. Pls.’ Mot. at 18–19.

from interview transcripts] are subject to the confidentiality requirements of 22 O.S. § 1015(B)” (“Section 1015(B)”). DPS Resp. at 2–3. It argues, however, that the transcripts themselves supposedly “clearly identify” those persons as falling within Section 1015(B). *Id.* DPS can have no objection then to the Court’s reviewing the transcripts *in camera* to determine whether or not they make it “clear[]” that all redacted names fall within the statute. *See* Pls.’ Mot. at 7–9 (citing redacted names of persons *not* covered by Section 1015(B)).

DPS’s Response does not address its redaction of information other than names or identities purportedly pursuant to Section 1015(B), *see* Pls.’ Mot. at 9–10. Because the statute protects *only* the *identities* of certain specified individuals, Okla. Stat. tit. 22, §1015(B); Pls. Mot. at 5–7, the Court should, after conducting its *in camera* review of the transcripts, release all such other information that has been improperly redacted by DPS.

II. DPS cannot assert new exemptions in its Response.

On May 6, the Court ordered DPS to provide Plaintiffs a privilege log setting forth its grounds for withholding records responsive to Plaintiffs’ requests. On July 11, DPS provided Plaintiffs with its privilege log. That log indicated that one line redacted on one page of one record responsive to Plaintiffs’ requests was made pursuant to Section 24A.8(B); Plaintiffs chose not to challenge that redaction. Pls.’ Mot. at 2 n. 2; *Id.* Ex. D. Now, in its Response, DPS claims that Section 24A.8(B) applies to all withholdings addressed in Plaintiffs’ Motion. *See* DPS Resp. at 4. DPS’s eleventh hour attempt to assert new exemptions not listed in its privilege log is impermissible. DPS had the opportunity and the obligation to identify whatever exemptions it believed applied to the withholdings at issue in its privilege log; it chose to invoke Section 24A.8(B) with respect to one—and only one—redaction. It has accordingly waived its ability now to assert that exemption with respect to

any other redactions, *see Faulkenberry v. Kansas City S. Ry. Co.*, 1979 OK 142, 602 P.2d 203, 206–07 (noting that “the voluntary or intentional relinquishment of a known right” is a waiver), and it should be estopped from doing so, *Bank of Wichita v. Ledford*, 2006 OK 73, ¶23, 151 P.3d 103, 112 (purpose of judicial estoppel is to “prohibit[] parties from deliberately changing positions according to the exigencies of the moment”).²

III. DPS must produce records for which it has offered no basis for withholding.

DPS does not defend its failure to provide any legal grounds for withholding those records identified in Appendix A to Plaintiffs’ Motion. Pls.’ Mot. at 19 & Appendix A. Those records, which DPS has conceded it has no basis to withhold, must be released.

IV. Neither the Governor nor her staff is covered by Section 1015(B).

First, the Governor’s Office does not address the fact that it has withheld *entire pages* of records purportedly under Section 1015(B), even though (1) that statute permits *only* the withholding of the *identity* of certain persons, and (2) the ORA requires redaction. Pls. Mot. at 11; Okla. Stat. tit. 22, § 1015(B); ORA § 25A.5(2) (“Any reasonably segregable portion of a record containing exempt material shall be provided . . .”). Thus, even setting aside the bizarre argument that the identity of the Governor is made confidential by Section 1015(B), that statute cannot be used to withhold any information other than “identities[.]” *Id.*

Second, the Governor’s Office devotes much of its Response to arguing that the Governor has a “role in the administration of the death penalty.” *See* Gov.’s Resp. at 1–4. Plaintiffs do not dispute that unremarkable proposition. However, that the Governor can, for example, “order a stay of execution” does not make the identity of the Governor, or of “her designated staff,” confidential under Section 1015(B). *Id.* The argument that the statute

² In the event that the Court does consider DPS’s newfound exemption claims, Plaintiffs should be afforded a full and fair opportunity to address them in briefing to the Court.

permits the Governor's Office to redact the name of the Governor herself (or that of her "design[ee]") in order to shield from public scrutiny actions taken by the Governor (or on her behalf) in connection with a particular execution is absurd; it stretches the narrow scope of Section 1015(B) beyond reason. Section 1015(B) makes confidential the names and identities of executioners and the suppliers of drugs and medical equipment used to carry out an execution. Pls.' Mot. at 5–7. It does not apply to the Governor or her staff.

V. The Governor's claims of attorney-client and work-product privilege fail.

The Governor's Office makes no attempt to support its claims of attorney–client and work product privilege. *Compare* Gov.'s Resp. at 8 *with* Pls.' Mot. at 12–14. Given the narrow scope of those privileges, particularly with respect to governmental agencies, *see id.*; Okla. Stat. tit. 12, §2502(D)(7), that failure should be fatal to those privilege claims. At a minimum, it is clear that *in camera* review is necessary to evaluate them.

VI. The Governor's executive privilege claims fail.

The qualified executive privilege recognized by the Oklahoma Supreme Court in *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, is (1) exceedingly narrow and must satisfy numerous criteria; (2) does not apply to factual material; and (3) may be overcome by public interest. *Id.*; Pls.' Mot at 14–16. The Governor does not address—let alone show—that either of the first two criteria are met. Her executive privilege claims, accordingly, fail.

In any event, as set forth in Plaintiffs' Motion, the substantial public interest here overcomes the qualified privilege, even if it applies, notwithstanding the Governor's Office's weak attempt to argue otherwise. *See* Gov.'s Resp. at 9–10 (claiming that "Plaintiffs' argument that the Lockett execution was and continues to be a matter of great public interest is supported only by Plaintiffs' business interests."). The widespread, sustained public

interest in Lockett's botched execution and its aftermath is readily apparent. Indeed, a Lexis news search for "Lockett execution" results in nearly a *million* (987,371) hits for newspaper articles, which come from across Oklahoma, the United States, and the world. It is not surprising that the Governor's Office offers no evidence to counter the fact that the Lockett execution was and continues to be a matter of great public interest and concern.

VII. The Governor's Office cannot withhold non-governmental email addresses.

The Governor's objection to the disclosure of non-governmental email addresses falls short for several reasons. First, the Governor fails to take into account that Section 24A.7 of the ORA *only* applies to *personnel records of government employees*; it cannot, among other things, be used to shield email addresses of persons who are *not* government employees. Second, the non-governmental email address used by the Governor is already public; she has no privacy interest left to assert.³ Third, even assuming *arguendo* that the Governor or a member of her staff does have some privacy interest in a non-governmental email address they use to conduct public business, that interest is overcome by the public's interest. Whether or not the use of such accounts is "contrary to law," Gov.'s Resp. at 7, the public has an interest in observing how the Governor conducts state business,⁴ monitoring her compliance with records retention laws and the ORA, and ensuring that the email systems she uses are appropriately secured against hacking and other potential threats.

CONCLUSION

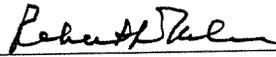
Plaintiffs respectfully request the Court grant their Motion for *in camera* review.

³ See, e.g., Grant Hermes, *Fallin Addresses Use of Private Email Account*, News 9 (Nov. 23, 2016), <http://bit.ly/2gC2lPH>; Ziva Branstetter, *Fallin defends use of personal email for state business as 'more efficient'*, The Frontier (Nov. 22, 2016), <http://bit.ly/2gaWvq3>.

⁴ See Phil Cross, *Gov. Mary Fallin used private email to set up meeting with lobbyist*, KTUL (Nov. 22, 2016), <http://bit.ly/2fEHrgv>.

Dated: December 2, 2016

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 December 2, 2016 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

