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 OKAHOMA; 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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY DISPOSITION OF ISSUES

Dated: March 23, 2015

Respectfully submitted,

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Counsel for Plaintiffs

On March 13—weeks after Plaintiffs filed their motion for summary judgment or, in the alternative, summary disposition of issues ("Motion"), and more than six months after Branstetter made an Open Records Act ("ORA") request for copies of transcripts of interviews from the Department of Public Safety ("DPS") relating to the botched execution of Clayton Lockett—DPS produced approximately 5,000 pages of heavily redacted[1] transcripts to Plaintiffs. It has yet to produce any email in response to Branstetter's *earlier* May 5 request, and Governor Fallin has yet to produce *any* records in response to Branstetter's May 1 request. Those requests have now been pending for more than ten months. Plaintiffs' efforts to obtain access to records concerning an issue of substantial, pressing concern for the people of Oklahoma does not reflect a "crescendo" of mere "irritation" on the part of Plaintiffs, as Defendants derisively assert. Indeed, Defendants' tone stands in stark contrast to the serious nature of the records at issue. The documents produced by DPS on March 13 raise troubling questions about the State's handling of the Lockett execution. Among other things, they reveal that the lethal drugs used were not properly labeled and that medical personnel who carried out the execution were inexperienced; they also indicate that Warden Trammell was asked to sign an affidavit prepared by the Attorney General's office that contained false statements concerning the drugs used.[2] Plaintiffs and the people of Oklahoma are entitled to prompt and meaningful access to this information and the remaining records at issue under the ORA and the Oklahoma Constitution.

I. Defendants have failed to provide "prompt, reasonable" access to the records.

Contrary to Defendants' arguments, while a public body may "establish reasonable procedures" for responding to ORA requests, it is still obligated to "provide prompt, reasonable

[1] In a cover letter, DPS's counsel stated only that the documents had been redacted "to protect the identity of persons participating in the execution process pursuant to 22 O.S. § 1015(B)" and "for other applicable privileges as well."

[2] *See* Cary Aspinwall and Ziva Branstetter, Records reveal lack of protocol in Clayton Lockett's Oklahoma execution, Tulsa World (Mar. 16, 2015), http://bit.ly/1GULNLH.

access" to its records. ORA §24A.5(5). To accept Defendants' distorted interpretation of the statutory language would be to render that express legislative mandate meaningless. Defendants must comply with the requirements of the ORA and the Oklahoma Constitution. Mot. at 14–18. Thus, any "procedures" they "establish" must be (1) "reasonable," and needed to either "protect the integrity and organization of [their] records" or "prevent excessive disruptions of [the] essential functions" of their offices, *and* (2) they must provide "prompt, reasonable" access in response to records requests. *Id.* at §24A.5(5).

Faced with the fact that a more than ten–month delay can hardly be considered "prompt," and that courts interpreting similar requirements for "prompt" access to public records have concluded that *weeks* of delay is not reasonable, *see* Mot. at 6–7, Defendants attempt to sidestep the "prompt" requirement entirely, arguing instead that their withholding of the records at issue is reasonable "under the circumstances." Fallin/Thompson Opp. at 8–9. As the Attorney General opinion that Defendants attempt to rely upon makes clear, however, to determine whether a public body "acted reasonably in response to a request" for public records, one must look to *the specific request* at issue. *See id.* at 8 (quoting 1999 OK AG 58, ¶ 11). Indeed, "public bodies must look *only* to the nature of the request and the efforts necessary to respond to it . . . ." *Id.* (emphasis added) (identifying "factors" such as "the number of records requested").

Neither Defendant has submitted *any evidence* that Branstetter's requests which have been pending since May are particularly complex, or unusually difficult or time-consuming to process.[3] To the contrary, the record is clear that Defendants simply failed to take any action to respond to those requests for months. The Governor's office has *yet to locate*—let alone begin reviewing—email responsive to Branstetter's May 1 request. Fallin Opp. at 15; *id.*, Ex. 1 at ¶ 26

[3] For this reason, among others, *Merrill v. Oklahoma Tax Commission*, 1992 OK 53, 831 P.2d 634, is inapposite. In *Merrill*, the requester sought records relating to 1.3 million tax filers in a unique format that the agency was not set up to produce. *Id.*, ¶ 9; *see also* 1999 OK AG 58, ¶ 11(noting that *Merrill* is an "extreme" case).

(averring that in "preparation to responding to Plaintiffs' request" an "email documentation pull was sent," but failing to indicate when it was sent, or how many documents have been pulled). DPS's Opposition effectively ignores Branstetter's requests, focusing instead on the process it undertook to comply with an order issued by the district court in the federal *Warner* case. Thompson Opp., Ex. 1, ¶¶ 7–11. And despite that focus, it is still unclear why approximately 5,000 pages of documents produced pursuant to that order *in November*—many of which the district court noted "could be reviewed at a rate of about a second per page," *id.*, Ex. 1-3 at 54:19–23—and that went through a "second round of redactions" *in December*, were only provided to Plaintiffs on March 13, *id.*, Ex. 1, ¶¶ 9–10, 12.[4] The Attorney General has opined that "[t]he duty to provide prompt and reasonable access" is "complied with only when a public body properly attends to its duty to provide a record," in response to a request; that duty has clearly not been complied with here. 1999 OK AG 58, ¶ 11.

II. Defendants' processes for responding to records requests violate the ORA.

Rather than address the specific ORA requests at issue here, Defendants proffer testimony concerning the way in which they respond to ORA requests generally, and the backlog of *other* requests created as a result of that process. Simply stated, Defendants' cannot chose procedures for responding to ORA requests that fail to provide Plaintiffs with "prompt, reasonable" access to requested records. ORA §24A.5(5).

In any event, Defendants' evidence demonstrates that those "procedures" *themselves* violate the ORA. It is clear that neither DPS nor the Governor's office has "[a]t least one person

[4] While DPS suggests that it was burdensome to comply with the district court's November order requiring the production of documents *within two days*, *id.*, Ex. 1, ¶ 8, DPS fails to explain that the district court took into account the fact that an ORA request for the same material had been pending for "several months." *See id.* at 69:12–19 ("I'm also mindful of the fact that all or substantially all of the documents at issue were requested by way of a formal open records request several months ago."); *id.* at 68:6–17 ("And so my heart does not bleed for the State of Oklahoma on these timing issues, especially since a document request was made months and months ago.")

. . . available at all times to release records during [] regular business hours," as the ORA *mandates*. *Id.*, §24A.5(6). In fact, it does not appear that either Defendant employs any person whose primary job duties include responding to ORA requests. *See* Thompson Opp., Ex. 1, ¶¶ 2–3; Fallin Opp. Ex. 1, ¶¶ 1–12. The Governor—despite employing a full-time Communications Director, a Press Secretary, and a Deputy Press Secretary[5]—has tasked a single paralegal with the initial processing of *all* ORA requests, a task Ms. Rockwell attends to only *after* she fulfills her (apparently more essential) "primary" duties, such as "greeting and offering refreshments to those meeting with staff" and "processing any gift the Governor or her staff receive[s]." *Id.*, Ex. 1, ¶ 4. In sum, the Governor attempts to oppose Plaintiffs' Motion on the ground that the "process" she "implemented" in January 2013 for responding to ORA requests—a process that also requires *all* requests to be subject to *multiple* rounds of attorney review, *id.*, Ex. 2, ¶ 20—consists only of "*reasonable* procedures" necessary to "prevent *excessive* disruptions of [the] *essential* functions" of her office," ORA §24A.5(5) (emphasis added). Her effort is misguided to say the least.

III. Defendants cannot evade judicial review.

As in their Motions to Dismiss, Defendants argue that they may withhold access to the records requested by Plaintiffs *indefinitely*, and their conduct is not subject to judicial review. Defendants are wrong. *See* Mot. at 6–9. The ORA requires "prompt, reasonable" access. When, as here, such access is refused—*i.e.*, *denied*—for months on end, the requester is entitled to seek relief under the plain language of ORA §24.A.17 ("Any person denied access to records . . ." may "bring a civil suit . . . "). Moreover, the well-established principle of constructive denial is fully applicable here, *see* Mot. at 6–9, and Defendants' effort to distinguish the authority cited by

[5] *See* Press Release: Governor Mary Fallin names Michael McNutt to Press Secretary Position (Aug. 28, 2013) *available at* http://services.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=12580.

Plaintiffs is unavailing.[6] Indeed, Defendants do not point to *any* authority from any jurisdiction that *rejects* application of that principle in a public records case. To adopt Defendants' view that this Court lacks jurisdiction because Plaintiffs' requests have not been *expressly* denied would eviscerate the ORA. Whether Defendants have complied with their duty to provide "prompt, reasonable" access to records is a question well within this Court's jurisdiction.

IV. The Oklahoma Constitution provides an independent basis for relief.

Even if Plaintiffs did not state a judiciable claim under the ORA, which they do, Oklahoma's Constitution provides a separate basis for relief. While Defendants claim that Plaintiffs "cite no authority" for the proposition that the Oklahoma Constitution guarantees to the people their inherent right to self-government and, thus, the right to receive information necessary to meaningfully self-govern, Fallin/Thompson Opp. at 16 (underlining original), that is incorrect. Plaintiffs cite Art. II, §1 of the Oklahoma Constitution—plainly a "recognized source of law" in existence before the ORA, *cf. id.* at 17. They also cite the ORA itself, which expressly acknowledges that the public's right "to know and be fully informed about their government" is an "*inherent*"—*i.e.* innate—right *guaranteed* by the Oklahoma Constitution. ORA §24A.2 (emphasis added). Justice Edmonson's opinion in *Shadid v. Hammon*, in which he expressly recognizes that the ORA "did not *create*" the "right of the People for access to public documents," but rather that such right "exists independent of the [ORA]," lends further support for Plaintiffs' assertion of the independent right to access to public records under the right to self-government guaranteed by the Oklahoma Constitution. 2013 OK 103, ¶ 13, 315 P.3d 1008, 1014. (Edmondson, J. concurring in part and dissenting in part) (emphasis in original).

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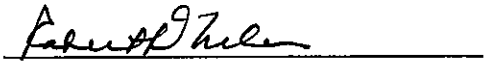
[6] In particular, Defendants misconstrue federal FOIA. It requires that a "determination" be made within, *at most*, 20 working days, 5 U.S.C. §552(a)(6)(A)(i), and that responsive records be produced "promptly"—*i.e.*, within days or a few weeks—thereafter. *See CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). In addition, the provision of FOIA cited in Plaintiffs' Motion, 5 U.S.C. § 552(a)(6)(C)(i), does describe constructive denial. Defendants erroneously replaced the text of that provision with the text of another: 5 U.S.C. §552(a)(6)(A)(i).

CONCLUSION

For the reasons set forth in Plaintiffs' Motion and herein, Plaintiffs are entitled to judgment as a matter of law, or summary disposition of issues, in their favor.

Dated: March 23, 2015

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that on March 23, 2015 a true and correct copy of the foregoing instrument was transmitted electronically and mailed, postage prepaid, to the following counsel of record:

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Appendix A

PLAINTIFFS' REPLY TO DEFENDANT FALLIN'S RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS AND ADDITIONAL UNDISPUTED FACTS

Plaintiffs hereby submit the following reply to the response to Plaintiffs' statement of undisputed material facts and additional undisputed facts submitted by Defendant Governor Mary Fallin ("Fallin") in opposition to Plaintiffs' motion for summary judgment or, in the alternative, for summary disposition of issues ("Motion").

Plaintiffs object to and respectfully request that the Court disregard any testimony and other evidence attached to or contained within the Affidavit of Audrey Rockwell ("Rockwell Affidavit") attached as Exhibit 1 to Fallin's Opposition, the Affidavit of Jennifer Chance ("Chance Affidavit") attached as Exhibit 2 to Fallin's Opposition, and the Affidavit of Kim Rytter ("Rytter Affidavit") attached as Exhibit 1 to the opposition of Commissioner Michael Thompson, that is inadmissible under the Oklahoma Rules of Evidence, Okla. Stat. tit. 12, §§ 2101 *et seq.*, or any other applicable statute. *See* District Court Rule 13(B)-(C). In particular, Plaintiffs object to the numerous statements set forth in those affidavits that are not based on personal knowledge, are not relevant to this case, and/or constitute argument or conclusions of law.

I. Plaintiffs' reply to Fallin's response to Plaintiffs' statement of undisputed material facts.

Fallin admits Paragraphs 1–12, 14, and 18 of Plaintiffs' statement of undisputed material facts, and concedes that they are material.

Fallin also admits Paragraphs 16 and 17, but asserts that those facts are immaterial. Paragraph 16 states: Charles Warner was executed by the state of Oklahoma on January 15, 2015. (Citations omitted.) Paragraph 17 states: On January 23, 2015, the Supreme Court

granted *certiorari* in *Glossip et al. v. Gross et al.*, No., 14-6244. (Citations omitted.) Plaintiffs seek summary judgment or summary adjudication of their causes of action under both the Oklahoma Open Records Act ("ORA") and Art. II, §1 of the Oklahoma Constitution. As set forth in Plaintiffs' Motion, the Oklahoma Constitution recognizes and guarantees the inherent right of the public to access and review government records so they may efficiently and intelligently exercise their inherent political power. The ORA ensures and facilitates that right. ORA § 24A.2. Paragraphs 16 and 17—as well as Paragraph 18, which Fallin admits and concedes is material—demonstrate the important and urgent nature of the records sought by Plaintiffs to the people of Oklahoma's ability to meaningfully engage in self-government. That the State of Oklahoma executed inmate Charles Warner by lethal injection, and the U.S. Supreme Court could determine whether the State's lethal injection protocol violates the U.S. Constitution *before* the people of Oklahoma have been given access to information that would allow them to evaluate their government's handling of Clayton Lockett's botched execution is irreconcilable with the rights guaranteed by the ORA and the Oklahoma Constitution, and underscores Defendants' failure to provide "prompt, reasonable" access to their records in response Plaintiffs' still pending ORA requests. Paragraphs 16 and 17 are thus material.

Fallin purports to deny Paragraphs 13 and 15, citing the Rytter Affidavit. While her basis for doing so is not specified, Fallin presumably means to deny these Paragraphs on the ground that a limited set of heavily redacted records responsive to Branstetter's September ORA request to the Department of Public Safety ("DPS") were produced to Plaintiffs on March 13, 2015, ten days after Plaintiffs' Motion was filed. *See* Rytter Aff. ¶ 12. However, both Paragraphs 13 and 15 state clearly that no records responsive to any of Plaintiffs' ORA requests had been received "[a]s of the date of" their Motion. Fallin, thus, has no grounds to deny either Paragraph 13 or 15.

In any event, no email has been produced by DPS in response to Branstetter's May ORA request to DPS, and Fallin has not produced any records, whatsoever, in response to Branstetter's May request. Both of those requests have now been pending for more than ten months.

II. Plaintiffs' reply to Defendant Fallin's statement of additional undisputed facts.

1. Undisputed for purposes of this Motion, but immaterial.
2. Undisputed for purposes of this Motion, but immaterial.
3. Undisputed for purposes of this Motion, but immaterial.
4. Undisputed for purposes of this Motion, but immaterial.
5. Undisputed for purposes of this Motion, but immaterial.
6. Undisputed for purposes of this Motion, but immaterial.
7. Undisputed for purposes of this Motion, but immaterial.
8. Undisputed for purposes of this Motion, but immaterial.
9. This paragraph contains argument and conclusions of law, including that the process engaged in by Ms. Rockwell constitutes compliance with the ORA. To the extent that the paragraph sets forth facts, they are undisputed for purposes of this Motion, but immaterial.
10. This paragraph contains argument and conclusions of law, including purporting to identify an acceptable method for processing ORA requests. Plaintiffs also object to this paragraph because it purports to set forth facts of which Ms. Rockwell does not have personal knowledge, including concerning the actions taken by other persons to process ORA requests. To the extent this paragraph sets forth facts based on Ms. Rockwell's personal knowledge, they are undisputed for purposes of this Motion, but immaterial.
11. Plaintiffs object to this paragraph because it purports to set forth facts of which Ms.

Rockwell does not have personal knowledge, including concerning the actions taken by other persons to process ORA requests. To the extent that the paragraph sets forth facts based on Ms. Rockwell's personal knowledge, they are undisputed for the purposes of this Motion, but immaterial.

12. This paragraph contains argument and conclusions of law, including that the Governor's office's purportedly complies with the ORA. To the extent that this paragraph sets forth facts, they are undisputed for the purposes of this Motion, but immaterial.

13. Disputed. Plaintiffs object to this paragraph because it contains inadmissible speculation outside the personal knowledge of Ms. Rockwell, including concerning what Ms. Rockwell and the Governor's Office purportedly plan to do in the future. Plaintiffs also object to this paragraph to the extent that it contains argument and conclusions of law, including purporting to affirm the Governor's Office's compliance with the ORA. In addition, the paragraph is at odds with Defendant Fallin's own previous representations regarding the status of Plaintiffs' ORA requests. *See* Fallin's Mot. to Dismiss at 5-6 (acknowledging that Plaintiffs' ORA requests have yet to be processed).

14. This paragraph contains argument and conclusions of law, including purporting to identify an acceptable method for processing ORA requests. Plaintiffs also object to this paragraph because it purports to set forth facts of which Ms. Chance does not have personal knowledge, including concerning the actions taken by other persons to process ORA requests. To the extent that the paragraph sets forth facts of which Ms. Chance has personal knowledge, they are undisputed for purposes of this Motion.

15. Undisputed for the purposes of this Motion, but immaterial.

16. Disputed. This paragraph consists of argument and conclusions of law.

Appendix B

PLAINTIFFS' REPLY TO DEFENDANT THOMPSON'S RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS AND ADDITIONAL UNDISPUTED FACTS

Plaintiffs hereby submit the following reply to the response to Plaintiffs' statement of undisputed material facts and additional undisputed facts submitted by Defendant Michael Thompson ("Thompson") in opposition to Plaintiffs' motion for summary judgment or, in the alternative, for summary disposition of issues ("Motion").

Plaintiffs object to and respectfully request that the Court disregard any testimony and other evidence attached to or contained within the Affidavit of Audrey Rockwell ("Rockwell Affidavit") attached as Exhibit 1 to Fallin's Opposition, the Affidavit of Jennifer Chance ("Chance Affidavit") attached as Exhibit 2 to Fallin's Opposition, and the Affidavit of Kim Rytter ("Rytter Affidavit") attached as Exhibit 1 to the opposition of Commissioner Michael Thompson, that is inadmissible under the Oklahoma Rules of Evidence, 12 O.S. §§ 2101 *et seq.*, or any other applicable statute. *See* District Court Rule 13(B)-(C). In particular, Plaintiffs object to the numerous statements set forth in those affidavits that are not based on personal knowledge, are not relevant to this case, and/or constitute argument or conclusions of law.

III. Plaintiffs' reply to Thompson's response to Plaintiffs' statement of undisputed material facts.

Thompson admits Paragraphs 1–12, 14, and 18 of Plaintiffs' statement of undisputed material facts, and concedes that they are material.

Thompson also admits Paragraphs 16 and 17, but asserts that those facts are immaterial. Paragraph 16 states: Charles Warner was executed by the state of Oklahoma on January 15, 2015. (Citations omitted.) Paragraph 17 states: On January 23, 2015, the Supreme Court

granted *certiorari* in *Glossip et al. v. Gross et al.*, No., 14-6244. (Citations omitted.) Plaintiffs seek summary judgment or summary adjudication of their causes of action under both the Oklahoma Open Records Act ("ORA") and Art. II, § 1 of the Oklahoma Constitution. As set forth in Plaintiffs' Motion, the Oklahoma Constitution recognizes and guarantees the inherent right of the public to access and review government records so they may efficiently and intelligently exercise their inherent political power. The ORA ensures and facilitates that right. ORA § 24A.2. Paragraphs 16 and 17—as well as Paragraph 18, which Thompson admits and concedes is material—demonstrate the important and urgent nature of the records sought by Plaintiffs to the people of Oklahoma's ability to meaningfully engage in self-government. That the State of Oklahoma executed inmate Charles Warner by lethal injection, and the U.S. Supreme Court could determine whether the State's lethal injection protocol violates the U.S. Constitution *before* the people of Oklahoma have been given access to information that would allow them to evaluate their government's handling of Clayton Lockett's botched execution is irreconcilable with the rights guaranteed by the ORA and the Oklahoma Constitution, and underscores Defendants' failure to provide "prompt, reasonable" access to their records in response Plaintiffs' still pending ORA requests. Paragraphs 16 and 17 are thus material.

Thompson purports to deny Paragraphs 13 and 15, citing the Rytter Affidavit. While his basis for doing so is not specified, Thompson presumably means to deny these Paragraphs on the ground that a limited set of heavily redacted records responsive to Branstetter's September ORA request to the Department of Public Safety ("DPS") were produced to Plaintiffs on March 13, 2015, ten days after Plaintiffs' Motion was filed. *See* Rytter Aff. ¶ 12. However, both Paragraphs 13 and 15 state clearly that no records responsive to any of Plaintiffs' ORA requests had been received "[a]s of the date of" their Motion. Thompson, thus, has no grounds to deny

either Paragraph 13 or 15. In any event, no email has been produced by DPS in response to Branstetter's May ORA request to DPS, and Fallin has not produced any records, whatsoever, in response to Branstetter's May request. Both of those requests have now been pending for more than ten months.

I. Plaintiffs' reply to Defendant Thompson's statement of additional undisputed facts.

1. Undisputed for purposes of this Motion, but immaterial.
2. Undisputed for purposes of this Motion, but immaterial.
3. Undisputed for purposes of this Motion, but immaterial.
4. Undisputed for purposes of this Motion, but immaterial.
5. Undisputed for purposes of this Motion, but immaterial.
6. Disputed. Plaintiffs object to this paragraph because it contains argument not supported by the evidence, including concerning the capability of DPS redact documents. To the extent that the paragraph sets forth facts, they are undisputed for purposes of this Motion, but immaterial.
7. Undisputed that DPS produced some heavily redacted documents responsive to Plaintiff Branstetter's September 4, 2014 ORA request on March 13, 2015. However, no email records responsive to Branstetter's May 5, 2014 ORA request have been produced by DPS. The remainder of this paragraph, to the extent it sets forth admissible facts, is undisputed for purposes of this Motion, but immaterial.
8. Disputed. This paragraph consists of argument and conclusions of law.