

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  
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**REPLY IN SUPPORT OF PLAINTIFFS’ MOTION TO COMPEL SEARCH OF NON-GOVERNMENTAL EMAIL ACCOUNTS**

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 to Compel Search of Non-Governmental Email Accounts (hereinafter the “Motion”):

1. The Governor does not dispute that emails sent or received by her and her staff using non-“.gov” email accounts are public “records” subject to the Open Records Act, Okla. Stat. tit. 51, §§24.A.1 *et seq.* (“ORA”). *See* Gov.’s Resp. at 10-11.

2. The Governor also does not dispute that Plaintiffs’ ORA Request to her Office sought emails concerning the Clayton Lockett and Charles Warner executions “whether on a personal email account or state email account.” First Am. Pet. (“FAP”), Ex. A. (emphasis added).

3. Apart from a recent search of a non-“.gov” email account used by the Governor that was apparently conducted only in response to Plaintiffs’ Motion, *see* Gov.’s Resp. at 11, the Governor’s Office also does not dispute that it has not searched non-“.gov” email accounts used by the Governor and her staff for records responsive to Plaintiffs’ ORA Request.

4. Nor does the Governor’s Office identify what—if any—steps it took to ensure that

responsive public records were not deleted, inadvertently or otherwise, from such non-“.gov” email accounts in the past two years while Plaintiffs’ ORA Request has been pending.

Accordingly, Plaintiffs’ Motion should be granted and the Governor’s Office required to:

- (1) immediately produce all responsive records located during the recent search of a non-“.gov” email account used by the Governor that is described on page 11 of the Response, including the purportedly “not responsive” email containing the name “Lockett”;
- (2) immediately search all other non-governmental email accounts used by the Governor or members of her staff for records responsive to Plaintiff’s ORA Request; and
- (3) submit declarations under penalty of perjury and based on personal knowledge that describe:
  - (a) the date and scope of the recent search of a non-“.gov” email account used by the Governor, *see* Gov.’s Resp. at 11, including the search terms used;
  - (b) the nature and extent of the use of non-“.gov” email accounts by the Governor and members of her staff; and
  - (c) the steps—if any—that were taken to preserve responsive public records located on non-“.gov” emails accounts used by the Governor and members of her staff.

**I. Plaintiffs’ Motion should be granted and the Governor’s Office ordered to submit declarations under penalty of perjury.**

As the August, 2014 internal email between Mr. Weintz and other members of the Governor’s staff makes clear, the Governor’s Office was aware of its obligation to search non-“.gov” email accounts for records responsive to Plaintiffs’ ORA Request. Mot. to Compel, Ex. A (“We do not believe an email is exempt from the Open Records act simply because it was sent on a private account.”). The Governor’s Office was also aware that “[t]he governor has two email addresses: a ‘dot gov’ address and a personal email address” and that “[*m*]/*ost* of her emails are

from the personal email address.” *Id.* (emphasis added). And, as discussed in Plaintiffs’ Motion, use of non-“.gov” email to conduct public business—a practice that the Governor’s Office vehemently defends, *see* Gov.’s Resp. at 7—is not limited to the Governor. It appears to be commonplace within the Governor’s Office. *Id.* (asserting that “personal email communications” are used “by governor’s staff, after hours, when staff has limited or no access to the state email server, when it is necessary for governor’s staff to handle state business”).<sup>1</sup>

Yet no search of any non-“.gov” email account was conducted until Plaintiffs’ Motion was filed, despite repeated entreaties from Plaintiffs’ counsel after this lawsuit was initiated. *See* Gov.’s Resp., Ex. C and D.<sup>2</sup> In fact, at the outset of this case, the Governor’s counsel misrepresented the nature and extent of the Governor’s use of “private” email for public business. Specifically, she stated in response to an initial inquiry from Plaintiffs’ counsel that:

*The Governor does not use private email accounts to conduct official state business, with the exception that her private email account is used in a dual notification. To explain, the Governor’s staff will, at times, send an email to the governor on both her official and private email account.*

*See id.*, Ex. C at 3 (emphasis added). This is false. And it was only when Plaintiffs’ counsel provided copies of emails sent *only* to the Governor’s “private email account”—*i.e.*, not “dual notification[s]”—that the Governor’s counsel then asserted that “a non-governmental email account may be used by the Governor or her staff when communicating with other staff members via staff’s *governmental* email accounts.” *Id.*, Ex. D at 2 (italics original).

This claim—which is the sole basis for the Governor’s Response—that every email responsive to Plaintiffs’ ORA Request was sent or received by at least one person using a “.gov”

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<sup>1</sup> It is not at all clear why the Governor or members of her staff would not have “after hours” access to the “state email server.” *Id.* This issue would be properly addressed in a declaration.

<sup>2</sup> For some reason, the Governor fails to attach any of Plaintiffs’ counsel’s correspondence. Plaintiffs are happy to provide a full set of the parties’ correspondence at the Court’s request.

email account (1) is not supported by a declaration or any competent evidence; (2) is not verifiable (because the Governor's Office has not searched non-“.gov” email accounts for responsive emails); and (3) even if true, does not account for communications by the Governor or her staff to or from individuals *outside* the Governor's Office.<sup>3</sup> In short, it does not excuse the Governor's Office's failure to search non-“.gov” email accounts for responsive records.

The Governor's Office simply cannot have it both ways. If the Governor and her staff are going to use non-“.gov” email accounts to conduct public business, then those email accounts must be searched in response to ORA requests. The Governor's Office is required to ensure that records maintained on those email accounts are retained.<sup>4</sup> And it is required to search for and release responsive records maintained on those accounts—duplicative or not—upon request. ORA, §24A.5 (“*All records* of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction . . . .”) (emphasis added). To demonstrate that it has satisfied its obligations under the ORA, as it claims, the Governor's Office must provide actual evidence—*i. e.*, declarations under penalty of perjury from individuals with personal knowledge—to support that claim. *See, e.g., West v. Vermillion*, No. 48601-6-II, 2016 WL 6599644, at \*1 (Wash. Ct. App. Nov. 8, 2016) (affirming trial court order requiring a public employee to submit an affidavit attesting to the adequacy of a search for public records on his non-governmental email account). It is patently insufficient for the Governor's counsel to simply argue as it does, on the basis of nothing but sheer speculation, that responsive emails maintained on non-“.gov” email

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<sup>3</sup> The Governor does not explain, for instance, how emails between the Governor or a member of her staff (using a non-governmental email account) and “the state Supreme Court justices or staff acting on their behalf[,] FAP, Ex. A, would be captured on the Governor's Office's server.

<sup>4</sup> Among other things, records of the Governor and her staff, including emails, are subject to the retention and destruction requirements promulgated by Oklahoma's Archives and Records Commission. *See Consolidated General Records Disposition Schedule*, as of January 22, 2015, available at <http://libraries.ok.gov/wp-content/uploads/2015/12/grds-schedule.pdf>.

accounts are probably duplicative.

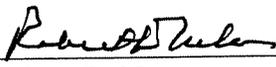
Finally, the Governor's contention, Gov.'s Resp. at 6, that Plaintiffs' "own evidence" shows that "electronic communications via non-state email addresses have been consistently released pursuant to open records requests" makes no sense. Plaintiffs obviously could not submit to the Court copies of responsive emails exchanged solely using non-".gov" email accounts. Plaintiffs do not have those emails because non-".gov" email accounts were not searched in response to their ORA Request. That is the point of Plaintiffs' Motion.

### CONCLUSION

Plaintiffs ask that the Court grant their Motion and enter the order described above.

Dated: December 2, 2016

Respectfully submitted,

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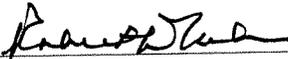
*Counsel for Plaintiffs*

**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:

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