

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAY 15 2015

MICHAEL S. RICHIE
CLERK

MARY FALLIN, in her official capacity as
GOVERNOR OF THE STATE OF
OKLAHOMA

Petitioner,

v.

THE HONORABLE PATRICIA G.
PARRISH, Judge of the District Court,
Oklahoma County, State of Oklahoma

Respondent.

Supreme Ct. Case No. 113884
Oklahoma County Case No. CV-14-
2372

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Dated: May 15, 2015

Respectfully submitted,

Robert D. Nelon, OBA #6610
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
(Motion to Appear Pending)
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 Real Parties in Interest

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INTRODUCTION

By their Applications to Assume Original Jurisdiction and Petitions for Writ of Prohibition (collectively, the “Petitions”), Defendants Governor Mary Fallin and Michael C. Thompson, Commissioner of the Oklahoma Department of Public Safety (“DPS”), ask this Court to conclude that they may withhold access to public records properly requested under the Open Records Act, Okla. Stat. tit. 51, §§ 24A.1-24A.30 (“ORA”), for months or years—indeed, *indefinitely*—and that such delay, no matter how lengthy or unreasonable, is *never* subject to judicial review. *See* Fallin Br. at 4–5; Thompson Br. at 4–5. The District Court correctly rejected this proposition, which flies in the face of both the language and intent of the ORA, and would leave citizens of Oklahoma with no means to require public officials and bodies to comply with the ORA’s express mandates. This Court should do the same.

This case arises out of ORA requests made to Defendants by Plaintiff Ziva Branstetter, a reporter and formerly the Enterprise Editor of *Tulsa World*, within days of the April 29, 2014 botched execution of Clayton Lockett. Lockett—whose veins reportedly “exploded” after he was administered lethal injection drugs by the State, Pet., ¶10, App. Ex. 1—died from a “massive heart attack” after his execution was stopped. *Id.* Shortly thereafter, Fallin appointed Thompson to conduct an investigation of the incident, which included interviews with government officials and witnesses. *Id.*, ¶¶ 10–14.

In the year that has passed since Branstetter submitted her still pending ORA requests for records relating to the Lockett execution, another inmate, Charles Warner, was executed by the State,¹ the U.S. Supreme Court heard oral argument in a federal constitutional

¹ Sean Murphy, Associated Press, *'It Feels Like Acid.' Charles Warner's Final Words Stir Execution Questions*, huffingtonpost.com (Jan. 17, 2015), <http://perma.cc/BK2Q-N22Z>. Real parties in interest request the Court take judicial notice of all facts, definitions, and other matters herein that are proper under 12 O.S. §§ 2201-2203.

challenge to the lethal injection protocol used in Oklahoma,² and the Legislature passed a bill making Oklahoma the first state to permit the use of nitrogen gas to carry out the death penalty.³ Yet, during that same time period, Oklahomans were (and continue to be) deprived of critical information about the way in which their government has administered the death penalty due to Defendants' withholding of the records at issue in this case.

Indeed, it was only when DPS finally responded, in part, to one of Branstetter's three ORA requests in March of this year—almost three months after this case was initiated, and more than five months after the records were requested, Pet., ¶¶ 27–33, App. Ex. 1—that troubling details about Lockett's execution came to light. From the heavily-redacted records produced by DPS, Plaintiffs and the public learned for the first time that the execution drug syringes used in Lockett's execution were not properly labeled, that the paramedic who inserted the IV did not have experience with the procedure, and that the warden was asked by the Attorney General's office to sign an affidavit containing false statements.⁴ That Plaintiffs would still not have access to email records Branstetter requested from DPS, or any of the records she requested from the Governor makes a mockery of the ORA's purpose to “ensure and facilitate the public's right of access to and review of government records so [citizens] may efficiently and intelligently exercise their inherent political power.” ORA §24.A.2.

Notwithstanding Defendants' extraordinary and ongoing failure to provide access to the records sought by Plaintiffs, Defendants argue that the ORA affords no remedy. According to Defendants, the courts of this State, including this Court, are powerless to even

² *Glossip, et al. v. Gross, et al.* (No. 14-7955).

³ See Barbara Hoberock, *Oklahoma gov. Mary Fallin signs bill adding nitrogen gas as state execution method*, Tulsa World (Apr. 19, 2015), <http://perma.cc/76WC-6PFS>.

⁴ Cary Aspinwall & Ziva Branstetter, *Records reveal lack of protocol in Clayton Lockett's Oklahoma execution*, Tulsa World (Mar. 16, 2015), http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayt on-lockett-s-oklahoma/article_e4f17853-160c-530a-9f36-928a0fd9f605.html.

hear a challenge brought against a government official or entity for failing to respond to an ORA request in a “prompt” and “reasonable” manner, as the statute requires. However, Defendants’ contention that Plaintiffs’ cause of action for violation of the ORA is not justiciable not only rests upon a flawed understanding of the ORA and Oklahoma law, but, if accepted, would eviscerate the ORA. The District Court correctly concluded that it had jurisdiction over Plaintiffs’ ORA claim and, for the reasons set forth in more detail herein, this Court should either (1) decline to assume original jurisdiction, or (2) accept such jurisdiction and deny Defendants’ petition for extraordinary relief.

QUESTION PRESENTED

Plaintiffs submit that the question before the Court is properly framed as follows:

Does a District Court have jurisdiction to hear a claim under the ORA that a public official or public body has failed to provide “prompt, reasonable” access to public records, as required by the ORA?

FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2014, Branstetter sent a written request under the ORA to the Governor’s office for access to “[a]ll records, including email[], associated with the execution of [Lockett] and [Warner] dating from March 1 to the present.” Pet. ¶¶16–17, App. Ex. 1. In addition to limiting her request to records created after March 1, 2014, Branstetter further limited her request by asking only for the responsive email of a handful of specified persons within the Governor’s office. *Id.* The request was assigned number 2014-16. *Id.* More than one year later, Fallin has not provided access to any of the requested records. *Id.*, ¶¶18–20.

On May 5, 2014, Branstetter sent a written request under the ORA to DPS seeking “all email to or from [Thompson] and Steve Krise or assistants acting on their behalf” regarding “the execution of [Lockett] and [Warner] and any related policy issues since April

1.” *Id.*, ¶21. On August 12, Branstetter was informed that DPS’s Legal Division was reviewing the email responsive to her request, and that the review would take “up to another three months” to complete. *Id.*, ¶23. Notwithstanding that estimate, DPS has still not provided access to any of the requested records. *Id.*, ¶¶24–26.

On September 4, 2014, Branstetter sent a second 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 [Thompson],” and “copies of statements by the paramedic and physician attending the execution.” *Id.*, ¶27. In March—approximately five months later, and three months after this lawsuit was filed—DPS produced heavily-redacted copies of those transcripts. *See* Order ¶4, Apr. 20, 2015.

On February 9, 2015, Defendants moved to dismiss, arguing that the District Court lacked jurisdiction to hear this case. *See* Fallin Mot. to Dismiss, App. Ex. 2; Thompson Mot. to Dismiss, App. Ex. 3. On April 20, the District Court denied Defendants’ motions to dismiss as to Plaintiff’s second cause of action, concluding that it had jurisdiction to determine whether Defendants failed to provide “prompt, reasonable” access to their records as required by the ORA.⁵ *See* Order, Apr. 20, 2015, Fallin App. Ex 1; Tr. 22:2-7, Fallin App. Ex. 6.

ARGUMENT AND AUTHORITIES

I. Defendants’ attempt to avoid the merits of this dispute should be rejected.

Under the Oklahoma Constitution district courts have “unlimited original jurisdiction of all justiciable matters.” Okla. Const., Art. VII, §7. And, as this Court has recognized, it is vital that the courts have broad power both to resolve specific controversies, and to provide

⁵ In light of the District Court’s ruling on their ORA claim, Plaintiffs agreed to voluntarily dismiss without prejudice their first cause of action for violation of the Oklahoma Constitution. Order ¶ 2, Apr. 20, 2015.

final and authoritative interpretations of state laws like the ORA. In *Bynum v. Strain* this Court explained:

[I]f there be a law and a properly presented controversy as to its meaning, it then becomes the duty and proper province of the judiciary to interpret such law and declare its meaning. The executive will then be guided by the court's interpretation of the law and will execute the court's mandates.

1923 OK 596, ¶12, 218 P. 883.

Thus, it is well settled that for a controversy to be justiciable it must only: (1) be definite and concrete, (2) concern legal relations among parties with adverse interests, and (c) be real and substantial so as to be capable of a decision granting or denying specific relief. *In re Okla. ex rel. DOT*, 1982 OK 36, ¶6, 646 P.2d 605, 609. All three requirements are met here. As the District Court correctly determined, Defendants' withholding of public records first requested by Plaintiffs more than one year ago has created a definite and concrete controversy. *See* Tr. 22:2–7. That controversy unquestionably concerns legal relations between adverse parties; Plaintiffs assert that Defendants' failure to provide access to the requested records violates the ORA's requirement that they provide "prompt and reasonable" access to their records. Finally, Plaintiffs seek specific relief—an order requiring Defendants to comply with the ORA's mandates, and to release the requested records—that the District Court is capable of granting. Plaintiffs' second cause of action is, accordingly, justiciable.

Defendants seek to avoid a judicial determination concerning whether they have complied with the ORA by attempting to re-cast this controversy in jurisdictional terms. According to Defendants, absent an *express* denial, a district court lacks jurisdiction to determine whether the ORA has been complied with in response to an ORA request. As set forth in detail below, however, in addition to being unsupported by the statutory language,

Defendants' argument is belied by common sense. A public body cannot insulate a failure to make records available in response to an ORA request from judicial review by refusing to "process" the request for months or years, and then claiming that the denial of access is only temporary. Like the federal Freedom of Information Act, 5 U.S.C. § 552(a) ("FOIA"), the ORA cannot be interpreted to allow an entity to keep "requests bottled up for months or years on end while avoiding any judicial oversight." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 190 (D.C. Cir. 2013) (hereinafter, "*CREW*"). Where there has been a denial of access to requested records—whether that denial is express, constructive, or otherwise—it is subject to judicial review. Defendants cite no authority to the contrary.

II. The District Court properly concluded that it has jurisdiction to determine whether Defendants have failed to provide "prompt, reasonable" access to the records requested by Branstetter in violation of the ORA.

A. The ORA expressly entitles Plaintiffs to "prompt, reasonable" access.

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. And a public body or official in receipt of an ORA 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.

While "prompt" is not explicitly defined in the ORA, it is a commonly used word with a well-accepted meaning. *See Edmondson v. Pearce*, 2004 OK 23, ¶72, 91 P.3d 605, 637 (absent a specific definition, "words in a statute are to be understood in their ordinary

sense”). Merriam Webster, for example, defines “prompt” to mean “performed readily or immediately.” <http://www.merriam-webster.com/dictionary/prompt> (last accessed May 11, 2015). This definition finds support in *In re University Hospitals Authority*, where a public body was found not to have violated the ORA when it made a record “available to [requesters] as soon as it came into existence.” 1997 OK 162, ¶16, 953 P.2d 314, 320.

Ohio’s Supreme Court, in interpreting its own open records law’s requirement that public records be “promptly” made available, concluded that “promptly” means “without delay and with reasonable speed.” *State ex rel. Wadd v. City of Cleveland*, 689 N.E.2d 25, 28 (Ohio 1998).⁶ In that case, Ohio’s highest court held that an agency’s delay of 24 days meant the records were not provided “promptly,” and it 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 FOIA’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.” *CREW*, 711 F.3d at 188.⁷

The District Court correctly concluded that Plaintiffs have alleged a judiciable violation of the ORA’s requirement that access to public records be “prompt” and “reasonable.” For months prior to the filing of this lawsuit, Defendants withheld access to the specific records requested by Branstetter—*i.e.*, records relating to the State’s (including

⁶ This Court routinely looks to other state court’s interpretations of their open records laws, as well as interpretations of the federal FOIA for guidance in interpreting the ORA. *See Okla. Pub. Emples. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶27, 267 P.3d 838, 848.

⁷ Under FOIA, an agency is required to make a “determin[ation]” within 20 days of receiving a request, 5 U.S.C. § 552(a)(6)(A)(i), and then. Once a determination has been made, the agency is then required to make non-exempt responsive records “promptly available” to the requester. *See CREW*, 711 F.3d at 188.

Defendants’) handling of, and response to, the botched Lockett execution. Pet., ¶¶ 18, 20, 24, 26, 30, 32, App. Ex. 1. It appears from their submissions to the District Court that, at the time they filed their Motions to Dismiss, Defendants had yet to even *begin* “processing” Branstetter’s ORA requests. Fallin Mot. to Dismiss 5-6, App. Ex 2; Thompson Mot. to Dismiss 6-8, App. Ex. 1. And Defendants have continued, to this day, to deny access to the email records requested by Branstetter more than one year ago—a delay far in excess of even Defendants’ typically lengthy time periods for responding to other, less controversial ORA requests.⁸ If such conduct does not on its face violate the ORA’s express mandate that Defendants provide “prompt, reasonable” public access to their records, it presents a concrete legal and factual dispute as to whether Defendants have complied with that requirement under the circumstances. That dispute, which requires an authoritative interpretation of the ORA’s statutory language, is appropriate for—indeed, it requires—judicial resolution.

B. Access to the requested records has been and continues to be “denied.”

Defendants attempt to evade judicial review by arguing that the Legislature did not authorize, and thus that the courts have no power to hear, a lawsuit for violation of the ORA that is not predicated on an *express* denial of an ORA request. According to Defendants, the law provides no legal recourse to a citizen who has submitted an ORA request when a government official or entity fails to substantively respond, or even ignores the request in its entirety. Not only is Defendants’ narrow interpretation of “denied” not supported by the statutory language, it is wholly at odds with the ORA’s purpose, and should be rejected.

In order to ensure compliance with its requirements, the ORA provides that any requester who is “denied access” to records may file a lawsuit seeking declaratory and/or

⁸ The Governor’s office took less than five months to provide 4,651 pages of records in response to a request for communications regarding a particular statute. See Fallin App. Ex. 5, Internal Exhibit 1K.

injunctive relief. ORA §24A.17. The word “denied” is not specifically defined in the ORA. It is commonly understood, however, to mean, *inter alia*: (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 May 11, 2015). In the legal context, a “denial” can also mean, among other things, a “deprivation or withholding.” Black’s Law Dictionary (10th ed. 2014) (citing, as an example, a “denial of due process”); see also 1999 OK AG 59, ¶¶11, 15 (explaining that the ORA does not authorize “a public body to ‘withhold’ records for any amount of time, however small”). Thus, the word “denial,” as “understood in [its] ordinary sense,” *Edmondson*, 2004 OK 23, ¶72, can refer to *either* an explicit denial—i.e., an express affirmative statement of denial—*or* a constructive denial based on a failure to substantively respond to a request.

The concept of constructive denial is well recognized under Oklahoma law. In *Robertson v. United States Fidelity & Guarantee Company*, for example, this Court applied it in the context of Okla. Stat. tit. 36, §3636, which requires insurance companies to 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 there was no express denial. *Id.* ¶11, 836 P.2d at 1297. A contrary holding, the Court reasoned, “would frustrate the purpose of the statute” and permit insurance companies “to benefit from their own noncompliance with the law.” *Id.* at ¶15, 836 P.2d at 1297.

Here, Defendants contend that their failure to substantively respond to the ORA requests at issue in this case for over a year is not a “denial” of access for purposes of ORA §24A.17. According to Defendants, a “denial” under the ORA should not be read to mean

the withholding of records responsive to a request; nor does it include a constructive denial. Yet Defendants purported support for that position—namely, the fact that another statute explicitly refers to “constructive denials” and the ORA does not—is unpersuasive for at least the following reasons. *See* Fallin Br. At 6–7; Thompson Br. at 6–7.

First, inferring legislative intent from mere silence is disfavored. As the U.S. Supreme Court explained in *Burns v. United States*:

In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress’ silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.

501 U.S. 129, 136, (1991).

There are myriad reasons why the Legislature would have chosen to use the broader, more general term “denied” in the ORA rather than modifying it with words like “explicitly,” “expressly,” “impliedly,” or “constructively.” The most obvious reason is that the Legislature did not intend a narrow construction, as urged by Defendants. Indeed, particularly in light of the widespread acceptance of the concept of constructive denial in open records law, which is discussed in more detail below, had the Legislature intended to deviate from the norm by limiting courts’ jurisdiction over ORA disputes to *only* those cases where there has an been *express* written or verbal denial of access, it is far more reasonable to assume that it would have said so explicitly. Just as the Legislature knows how to draft laws to explicitly address constructive denials, it is likewise more than capable of drafting language to explicitly address express denials. *See, e.g.,* Okla. St. tit. 74, § 775 (“To the extent that the powers granted hereby may be *expressly denied* to any legislative committee or committees . . . Sections 2, 3, and 4 hereof shall not be applicable to said committees.”)

(emphasis added). Because the Legislature choose not to limit the ORA's definition of the word "denied" in this way, it should logically be interpreted to refer not just to express denials, but constructive denials as well.

Further, this interpretation is consistent with the ORA's purpose, which is to "ensure and facilitate the public's right of access to and review of government records," ORA §24A.2, as well as its other provisions, including its requirement that government officials and entities provide "prompt, reasonable" access to their records. ORA §24.A.5(5); *see also* ORA §24.A.5(1) ("All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours; . . ."); §24.A.5(6) ("At least one person shall be available at all times to release records during the regular business hours of the public body.") To accept Defendants' argument would render these provisions meaningless and "frustrate the purpose of the statute" by allowing public bodies and officials to withhold records requested by citizens for lengthy, indefinite periods of time under the guise of processing them—or to even ignore ORA requests in their entirety—without any judicial oversight. *Robertson*, 1992 OK 113, ¶15, 836 P.2d at 1297.⁹ Such a result could not have been intended by the Legislature. *See Hogg v. Okla. Cnty. Juvenile Bureau*, 2012 OK 107, ¶7, 292 P.3d 29, 33 (courts should "give a sensible construction when interpreting statutes and not presume that the legislature intended an absurd result").

⁹ 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 *CREW*, 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.

Finally, were the ORA to be found not to embrace the concept of constructive denial, it would be an extraordinary outlier. Constructive denial resulting from an agency's failure to substantively respond to a request for public records is a well-recognized and long-accepted facet of both federal and state open records laws.¹⁰ Defendants identify no state that refuses to treat a constructive denial as a justiciable denial for purposes of its public records law, and Plaintiffs are not aware of any. Defendants' jurisdictional argument rests on a flawed interpretation of the ORA and should be authoritatively rejected by this Court.¹¹

III. Whether or not Defendants have “establish[ed]” and follow “reasonable procedures” for responding to ORA requests involves issues of statutory interpretation and fact that go to the merits of this dispute.

Defendants attempt to bolster their misguided effort to deprive the District Court of jurisdiction over this matter by arguing that their internal “procedures” for responding to ORA requests have made it impossible for them to substantively respond to Plaintiffs' requests which have been pending for more than a year. Defendants' bald assertions as to the purported “reasonable[ness]” of their procedures and their conduct, however, do not insulate

¹⁰ See, e.g., 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”); see also, 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); MCLS § 15.235(3) (“Failure to respond to a request pursuant to subsection (2) constitutes a public body’s final determination to deny the request.”); N.J. Stat. § 47:1A-5 (“In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request”); N.M. Stat. Ann. § 14-2-11(A) (“a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied”); R.I. Gen. Laws § 38-2-7(b) (“Failure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial.”).

¹¹ That Defendants have a record of failing to respond to ORA requests for months on end, only to later contend that such conduct is immune from judicial review, suggests that a decision from this Court interpreting ORA §24A.17 would provide much-needed guidance to public officials and entities. For example, just 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*”), Fallin App. Ex. 8. Fallin moved to dismiss on largely the same grounds she asserted in this case, arguing that her office's delay in substantively responding to the request was not a “deni[a]” of access. See Mot. to Dismiss, *Take Shelter*, App. Ex. 4.

Defendants' withholding of records from judicial review; they are disputed issues of law and fact for the District Court to resolve when determining whether Defendants have complied with the ORA's mandate to provide "prompt, reasonable" access to the records at issue. ORA §24A.5(5).

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." *Id.* (emphasis added). Thus, contrary to Defendants' arguments, this provision on its face does not authorize Defendants to "establish" *any* "procedures" they choose, or permit them to process ORA requests at their leisure, or in a politically expedient manner. *See* Fallin Br. at 7–12; Thompson Br. at 7–11. Nor can this language be read in isolation. It does not relieve Defendants of their obligation to provide "prompt, reasonable" access to their records. ORA §24A.5(5). To the contrary, the term "reasonable procedures" should be interpreted in harmony with that requirement, and the rest of ORA. *Id.* Whether Defendants have, in fact, established "reasonable procedures," and have followed those procedures in responding to the ORA requests at issue in this case, are, as the District Court recognized, mixed questions of law and fact for it to resolve.

By pointing to their "procedures" for responding to ORA requests, Defendants only underscore why judicial oversight and interpretation of the ORA's requirements is necessary. The record in this case demonstrates that—even assuming that Defendants followed their "procedures" with respect to Plaintiffs' requests—those "procedures" are far from "reasonable." For example, because the Governor's office has determined that it will process ORA requests one at a time, and on a mostly "first come, first served" basis, whenever it is convenient to do so, *see* Fallin Br. at 10, it has created an unnecessary backlog of ORA

requests. That backlog is exacerbated by the fact that—contrary to the ORA’s requirements—the Governor’s office does not have at least one person “available at all times to release records during the regular business hours” ORA §25A.5(6). Ms. Rockwell, the paralegal/assistant responsible for the initial processing of *all* ORA requests received by Fallin, attends to that *secondary* responsibility only after fulfilling her numerous *primary* duties, including, for instance “offering refreshments to those meeting with staff” Fallin Resp. to Pls’ Mot. for Summ. Judg, Ex. 1, Aff. of Audrey Rockwell, App. Ex 5 (“In addition to my regular duties I also have a role in the production of Open Records Requests.”). Further, the “procedures” that the Governor’s office has established for processing ORA requests include multiple rounds of review for *every* request—not just for attorney-client privilege or other statutory exemptions from disclosure under the ORA—but also to flag “potentially sensitive” documents. *See* Fallin Br. at 10–11 and App. Ex. 9, Aff. of Jennifer Chance (stating that, following an initial review of documents by Ms. Rockwell, Ms. Chance—a lawyer—will review the same documents again, and, among other things, notify the Governor’s Chief of Staff about “potentially sensitive” documents).

It is the judicial branch—not the executive branch—that is tasked with giving a final and authoritative interpretation of what is meant by “prompt, reasonable” access to public records, and “reasonable procedures” for responding to requests under the ORA. *See In re Initiative Petition No. 349 State Question No. 642*, 1992 OK 122, ¶ 5 n.3. (“The ultimate responsibility for construction and interpretation of our law is with this Court.”); *Bynum*, 1923 OK 596, ¶12. And whether Defendants’ inaction with respect to Plaintiffs’ ORA requests satisfies their statutory obligations is an issue to be resolved by the District Court applying the law, as interpreted, to the facts of this case. Indeed, had the Legislature

intended to subvert this familiar balance by depriving the courts of any opportunity to interpret key provisions of the ORA, and by vesting the executive with the type of unfettered and unreviewable discretion that Defendants claim, it is reasonable to assume that it would have done so expressly. For these reasons, the District Court correctly rejected Defendants' jurisdictional objections. *See* Order, Apr. 20, 2015. This Court should do the same.

IV. Defendants' request for an additional stay of proceedings should be denied.

The District Court stayed proceedings in this matter until May 28, 2015 to permit resolution of Defendants' Petitions. Order, Apr. 27, 2015. No further stay is warranted. Indeed, the factors to be considered in determining whether a stay of proceedings is appropriate under Supreme Court Rule 1.15(c) weigh heavily against any additional delay. First, as set forth above, and as their efforts to avoid judicial review suggest, Defendants cannot succeed on the merits of their claim that their failure to make public records available to Plaintiffs for more than a year satisfies their obligation to provide "prompt, reasonable" access to records under the ORA. Second, contrary to Defendants' position, merely being required to participate in discovery does not rise to the level of "irreparable harm." *Fallin Br.* at 13, *Thompson Br.* at 12. Third, if an additional stay is granted, it is Plaintiffs who will be substantially harmed. As members of the press, they need prompt access to the requested records in order to inform the public about a matter of intense and ongoing public concern. Thus, fourth, the public interest will be best served by permitting this case to proceed.

CONCLUSION

The District Court correctly concluded that it had jurisdiction over Plaintiffs' second cause of action for violation of the ORA. Accordingly, and for all the foregoing reasons, this Court should either (1) decline to assume original jurisdiction over this matter, or (2) accept such jurisdiction and deny Defendants' petition for extraordinary relief.

Dated: May 15, 2015

Respectfully submitted,

By: 
Robert D. Nelon, OBA #6610
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 May 15, 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

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