IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

#113885

MICHAEL C. THOMPSON, in his official capacity as COMMISSIONER OF THE OKLAHOMA DEPARTMENT OF PUBLIC SAFETY	
Petitioner,	
v.	**Supreme Ct. Case No. _____** **Oklahoma County Case No. CV-14-2372**
THE HONORABLE G. PATRICIA PARRISH, Judge of the District Court, Oklahoma County, State of Oklahoma	
Respondent.	

BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION

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April 29, 2015

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Applicant and Petitioner Michael C. Thompson, in his official capacity as Commissioner of the Department of Public Safety, State of Oklahoma ("Commissioner"), presents this brief in support of his Application to Assume Original Jurisdiction and Petition for Writ of Prohibition.

The issue before the Court is: Does a District Court have jurisdiction to proceed with a civil action alleging violation of the Open Records Act when the public body or official has not denied the records, but has stated that the records will be provided after review and redaction of privileged material in accordance with the procedures of the public body?

Ziva Branstetter ("Branstetter") and BH Media Group Inc. d/b/a/ Tulsa World ("World") filed an action in Oklahoma County, *Ziva Branstetter and BH Media Group Inc. d/b/a Tulsa World, Plaintiffs, vs. Mary Fallin, in her official capacity as Governor of the State of Oklahoma and Michael C. Thompson, in his official capacity as Commissioner of the Oklahoma Department of Public Safety*, Defendants, CV-2014-2372 (the "Oklahoma County Case") asserting that Michael C. Thompson ("Commissioner") and Governor Mary Fallin ("Governor") had violated the Open Records Act, 51 O.S. § 24A.1 *et seq.* However, Branstetter and World both affirmatively stated in their Petition that a representative of DPS advised them that "DPS's Legal Division was 'conducting a review to determine which [email responsive to Branstetter's May 5 Open Records Request], if any, may contain privileged or confidential information that is not subject to an open record request.'" Petition, ¶ 23, App., Exhibit 2. Regarding a second records request to DPS, Branstetter and World affirmatively stated in the Petition in the Oklahoma County Case that a representative of DPS advised them that "he had 'received your official open records request dated 9/14/14 and will review it for consideration and processing,'" Petition, ¶ 28, App., Exhibit 2, and further that a representative of DPS "informed Branstetter that DPS was reviewing approximately 5,000 pages of material....[and] that after redacting from

that material the information it was required by law to redact, DPS intended to make the material available to the public via its website.'" Petition, ¶ 29, App., Exhibit 2.

The Commissioner filed a Motion to Dismiss because he believed the District Court lacked a definite and concrete controversy, and thus lacked a justiciable controversy to support subject matter jurisdiction. A requisite for a civil action for a violation of the Open Records Act had not been satisfied, i.e., the records had not been requested and denied, as required by 51 O.S. § 24A.17(B): "Any person denied access to records of a public body or public official: 1. May bring a civil suit for declarative or injunctive relief, or both, **but such civil suit shall be limited to records requested and denied prior to filing of the civil suit**..." (Emphasis added).

The Honorable Patricia G. Parrish, Judge of the District Court, Oklahoma County denied the motion to dismiss, stating that she believed that an unreasonable delay could qualify as a "constructive denial" of the records. Tr. 22:2-7, App. Exhibit 5. At the time of the District Court hearing, DPS had produced over 5,000 pages of redacted documents responsive to the open records requests. These documents had been subject to federal court litigation as explained below.

The District Court exceeded its jurisdiction in permitting the Oklahoma County Case to move forward in the absence of a denial, a statutory prerequisite to a civil action for violation of the Open Records Act.

I. This Court may use constitutional supervisory writs to remedy a District Court's improper exercise of jurisdiction when a jurisdictional prerequisite has not been satisfied.

"The remedies provided by this Court's *constitutional* supervisory writs may be used to challenge the exercise of jurisdiction by a District Court." *State ex rel. Bd. of Regents of the Univ. of Okla. v. Lucas*, 2013 OK 14, ¶ 12, 297 P.3d 378, 385 (italics by the Court).

The Open Records Act provides that any civil action for a violation of the Open Records Act is limited to records requested and denied prior to the filing of the action. In other contexts, this Court has found that an action must be dismissed when a jurisdictional prerequisite was not met. In *Stallings v. Oklahoma Tax Commission*, 1994 OK 99, 880 P.2d 912, the Court recognized that the trial court did not have jurisdiction when the prerequisites required to give the trial court jurisdiction had not been satisfied:

> Before a taxpayer may file a suit..., he must first pay the taxes under protest and at the time of payment give notice of his intent to file suit. Appellants neither paid the taxes under protest nor gave notice of intent to file suit at the time the taxes were paid. Therefore, they failed to satisfy the statutory prerequisites for *invoking district court jurisdiction* under § 226.

Id. at ¶ 18, 880 P.2d at 918 (emphasis added). In *Muskogee Fair Haven Manor Phase I Inc. v. Scott*, 1998 OK 26, 957 P.2d 107, the Court held that the district court lacked jurisdiction to "grant declaratory relief to a taxpayer who, without first invoking any judicial remedy provided in the Ad Valorem Tax Code, commences an action, challenging the county assessor's refusal to recognize an exemption claimed under a self-executing provision of the Oklahoma Constitution." *Id.* at ¶ 1, 957 P.2d at 108. "A pre-suit notice of claim that complies with the provisions of § 156(F) is necessary to *invoke the power* of the district court to enforce a governmental tort claims action." *State v. Dixon*, 1996 OK 15, ¶ 7, 912 P.2d 842, 844 (emphasis added). A prior spacing order is a jurisdictional prerequisite to the entry of a pooling order by the Corporation Commission. *Gulfstream Petroleum Corp. v. Layden*, 1981 OK 56, ¶ 11, 632 P. 2d 376, 379.

The State Constitution gives Oklahoma courts unlimited original jurisdiction over all *justiciable* matters unless otherwise provided by law. *Reeds v. Walker,* 2006 OK 43, ¶ 11, 157 P.3d 100, 107. Subject matter jurisdiction of a court is invoked by pleadings which show that the court has power to proceed in a case of the character presented, or power to grant the relief

sought. *State ex rel. Oklahoma Bar Association v. Mothershed,* 2011 OK 84, ¶ 47, 264 P.3d 1197, 1215. Subject matter jurisdiction is essential; it is the power and authority of a court to hear and determine causes of the kind in question. *In re A.N.O.,* 2004 OK 33, ¶ 9, 91 P.3d 646, 649. Subject matter jurisdiction of the court is not invoked by pleadings to hear and determine a cause where no petition meeting statutory requirements is filed. *Id.* ¶ ¶ 12-13, 91 P.3d at 650.

To be justiciable, and confer subject matter jurisdiction, a claim must be suitable for judicial inquiry; this requires determining whether the controversy (a) is definite and concrete, (b) concerns legal relations among parties with adverse interests and (c) is real and substantial *so as to be capable of a decision granting or denying specific relief of a conclusive nature. Dank v. Benson,* 2000 OK 40, ¶ 8, 5 P.3d 1088, 1091 (emphasis in original). For declaratory relief, the issue must be ripe for judicial determination. *Knight v. Miller,* 2008 OK 81, ¶ 8, 195 P.3d 372, 374. In the instant case, the Petition negates a *denial* of requested records by affirmatively stating that Plaintiffs' requests have been placed in line for response, creating only a *delay* unacceptable to Plaintiffs. The statute only creates a remedy for *denial* of records. 51 O.S. § 24A.17(B)(1).

Plaintiffs themselves defined "denied" in terms inapplicable to DPS's practice of putting Open Records Act requests in a queue and responding to them after a review for privilege. Plaintiffs defined "denied" as both "to refuse to give (something) to someone" and "to prevent someone from having or receiving something." Response to Motion to Dismiss, p. 8, App., Exhibit 4. As Plaintiffs alleged, DPS has neither refused to give Plaintiffs something, nor prevented Plaintiffs from having or receiving something. Plaintiffs' definition of "denied" does not apply to their own allegations.

A denial of the sought records is a jurisdictional prerequisite to a civil action to enforce the Open Records Act. Because there was no denial of the sought records, the District Court

lacked jurisdiction to consider the Petition for Relief filed by Branstetter and World. The District Court's exercise of jurisdiction without the denial of the sought records exceeds its authority, and it is appropriate for this Court to issue a writ of prohibition to prohibit the District Court from proceeding in the Oklahoma County Case.

II. This Court has already determined that Open Records Act issues are *publici juris* and subject to a likelihood of repetition; therefore, it is clear that this is an appropriate situation for the exercise of original jurisdiction.

In *Shadid v. Hammond*, 2013 OK 103, 315 P.3d 1008, this Court considered another issue under the Open Records Act. In considering the issues, the Court stated:

> The controversy before the Court presents issues of first impression involving the application of the Oklahoma Open Records Act and a local rule of a District Court, and whether decisions involving opening and sealing court records should be reviewed by an original action as in the present case or by an appeal. The controversy is *publici juris,* is likely to be repeated, and judicial economy is served by answering the issues now. The Court should thus assume original jurisdiction pursuant to Okla. Const. Art. 7 § 4...

Id. at ¶ 4, 315 P.3d at 1009. By their very nature, Open Records Act controversies are *publici juris*, as the Court recognized in *Shadid.* It is certain that this controversy is likely to be repeated, either regarding the DPS or other state agencies. It has already been repeated. The District Judge noted at the hearing on the Governor's Motion to Dismiss that she had previously had a similar case, *Wendy Gregory v. Mary Fallin, as Governor of the State of Oklahoma, and State of Oklahoma, Office of the Governor*, Oklahoma County Case No. CV-2013-2280. See, Tr. 4:3-19, App., Exhibit 5. Other cases in which plaintiffs attempted to pursue civil actions for violations of the Open Records Act despite having been informed that their request had been placed in the queue for response by the Governor and her office include *Danni Legg and Mikki Davis v. Mary Fallin in her official Capacity as the Governor of the State of Oklahoma ex rel. Office of the Governor*, Oklahoma County Case No. CV-2014-163 and *Take Shelter Oklahoma v. Mary Fallin*

in her official Capacity as the Governor of the State of Oklahoma ex rel. Office of the Governor, Oklahoma County Case No. CV-2014-374. A copy of the Petition in the *Legg* case is included in the Appendix as Exhibit 6, and a copy of the Petition in the *Take Shelter Oklahoma* case is included in the Appendix as Exhibit 7.

This Open Records Act controversy is *publici juris* and likely to be subject to repetition. Judicial economy would be served by answering the question presented now.

III. The Legislature could have provided for a "constructive" or "deemed" denial in the Open Records Act, as it did in the Oklahoma Governmental Tort Claims Act, but it did not, and the District Court exceeded its authority in rewriting the Act to include such a provision.

The Legislature could have provided for an open records request to be "deemed" denied after the passage of a certain period of time. The Legislature did this in the Oklahoma Governmental Tort Claims Act, when it provided, "A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the state or political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period." 51 O.S. § 157(A). Similar provisions for considering a claim to be "deemed" denied or an offer "deemed" accepted or rejected appear in the Model Tribal Gaming Compact, 3A O.S. § 281, the Seismic Exploration Regulation Act, 52 O.S. §§ 318.22, 318.23, and provisions regarding offers of judgment, 12 O.S. § 1101.1.

The Legislature did not provide for such a deemed denial or a "constructive" denial in the Open Records Act. "When a court is called on to interpret a statute, the court has no authority to rewrite the enactment merely because it does not comport with the court's view of prudent public policy." *Head v. McCracken*, 2004 OK 84, ¶ 13, 102 P.2d 670, 680.

The Legislature clearly knows how to draft legislation to include a provision for a deemed or constructive denial. It did not choose to do so in drafting the Open Records Act. The

District Court had no authority to rewrite the Open Records Act merely because it does not purport with the court's view of prudent public policy. The District Court's rewriting of the Open Records Act to provide for a "deemed" or "constructive denial" was in error, and this error led the Honorable Judge to exercise jurisdiction which she did not have.

IV. The Open Records Act offers a remedy only for denial of requested records, and allows public bodies to establish reasonable procedures to prevent excessive disruptions of their essential functions.

The Open Records Act provides for public access to a wide array of records and creates legal remedies when requests for documents are improperly denied. The Act provides:

> B. Any person *denied access* to records of a public body or public official:
>
> 1. May bring a civil suit for declarative or injunctive relief, or both, but *such civil suit shall be limited to records requested and denied prior to filing of the civil suit*;

51 O.S. § 24A.17(B)(1)(emphasis added). While the Act creates a right to sue for declarative or injunctive relief, it qualifies that right, using the word "but." As one court has put it:

> The word "but" is used conjunctively in the sense of "on the contrary," and connects two clauses of the sentence in such a way as to make the last one modify or give meaning to the first, indicating that that which follows is an exception to that which has gone before. It further indicates that that which has gone before does not control that which follows.

Haugland v. City of Bismarck, 818 N.W.2d 660, 672 (S.D. 2012). Common dictionary definitions of "but" confirm this understanding. "But" can mean, "except for the fact," or "on the contrary," or "with the exception of." www.merriam-webster.com/dictionary/but. The plain effect of the "but" in 51 O.S. § 24A.17(B)(1) is to modify and limit the right of action (as does the very word "limited") to instances where records have been both requested and denied "prior to the filing of the civil suit." Plaintiffs' allegations refuted a denial before their suit was filed.

Neither the Commissioner nor any of his staff have denied Branstetter and World any records prior to the filing of this suit. Branstetter and World have merely been told they must

wait until the Commissioner's staff can process their requests. Therefore, a denial of records is a prerequisite to suit and *under the plain language of the Act, Branstetter and World did not have statutory authority to bring the Oklahoma County Case.* The District Court did not have jurisdiction to consider the case.

In essence, the Open Records Act creates a right to access to certain public records, and a remedy for the violation of that right (denial of requested records). When a statute creates both a right and a remedy for its enforcement the statutory remedy is exclusive. *R.R. Tway v. Oklahoma Tax Commission,* 1995 OK 129, ¶ 25, 910 P.2d 972, 976, citing *Tate v. Browning-Ferris, Inc.,* 1992 OK 72, ¶ 11, 833 P.2d 1218, 1226-27, and n. 36. The District Court rewrote the Open Records Act to create a new remedy (for an allegedly *delayed* production of records) where the Legislature has only created a remedy for *denied* records. The District Court's action exceeded the District Court's jurisdiction. The District Court has jurisdiction to hear cases alleging a public officer has said "no" to an Open Records Act request, but not to hear a case in which the officer is alleged to have said "not now, please wait your turn."

The Open Records Act provides that a "public body must provide prompt, reasonable access to its records" qualified as above by the word "but" and provides that a "public body *may establish reasonable procedures* which protect the integrity and organization of its records and to *prevent excessive disruptions of its essential functions*." 51 O.S. § 24A.5(5). Following the "but," the ability to establish reasonable procedures to prevent excessive disruptions of essential functions is an exception or limitation to the requirement of providing prompt and reasonable access to records. *Haugland,* 818 N.W.2d at 672.

Branstetter and World cannot dispute that the Commissioner's office performs essential functions for the public at all times. The affidavit of Kim Rytter, Assistant General Counsel of

DPS details some of his responsibilities to the Department and to the public, including forfeiture actions of which he has over 105 active cases. Mr. Rytter also responds to subpoenas, of which DPS received 910 in 2014, and helps with Open Record Act requests, of which DPS received 1000 in 2014. Mr. Rytter also works driver's license fraud cases, gives DPS personnel legal advice, establishes training requirements, and helps develop DPS policies. Mr. Rytter works with the Attorney General's office on matters in which the Attorney General represents DPS personnel. *See,* Affidavit of Kim Rytter, ¶¶ 2-3, App., Exhibit 8.

The Act specifically authorizes public agencies to establish reasonable procedures to prevent excessive disruptions to its essential functions. The DPS has a queue system for responding to Open Records Act requests. Under this system, requests are handled in the order in which they are received when possible. The order may sometimes be altered when information relating to a later request becomes available before information relating to an earlier request. Affidavit of Kim Rytter, ¶ 4, App., Exhibit 8. The Commissioner's assignment of staff to respond to Open Record Act requests is just such a reasonable procedure to manage a heavy volume of Open Records Act requests with the resources available, while still meeting the office's other pressing demands and performing its essential functions. As heavy as the record request load of the DPS normally is, Plaintiffs' request presented an extraordinary situation.

The present case arose following requests for records pertaining to the execution of Clayton Lockett, and the investigation of that execution ordered by Governor Fallin. DPS is unaccustomed to responding to such a large request for records. To complicate matters, a subpoena was issued to Commissioner Thompson in a separate federal court case styled *Warner v. Gross.* Mr. Rytter's affidavit, App., Exhibit 4 at ¶¶ 5-12, recounts how DPS met its responsibilities regarding the Lockett investigation and the federal court *Warner* case, producing

and redacting thousands of pages of documents requested in federal court, and objecting in Texas to production of Oklahoma documents sent to the Dallas County Medical Examiner who conducted a forensic examination. By assigning Mr. Rytter to perform these tasks, other important public work necessarily took a back seat, and will continue to take a back seat until another 5,000 pages of documents is redacted and produced, as well as requested emails.

The Open Records Act expressly provides that the Commissioner "may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions." The word "may" is generally understood to be a permissive term, itself conferring discretion to do a thing or not do it. *Tate,* 1992 OK 72, ¶ 16, 833 P.2d at 1229. The Act confers upon the Commissioner the discretion to establish a reasonable procedure (1) to protect the integrity and organization of the records, and (2) to prevent excessive disruptions of [the agency's] essential functions. This statute contains a double grant of discretion: (1) what the reasonable procedure should be to avoid excessive disruptions of essential functions, and (2) how much disruption is "excessive," given the high volume of crucial public business performed by DPS.

This Court has found that a disruption of an agency's critical day-to-day functions can result from having to pull staff off regular jobs to comply with an Open Records request. *Merrill v. Oklahoma Tax Commission,* 1992 OK 53, ¶ 13, 831 P.2d 634, 642-43. Such circumstances constitute an "excessive disruption of the public body's essential functions" under the Act, authorizing the imposition of a search fee for the request. *Id.* at ¶¶ 11-13, 831 P.2d at 642-43.[1] Following *Merrill,* one Court of Civil Appeals has observed that the public interest is as equally well-served by public agencies performing their essential services without burdensome,

disruptive records requests as in providing release of information to taxpayers. *McVarish v. New Horizons Community Counseling and Mental Health Services,* 1995 OK CIV APP 145, ¶ 3, 909 P.2d 155, 156. In the related but distinct context of the Governor's deliberative process privilege, the Supreme Court in *Vandelay Entertainment, LLC v. Fallin,* 2014 OK 109, 343 P.3d 1273 stated "[t]he Governor's need for confidential advice in deliberation of policy and decision-making is just as important to '[the people's] protection, security, and benefit, and to promote their general welfare,' as the people's access to information." *Id.* at ¶ 27, 343 P.3d at 1279. Similarly, the Commissioner's discretionary and reasonable procedure to prevent disruptions of the essential functions of DPS is just as important to the people's protection, security, benefit, and general welfare, as the people's access to information. Even more so than in *Vandelay,* in which the Court allowed a *permanent* qualified privilege for discussions with senior advisors, the Commissioner's procedure in this case serves the public because it only *delays* production of records in order not to interfere with other important public work. DPS needs to perform its essential functions in order to serve the public interest. The Commissioner has instituted a reasonable procedure to allow it to do so, while fulfilling its obligations under the Open Records Act, all as allowed by the Act itself.

The District Court did not have jurisdiction to proceed in the Oklahoma County Case in the absence of a denial of the records. DPS has a legitimate and accepted system for responding to open records requests. This Court should issue a writ to the District Court directing the District Court to dismiss the action and prohibiting her from proceeding in that action.

V. A stay is necessary pending the outcome of this Petition.

Pursuant to Supreme Court Rule 1.15(c), the Commissioner has applied for a stay in this Court. The Commissioner applied for a stay in the District Court and the District Court granted a stay of discovery only until May 29, 2015, Order, App., Exhibit 9.

The Commissioner has a strong likelihood of success on his application for original jurisdiction, because the District Court exceeded its jurisdiction in proceeding in a civil open records action without any denial of the requested record and the District Court rewrote the Open Records Act to provide for a "constructive" denial. In doing so, the District Court exceeded its authority.

If relief from discovery in the Oklahoma County Case is not granted, staff from DPS will be required to spend time in answering discovery and attending and testifying at depositions. This time will never be recovered, and will have the impact of putting DPS further behind on responding to open records requests. Further, the Commissioner is entitled under the Open Records Act to "establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions." 51 O.S. § 24A.5(5). Pulling staff away from their essential functions and their efforts to comply with Open Records Act requests will only compound the delays in getting those records produced.

There will be no or limited harm to Branstetter and the World if discovery is stayed pending the outcome of the Commissioner's petition to assume original jurisdiction. The Supreme Court usually handles these matters reasonably quickly, so it is not anticipated that a long delay would occur. In addition, if discovery is not stayed, Branstetter and the World will suffer from the same increased delays which would be caused by diverting the Commissioner's

resources to responding to discovery rather than focusing on responding to open records requests and essential duties, which is ongoing as quickly as other matters allows.

There is no risk of harm to the public interest. As stated above, due to the Supreme Court's swift action in responding to petitions such as that of the Commissioner, it is anticipated that only a short delay would be incurred as a result of the stay. In addition, if the harm to the public is delay in receiving the requested documents, again, diverting the Commissioner's resources is only likely to increase that delay.

This is an appropriate case for this Court to enter an order staying discovery pending the results of the Commissioner's Petition for Assumption of Original Jurisdiction and Application for Writ of Prohibition.

VI. Conclusion

A District Court may not proceed with a civil action alleging violation of the Open Records Act when the public body or official has not denied the records, but has stated that the records will be provided in accordance with the procedures of the public body.

It is an appropriate exercise of this Court's Constitutional writ authority to direct the dismissal of an action below when a trial court proceeds in the absence of a jurisdictional prerequisite. Open Records Act controversies are *publici juris* and this controversy is likely to repeat. Judicial economy would be served by addressing the issue at this time.

The Open Records Act only provides for a civil action when records have been requested and denied. The Legislature knows how to provide for a "deemed" or "constructive" acceptance, denial or rejection. It has provided for deemed acceptance, denial or rejection in other statutory schemes, but did not choose to do so in the Open Records Act. In rewriting the Open Records Act to construe "denied" to mean "delayed," the District Court rewrote the statute to comply

with the District Court's view of prudent public policy. The District Court did not have the authority to rewrite the statute, and therefore, the District Court exceeded its authority when it did so.

The Open Records Act's limitation of civil actions to those instances in which the records have been requested and denied saves the Court system from handling Open Records Act cases anytime that a requestor decides that disclosure of the records is taking "too long" in the requestor's eyes. In addition, the Open Records Act recognizes that public bodies have other functions, which the Act denotes as essential, and permits the public body to establish reasonable procedures to prevent disruption of the public body's essential functions. The Commissioner has designated staff to respond to open records requests. However, DPS is not accustomed to requests as extensive and complex as that of Branstetter, which strains Department resources and hampers other work.

A stay is necessary pending the resolution of the Commissioner's Petition for Assumption of Original Jurisdiction. Such a stay will not cause harm to Branstetter, the World, or the public, and in fact, refusing to stay discovery will only increase the delay in responding to Branstetter's and other open records requests.

Wherefore, Commissioner Michael C. Thompson asks that this Honorable Court assume original jurisdiction, enter a stay pending the outcome of this proceeding, and prohibit the District Court from taking any further action in Branstetter's and the World's action against the Commissioner.

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