

IN THE DISTRICT COURT IN AND FOR POTTAWATOMIE COUNTY
STATE OF OKLAHOMA

FILED

JUL 16 2021

FRONTIER MEDIA GROUP, INC. and)
KASSIE L. DANIEL,)
Plaintiffs,)

POTTAWATOMIE COUNTY, OK
VALERIE N. UELTZEN, COURT CLERK
BY _____ DEPUTY

vs.)

Case No. CV-2021-93

POTTAWATOMIE COUNTY PUBLIC)
SAFETY CENTER TRUST and BREONNA)
R. THOMPSON in her official capacity as)
EXECUTIVE DIRECTOR of POTTAWATOMIE)
COUNTY PUBLIC SAFETY CENTER TRUST,)
Defendants.)

PLAINTIFFS' RESPONSE AND BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Plaintiffs Frontier Media Group, Inc. and Kassie L. Daniel respectfully submit their
Response and Brief in Opposition to Defendants' Motion to Dismiss (Defs' Mot.).

I. INTRODUCTION

Under the Oklahoma Open Records Act ("ORA"), "all records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction." Okla. Stat. tit. 51, § 24A.5. Plaintiffs previously submitted multiple requests for public records to Defendants, a public body and public official respectively under the ORA. Defendants have failed to make available to Plaintiffs "any existing video of Given at the jail," "incident reports related to use of force or injury" and any other records "related to the custody of Ronald Gene Given." Defendants have therefore unlawfully denied access to and withheld records that are responsive to Plaintiffs' requests. Defendants' withholding of records requested by Plaintiffs is an abrogation of their duties under the ORA and a violation of the ORA. As Plaintiffs have sufficiently stated a claim for relief in their Petition, the

Defendants' Motion to Dismiss should be denied. Further, the Court should deny Defendants' Motion to Dismiss without a hearing as the Defendants' pleading fails to separately state each alleged omission or defect in the Petition.

II. STANDARD OF REVIEW

The Oklahoma Supreme Court has made clear in numerous decisions that motions to dismiss for failure to state a claim are strongly disfavored. *See, e.g., Tuffy's Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d, 1158. When reviewing a motion to dismiss pursuant to Okla. Stat. tit. 12, § 2012(B)(6), the court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. *Indiana Nat'l Bank v. State Dep't of Human Serv.*, 1994 OK 98, ¶ 3, 880 P.2d 371, 375 (citing *Great Plains Fed. Sav. And Loan Ass'n v. Dabney*, 1993 OK 4, 846 P.2d 1088, 1090 n.3). "A pleading *must not* be dismissed for failure to state a legally cognizable claim *unless* the allegations indicate *beyond any doubt* that the litigant can prove *no* set of facts which would entitle him to relief." *Id.* (citing *Frazier v. Bryan Memorial Hosp. Auth.*, 1989 OK 73, ¶ 13, 775 P.2d 281, 287 (emphasis in original)). The burden to show the legal insufficiency of the challenged pleading is on the party moving for dismissal, and a motion made under § 2012(B)(6) must separately state each omission or defect in the petition; if it does not, the motion shall be denied without a hearing. *Id.* (citing *Curlee v. Norman*, 1989 OK CIV APP 25, ¶ 4, 774 P.2d 481, 482).

III. PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF UNDER THE ORA

A. Plaintiffs are entitled to public records in the Defendants' control.

Defendants claim it is not clear from the Petition “what items, exactly, Plaintiffs contend they had no reasonable access to/were withheld,” but later cite Plaintiffs’ Second Request, included in the Petition, which requests the following: “[a]ny and all records related to the custody of Ronald Gene Given, including the booking sheet, release sheet, any existing video of Given at the jail, mugshots and incident reports related to use of force or injury. Given, age 42, was incarcerated at the jail in January 2019.” Defs’ Mot. 3. It is clear from the language of Plaintiffs’ Second Request what records were being sought, and Plaintiffs have no further burden to detail every responsive record that could possibly exist. Rather, it is the Defendants’ duty to make the responsive records available for inspection, copying, or mechanical reproduction in a prompt and reasonable manner. Okla. Stat. tit. 51, § 24A.5.

Defendants provided Plaintiffs with the booking sheet and release sheet in response to Plaintiffs’ Second Request. Plaintiffs then attempted to start a dialogue with the Pottawatomie County Public Safety Center Trust (“PCPSCT”) officials to resolve the matter of the outstanding records but were forced to file this action instead, as Defendants continue to deny access to “any existing video of Given at the jail” and “incident reports related to use of force or injury,” as well as any other records “related to the custody of Ronald Gene Given.” Plaintiffs are entitled to seek such relief pursuant to the ORA. *Id.* § 24A.17.

B. The requested video and incident reports are “records” under the ORA.

The ORA defines a record as:

[A]ll documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by,

under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.

Id. § 24A.3.

Plaintiffs and Defendants agree the PCPSCT is a “public body” under the ORA and, thus, is governed by the general provisions of the ORA rather than the Act’s law enforcement section. Defs’ Mot. 4-6; *see* Okla. Stat. tit. 51, § 24A.8. Under the ORA, “all records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction.” *Id.* § 24A.5. “Unless a record fall[s] within a statutorily prescribed exemption in the Act, the record must be made available for public inspection.” *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶ 12, 73 P.3d 871, 875 (citing *Merrill v. Oklahoma Tax Comm’n*, 1992 OK 53, ¶ 8, 831 P.2d 634, 641).

Defendants argue that the “video of Given at the jail” and “incident reports related to use of force or injury” are not open records within the meaning of the ORA for a number of reasons. Defs’ Mot. 4-8. First, Defendants argue said records are not open records because they are not connected with the transaction of public business, the expenditure of public funds or the administration of public property. However, the video and incident reports are records created by the PCPSCT or its representatives in connection with the transaction of public business, *i.e.*, carrying out its primary function as the county’s jail. For example, video footage helps monitor detainees and increase the facility’s security. Incident reports related to use of force or injury serve to document critical incidents and meet reporting requirements such as those laid out in § 310:670-5-2 of the Oklahoma Administrative Code—all of which are connected to the transaction of public business.

The Defendants also argue that “other provisions in the Open Records Act clearly indicate that the Oklahoma Legislature did not intend for a jail’s incident reports or surveillance videos to be considered open records.” Defs’ Mot. 6. For example, Defendants contend that because “incident reports” are not specifically listed in § 24A.3(1) of the ORA, they are not open records. Defs’ Mot. 7. But § 24A.3(1) clearly includes in its definition of records “**all** documents . . . created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property” (emphasis added). This would include a jail’s incident reports just as it would include a school’s invoice for supplies; both are documents connected with the transaction of public business, the expenditure of public funds or administration of public property. Indeed, Defendants concede, as they must, that “videos” are contained in the ORA’s definition of a record, but cite other inapplicable sections of the ORA (*i.e.*, the law enforcement section of the ORA that Defendants admit is not applicable here) that mention specific types of video (*e.g.*, body camera) to argue that jail surveillance videos should not be understood to be a record within the meaning of the ORA. This argument is meritless. Absent an express exemption, the ORA makes all records of public bodies, like the PCPSCT, subject to disclosure. To adopt Defendants’ baseless interpretation of the ORA would not only contravene the plain language of the statute, but also frustrate the stated purpose of the ORA, which is “to ensure and facilitate the public’s right of access to and review of government records” Okla. Stat. tit. 51, § 24A.2.

C. The protective order issued in Pottawatomie County Case Number PB-20-75 has no bearing on the question of whether the requested video is a public record within the meaning of the ORA.

Defendants also argue that a protective order entered in Pottawatomie County Case Number PB-20-75 “with regard to release of the video at issue” in that matter is controlling in the instant case. Defs’ Mot. Ex. 3. Defendants cite no authority for such a proposition. Nor could they. The referenced protective order was an agreed protective order entered into by Personal Representative Eva Kopaddy and Third-Party B.R. Thompson and Pottawatomie County Public Safety Center on June 23, 2021, in connection with that separate litigation. Neither Plaintiff Frontier Media Group, Inc. nor Plaintiff Kassie L. Daniel were or are parties to that action or to the agreed protective order. And nothing in Defendants’ Exhibit 2 or Exhibit 3 relating to the protective order states that this Court made a finding related to the question of whether or not the video at issue was an open record under the ORA. Even if the protective order was binding here, which it is not, the protective order by its own terms expressly states that it “is not intended to preclude use or disclosure of any document or information which is properly in the public domain.” Defs’ Mot. Ex. 3, 3. An open record is one properly in the public domain and the video qualifies as such under the ORA.

IV. PLAINTIFFS ARE ENTITLED TO MANDAMUS RELIEF

Plaintiffs have adequately pled their right to mandamus relief, a proper procedural vehicle for requiring compliance with the ORA. *See, e.g., Transp. Info. Servs., Inc. v. State ex rel. Oklahoma Dept. of Corrs.*, 1998 OK 108, 970 P.2d 166. As Defendants state, a case for mandamus has five elements: (1) the party seeking the writ has no plain and adequate remedy in the ordinary course of the law; (2) the party seeking the writ possesses a clear legal right to the relief sought; (3) the respondent (defendant) has a plain legal duty

regarding the relief sought; (4) the respondent has refused to perform that duty; and (5) the respondent's duty does not involve the exercise of discretion. *Chandler U.S.A., Inc. v. Tyree*, 2004 OK 16, ¶ 24, 87 P.3d 598, 604-05. Defendants assume (rightfully so) that Plaintiffs have met elements one and five, but argue that Plaintiffs have not pled facts necessary to support elements two, three, and four. However, Plaintiffs have pled facts sufficient to support all five elements:

First, Plaintiffs have no plain and adequate remedy in the ordinary course of the law. Plaintiffs have taken all steps required of them under the ORA to examine the public records at issue. Despite Plaintiffs' actions, Defendants have refused to provide Plaintiffs with access to the relevant public records.

Second, Plaintiffs have a clear legal right to the public records. "The purpose of the [ORA] is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." Okla. Stat. tit. 51, § 24A.2. "It is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government." *Id.* The outstanding records at issue related to Plaintiffs' Second Request include "any existing video of Given at the jail" and "incident reports related to use of force or injury," as well as any other records "related to the custody of Ronald Gene Given"—all of which are records within the meaning of the ORA. *Id.* § 24A.3(1). The Plaintiffs have a clear legal right to both inspect and obtain a copy of the public records at issue. *Id.* § 24A.5

Third, Defendants have a plain legal duty to provide Plaintiffs with access to the public records. The ORA commands that "[a]ll records of public bodies and public officials

shall be open to any person for inspection, copying, or mechanical reproduction.” Okla. Stat. tit. 51, § 24A.5.

Fourth, Defendants have refused to perform that duty. Despite the statutory requirement that Defendants must make public records available for inspection and copying by the Plaintiffs, Defendants have denied and continue to deny Plaintiffs access to public records they requested.

Fifth, Defendants’ duty does not involve the exercise of discretion. The ORA clearly states that “[a]ll records of public bodies and public officials *shall* be open to any person for inspection, copying, or mechanical reproduction” (emphasis added). Okla. Stat. tit. 51, § 24A.5. “[I]t is ‘well settled’ the statutory wording *shall* connotes a mandatory duty.” *Lawson v. Curnutt*, 2010 OK CIV APP 78, ¶ 8, 239 P.3d 192 (emphasis in original) (citing *TIB Corporation v. Edmondson*, 1981 OK 76, ¶ 4, 630 P.2d 1296, 1297 (“The premise that in statutory construction the word ‘shall’ connotes a mandatory duty is well settled in this state.”))). Defendants are in possession of public records and have a mandatory duty to make those records available for inspection and copying to Plaintiffs.

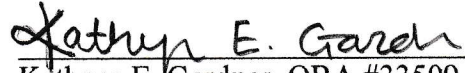
Accordingly, Plaintiffs have adequately pled a claim for mandamus relief pursuant to Okla. Stat. tit. 12, §§ 1451-1462.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants’ Motion to Dismiss. Pursuant to Okla. Stat. tit. 12, § 2012(B), Defendants’ Motion to Dismiss should be denied without a hearing as it fails to separately state each alleged omission or purported defect in the Petition. Plaintiffs further respectfully request

that the Court order Defendants to file an Answer to Plaintiffs' Petition within twenty days of this Court's order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I served a true and correct copy of the foregoing document by U.S. Mail to the following:

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