



**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA FILED**

SUPREME COURT  
STATE OF OKLAHOMA

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

JAN 11 2022

Plaintiffs/Appellees, )

JOHN D. HADDEN  
CLERK

vs. )

Case No. 119952

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

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Defendants/Appellants. )

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**DEFENDANTS/APPELLANTS' BRIEF IN CHIEF**

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**Appeal from Journal Entry of Judgment entered September 30, 2021  
District Court of Pottawatomie County, Oklahoma  
Case No. CV-2021-93  
The Honorable John G. Canavan, Jr., Presiding**

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January 11, 2022

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## **APPELLANT'S BRIEF IN CHIEF**

Defendants/Appellants Pottawatomie County Public Safety Center Trust and Breonna R. Thompson, in her official capacity as Executive Director of Pottawatomie County Public Safety Center Trust, appeal the entry of judgment granted on Plaintiffs/Appellees Frontier Media Group, Inc. and Kassie L. Daniel's behalf. In support thereof, the Appellants respectfully submit their Brief in Chief.

### **SUMMARY OF THE RECORD**

This case concerns purported Oklahoma Open Records Act ("ORA") requests submitted by Plaintiff/Appellee Kassie L. Daniel ("Daniel"), a reporter for Plaintiff/Appellee Frontier Media Group, Inc. ("Frontier"), to the Pottawatomie County Public Safety Center Trust ("PCPSC Trust") for documents concerning Ronald Gene Given ("Given"). Appellees claimed Daniel faxed an ORA request ("Faxed Request") to the PCPSC Trust in November 2019 and that shortly thereafter, the PCPSC Trust informed Daniel, in writing, that faxing records requests was not an accepted method to submit ORA requests to the Trust and directed Daniel as to the accepted method. (ROA, Petition, pp. 4-5, 9-12).<sup>1</sup> Daniel then personally delivered a written ORA Request ("Second Request") to the PCPSC Trust seeking "access to and [copies] of any and all records related to the custody of [Given], including the booking sheet, release sheet, any existing video of Given at the jail, mugshots and

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<sup>1</sup> Appellees attached the Faxed Request and the PCPSC Trust's aforementioned response to Daniel as Exhibits A and B, respectively, to their Petition. (ROA, pp. 9-10). They also attached the Second Request as Exhibit C to their Petition, a letter from their counsel to PCPSC Trust as Exhibit D, and emails between their counsel and PCPSC Trust personnel as Exhibit E. (ROA, pp. 15-20).

incident reports related to use of force or injury.” (ROA, Petition, pp. 5, 13-14). Appellees claimed they have not received any of these records except for Givens’ booking and release sheets. (ROA, Petition, pp. 5-6).<sup>2</sup>

On June 7, 2021, Appellees filed this case in Pottawatomie County District Court against Appellants PCPSC Trust and Breonna R. Thompson, in her official capacity as Executive Director. (ROA, Petition, pp. 1-20). In their Petition, Appellees alleged that the PCPSC Trust “operate[d] a county jail” and was a “public body” under the ORA. (ROA, Petition, p. 2). Further, Appellees, generally, claimed Appellants withheld records and jail surveillance video in violation of the Oklahoma Open Records Act and sought declaratory and injunctive relief under the ORA as well as a writ of mandamus under 12 O.S. §§ 1451-1462. (ROA, Petition, pp. 1, 4-7).

On June 29, 2021, Appellants filed a Motion to Dismiss arguing Appellees had failed to state a claim upon which relief may be granted and requesting dismissal of all of Appellees’ claims against them pursuant to 12 O.S. § 2012(b)(6). (ROA, MTD, pp. 21-43; ROA, Journal Entry, p. 61). Specifically, in their Motion to Dismiss Appellants argued that Appellees failed to state a claim for mandamus relief and failed to state a claim for violation of the ORA because, among other reasons, the requested jail surveillance video and PCPSC Trust internal, investigative records were

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<sup>2</sup> Appellees did not attach the material received from the PCPSC Trust to their Petition to allow the Court to review what information was provided. However, copies of Mr. Given’s PCPSC booking and release sheets for the January 9, 2019 incarceration were attached to Appellants’ Motion to Dismiss as Exhibit 1. (ROA, MTD, pp. 35-36).



not open records under the ORA.<sup>3</sup> (ROA, MTD, pp. 21-34; ROA, Journal Entry, p. 61). At no point in their Motion to Dismiss or supporting Reply did Appellants present or otherwise rely upon any matters outside the pleadings in arguing for dismissal under 12 O.S. § 2012(b)(6). (ROA, MTD, pp. 21-43; ROA, Reply to MTD, pp. 54-59). In their Response and Brief in Opposition to Appellants' Motion to Dismiss, Appellees generally argued that their Petition had sufficiently stated claims for relief against Appellants and that dismissal of their claims against Appellants was not warranted. (ROA, Resp. to MTD, pp. 44-53). At no time in their Response to the Motion to Dismiss did Appellees seek judgment on the pleadings or immediate entry of judgment on their behalf. (ROA, Resp. to MTD, pp. 44-53). Instead, Appellees asked only that the Motion to Dismiss be denied. (ROA, Resp. to MTD, pp. 44-45, 51-52).

On September 2, 2021, the trial court held a hearing concerning Appellants' Motion to Dismiss during which both parties' counsel's arguments were limited to those issues presented in the parties' briefing concerning Appellants' Motion to Dismiss, *i.e.*, whether dismissal of Appellees' claims against Appellants was warranted pursuant to 12 O.S. § 2012(b)(6). (ROA, Journal Entry, pp. 62-63). Also, Appellants did not present or otherwise rely upon any matters outside the pleadings in

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<sup>3</sup> Appellants also argued that Appellees failed to state an ORA claim (1) as to any records requested and received prior to filing suit; (2) because the trial court, in the related probate case, had already implicitly determined that the video at-issue was not an open record under the ORA; and (3) because the PCPSC Trust had provided prompt, reasonable access to those records it produced in response to open records requests before Appellees filed this suit. (ROA, MTD, pp. 23-24, 29-32). However, these arguments are not at issue on this appeal.

arguing that dismissal of all Appellees' claims against them was warranted pursuant to 12 O.S. § 2012(b)(6). (ROA, Journal Entry, p. 61). And at no point during the hearing on Appellants' Motion to Dismiss or in their related briefing did Appellees request or otherwise argue that the Court, when deciding whether to grant or deny Appellants' Motion to Dismiss, should immediately grant Appellees' request in their Petition for Relief seeking a writ of mandamus requiring production of certain records. (ROA, Journal Entry, pp. 61-62; ROA, Resp. to MTD, pp. 44-53). Instead, the specific relief sought by Appellees at the hearing was only for the Court to deny the Motion to Dismiss, Appellants to answer and proceed with the normal course of the litigation. (ROA, Journal Entry, pp. 61-63; ROA, Resp. to MTD, pp. 44-55, 51-52). And notably, since the Appellants' Motion to Dismiss was pending before the Court, the parties had not conducted any discovery in this case, or otherwise had the opportunity to do so, as of the September 2, 2021 hearing on Appellants' Motion to Dismiss. (ROA, Journal Entry, pp. 61-63).

During the September 2, 2021 hearing, the trial court denied Appellants' Motion to Dismiss. (ROA, Journal Entry, p. 62). However, the trial court also ruled that the at-issue jail surveillance video and internal, investigative records of the PCPSC Trust<sup>4</sup> were open records under the ORA subject to mandatory disclosure and that the provisions of the ORA pertaining to law enforcement agencies did not apply

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<sup>4</sup> In the Journal Entry reflecting the September 2, 2021 rulings, the trial court specifically stated "that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records . . ." (ROA, Journal Entry, p. 62).

to the PCPSC Trust. (ROA, Journal Entry, p. 62). The trial court then, *sua sponte* and without further argument or discussion from the parties centering matters outside the pleadings or issues not presented nor required to be presented at that stage in the proceedings, entered a writ of mandamus, ordered that Appellants were to immediately disclose the requested records to Appellees, and declared that these decisions were the court's final judgment in this case. (ROA, Journal Entry, pp. 62-63). The Journal Entry reflecting these rulings and entering judgment on behalf of Appellees was subsequently filed in the District Court on September 30, 2021, (ROA, Journal Entry, pp. 61-64), and this appeal followed.

#### **STANDARD OF REVIEW**

“The usual [ORA] judicial remedy is a civil suit for declarative or injunctive relief in a District Court when a record is not provided as requested.” *State ex rel. Oklahoma State Bd. of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 37 & n.48, 489 P.3d 36, 51 (citing 51 O.S. § 24A.17(B)(1)); *see also City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, n. 12, 250 P.3d 305, 316, *as corrected* (Jan. 19, 2011) (“The Oklahoma [ORA] provides a remedy in the form of a civil suit for declaratory and/or injunctive relief to a person denied access to a record of a public body or public official.”). Additionally, “[a]n abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.” *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591, 608, *as corrected* (Feb. 24, 2003). Further, “[t]he interpretation to be given

to a statute is a question of law, subject to [the Court's] plenary, independent and non-deferential examination applying a *de novo* standard of review[; and the Court] use[s] this standard when examining statutory references made by the parties, such as those relating to the Open Records Act. *Rivero*, ¶ 42, 489 P.3d at 53.

### ARGUMENT AND AUTHORITY

**I. THE POTTAWATOMIE COUNTY PUBLIC SAFETY CENTER TRUST SHOULD BE CONSIDERED A LAW ENFORCEMENT AGENCY UNDER THE PROVISIONS OF THE OKLAHOMA OPEN RECORDS ACT, 51 O.S. § 24A.3(5).**

The Oklahoma Open Records Act, 51 O.S. § 24A.1, *et seq.*, was enacted in 1985. *See Citizens Against Taxpayer Abuse, Inc. v. City of Okla. City*, 2003 OK 65, ¶ 11, 73 P.3d 871, 875 (citing 1985 Okla.Sess.Laws, ch. 355). Generally, the ORA requires that “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours.” 51 O.S. § 24A.5; *see also Fabian & Assoc., P.C. v. State ex rel. Dep't of Pub. Safety*, 2004 OK 67, ¶ 9, 100 P.3d 703, 705 (noting the “general rule” is expressed in § 24A.5 and requires that “[a]ll records of public bodies and public officials shall be open...”). In other words, the ORA only applies to qualifying records of “public bodies and public officials.” 51 O.S. § 24A.5.

In that regard, a “record” under the ORA is defined as:

all 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.

51 O.S. § 24A.3(1). Further, the ORA defines a “public body” as including, but not limited to, “any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, [or] *trust*, . . . supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property. . .” 51 O.S. § 24A.3(2) (emphasis added).

Law enforcement agencies are also considered public bodies under the ORA, and law enforcement agency records subject to disclosure under the ORA are specifically enumerated in 51 O.S. § 24A.8. *See* 51 O.S. § 24A.3(5) (defining “law enforcement agencies”); § 24A.8; *Cummings & Assoc., Inc. v. City of Okla. City ex rel. Okla. City Police Dep’t*, 1993 OK 36, ¶ 7, 849 P.2d 1087, 1089 (discussing § 24A.8). The ORA defines “law enforcement agencies” as:

*any* public body charged with enforcing state or local criminal laws and initiating criminal prosecutions, *including, but not limited to*, police departments, county sheriffs, the Department of Public Safety, the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, the Alcoholic Beverage Laws Enforcement Commission, and the Oklahoma State Bureau of Investigation.

§ 24A.3(5) (emphasis added); *see also Fabian*, ¶ 14, 100 P.3d at 706; *Okla. Assoc. of Broad., Inc. v. City of Norman, Norman Police Dep’t*, 2016, ¶ 14 n. 4, 390 P.3d 689, 694.

While the PCPSC Trust is not a classic “law enforcement” agency, it is a public trust created under the laws of the State of Oklahoma which is tasked with performing law enforcement duties, maintenance and operation of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County Jail, and these duties necessary includes supervision of inmates, investigation of events or crimes within the jail, and enforcement of court orders related to criminal matters. In that role, the PCPSC Trust is a “law enforcement agency” within the meaning of § 24A.3(5) for the purposes of records under the Open Records Act. Such a determination is a question of statutory construction. *Okla. Pub. Employees Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶ 11, 267 P.3d 838, 844 (courts “focus on legislative intent” when determining “whether a statute applies to a given set of facts”); *Okla. Assoc. of Broad.*, ¶ 15, 390 P.3d at 694 (breadth of the term “arrest” under § 24A.8(A)(2) was “an issue of statutory construction”). In that regard, “[t]he fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, and that intent is first sought in the language of a statute.” *Matter of I.T.S.*, 2021 OK 38, ¶ 14, 490 P.3d 127, 132 (quoting *Fanning v. Brown*, 2004 OK 7, ¶ 10, 85 P.3d 841, 845); *Okla. Assoc. of Broad.*, ¶ 14 n. 4, 390 P.3d at 694 (“In construing a statute, our goal is to determine the Oklahoma Legislature’s intent.”). To ascertain Legislative intent, “court looks ‘to each part of an act, to other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural and absurd consequences of any particular interpretation.’” *Okla. Assoc. of*

*Broad.*, ¶ 16, 390 P.3d at 694 (quoting *Blevens v. Graham*, 1919 OK 147, ¶ 8, 182 P. 247, 248).

Further, the “words of a statute” are given their “plain and ordinary meaning, unless it is clear from the statute that a different meaning was intended by the Legislature.” *Matter of I.T.S.*, ¶ 14, 490 P.3d at 132 (quoting *Fanning*, ¶ 10, 85 P.3d at 845). When the statutory language “is plain and unambiguous, no occasion exists for application of rules of construction, and the statute will be accorded meaning as expressed by the language employed.” *Matter of I.T.S.*, ¶ 14, 490 P.3d at 132 (quoting *In re City of Durant*, 2002 OK 52, ¶ 13, 50 P.3D 218, 221). If legislative intent cannot be ascertained from the statutory language, such as in cases of “ambiguity, conflict, or uncertainty in meaning,” then rules of statutory construction are applied. *Assessments for Tax Year 2012 of Certain Properties Owned by Throneberry v. Wright*, 2021 OK 7, ¶ 15, 481 P.3d 883, 892 (also explaining ambiguity occurs where a statute is “susceptible to more than one meaning”). Further, “[b]ecause of the [ORA’s] strong public policy allowing public access to governmental records, [courts] must construe the [ORA’s] provisions to allow access unless an exception clearly applies, and the burden is on the public agency seeking to deny access to show a record should not be made available.” *Okla. Assoc. of Broad.*, ¶ 16, 390 P.3d at 694

Here, while the PCPSC Trust may not be a police department, sheriff, or any of the State agencies listed in § 24A.3(5), the plain language of § 24A.3(5) clearly does not preclude it from being considered a “law enforcement agency” under the Open

Records Act. Indeed, the phrase “including but not limited to” precedes the enumerated list of entities in § 24A.3(5), indicating said enumerated list is not exclusive. *See JPMorgan Chase Bank, N.A. v. Specialty Rest., Inc.*, 2010 OK 65, ¶ 16, 243 P.3d 8, 14 *as corrected* (Nov. 22, 2010) (phrase “including without limitation . . . denotes an intention of non-exclusivity” and noting “[t]he term “including” is neither limiting nor exclusive”); *see also* 2020 OK AG 2, ¶ 10 n.14<sup>5</sup> (“[T]he ORA definition [of “public body”] employs the expansive phrase “shall include, but not be limited to,” followed by a list of entities, which indicates that the enumerated list is *not* exclusive.”) (citing *JPMorgan Chase Bank*, ¶ 16, 243 P.3d at 14). Further, by its plain terms, the ORA defines a “law enforcement agency” as “*any* public body charged with enforcing state or local criminal laws and initiating criminal prosecutions. . .” § 24A.3(5) (emphasis added). “When used in a statute, [the term] “any” is equivalent and has the force of “every” and “all.”” *Matter of I.T.S.*, ¶ 17, 490 P.3d at 132; *State ex rel. Porter v. Ferrell*, 1998 OK 41, ¶ 9, 959 P.2d 576, 578 (using word “any” in a statute means “every” and “all”); *JPMorgan Chase Bank*, ¶ 16, 243 P.3d at 14 (“The term “any” is all-embracing and means nothing less than “every” and “all.”).

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<sup>5</sup> Oklahoma Attorney General Opinions are generally considered “persuasive authority.” *Okla. Pub. Employees Ass’n*, ¶ 24, 267 P.3d at 847. However, such opinions “carr[y] more weight” where “the Legislature has not acted since the opinion was promulgated,” since courts consider “the Legislature’s silence as acquiescence or approval of the law as expounded in an Attorney General opinion.” *Okla. Pub. Employees Ass’n*, ¶ 24, 267 P.3d at 847. Notably, 51 O.S. § 24A.3 has not been amended since this Attorney General opinion. *See* 51 O.S. § 24A.3; 2014 Okla.Sess.Laws, ch. 266, § 2.



As such, whether the PCPSC Trust is considered a “law enforcement agency” under the ORA depends on whether it “enforce[es] state and local criminal laws and initiates criminal prosecutions.” 51 O.S. 24A.3. However, the meaning of “charged with enforcing state or local criminal laws and initiating criminal prosecutions” is not plain on its face or further defined anywhere in the ORA. See generally 51 O.S. §§ 24A.1, *et. seq.* “Where a statute is ambiguous or its meaning uncertain it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent.” *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. Further, “[c]onflicts between statutory provisions will be resolved in favor of a construction which promotes, rather than limits, the Legislature’s intent and an act’s purpose.” *Okla. Assoc. of Broad.*, ¶ 27, 390 P.3d at 697.

In that regard, to presume the PCPSC Trust is not a “law enforcement agency” under the ORA would render the ORA otherwise absurd. Indeed, and as Appellees themselves alleged, the PCPSC Trust “operates the county jail for Pottawatomie County, the Pottawatomie County Public Safety Center.” (ROA, Petition, pp. 2, 25). In that regard, 51 O.S. § 24A.8(8)(A)(8) requires law enforcement agencies to “make available for inspection and copying, if kept . . . [j]ail registers, including jail blotter data or jail booking information recorded on persons at the time of incarceration . . .” Since “law enforcement agencies” under the ORA are required to make jail registers available to the public, it seems inconsistent and implausible that a trust, like PCPSC

Trust, which operates a county jail and thus would be in possession of jail registers, would still not be considered a “law enforcement agency” under the ORA.

Similarly, a review of other pertinent statutes indicates that the Legislature did intend for public trusts operating county jails, such as PCPSC Trust here, to be considered “law enforcement agencies” under 51 O.S. § 24A.3. Indeed, “county sheriffs” are included within the definition of a “law enforcement agency” in § 24A.3(5). In that regard, 19 O.S. § 513.2(A) provides, in pertinent part:

For purposes of any jail facility, holding facility or detention center, *every reference in statute or rule to any duty or responsibility imposed upon the sheriff* or any jailer to operate, manage or provide any service to any person in the custody of such facility or any service related to the management or operation of such facility *shall be deemed applicable to and imposed upon the public trust* or private owner or management entity who by contract or otherwise legally operates or manages such jail facility, holding facility or detention facility.

*Id.* (emphasis added). Furthermore, 19 O.S. § 339(E) states:

When the board of county commissioners approves an express trust, pursuant to Sections 176 through 180.4 of Title 60 of the Oklahoma Statutes, for the purpose of operating a county jail, the trustees of the public trust *may appoint commissioned peace officers, certified by the Council on Law Enforcement Education and Training [“CLEET”],* to provide security for inmates that are required to be transported outside of the detention facility, *and investigate violations of law within the detention facility.*

Both of these statutes would support a finding that the PCPSC Trust does “enforce state and local criminal laws and initiate criminal prosecutions” and thus would qualify as a “law enforcement agency” under the ORA (§ 24A.3(5)). Even so,

Appellants never got the chance to make these arguments, since the trial court entered judgment on Appellees' behalf during the motion-to-dismiss stage of these proceedings and before any discovery could be conducted or record developed concerning any facts outside the pleadings. Indeed, Appellants were precluded from developing a record to establish that the PCPSC Trust was a "public" or "express trust" to which 19 O.S. §§ 339(E) and 513.2(A) may apply. Further, records, and any corresponding testimony, showing that CLEET-certified officers were appointed by the PCPSC Trust and the functions they performed for the jail was also relevant to determining whether § 339(E) applied and/or illustrated the PCPSC Trust was a "law enforcement agency" under the ORA. However, introducing said records and testimony is impermissible at the motion-to-dismiss stage, since same are considered "outside the pleadings" and thus not permissible for a motion to dismiss. *Okla. Ass'n of Broad. Inc.*, ¶ 2, 390 P.3d at 691.

**II. THE JAIL SURVEILLANCE VIDEO AND POTTAWATOMIE COUNTY PUBLIC SAFETY CENTER TRUST'S INTERNAL, INVESTIGATIVE RECORDS ARE NOT "OPEN RECORDS" SUBJECT TO MANDATORY DISCLOSURE UNDER THE OPEN RECORDS ACT.**

**A. PCPSC Trust's internal, investigative records and jail surveillance video are not subject to disclosure under § 24A.8.**

Again, the ORA generally requires that "[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours." 51 O.S. § 24A.5; *see also Fabian*, ¶ 9, 100 P.3d at 705. "Unless a record falls within a statutorily prescribed exemption in the

[ORA], the record must be made available for public inspection.” *Citizens Against Taxpayer Abuse*, ¶ 12, 73 P.3d at 87; *see also Cummings*, ¶ 6, 849 P.2d at 1089 (access to record “may be denied when the records have been specifically exempted from disclosure by the [ORA] or statutes which authorize, create or require the records, or when state or federal statutes create a confidential privilege”). One such exception involves law enforcement agencies. *See* § 24A.8(B).

Indeed, law enforcement agency records subject to disclosure under the ORA are specifically enumerated in 51 O.S. § 24A.8. *See also Cummings*, ¶ 7, 849 P.2d at 1089 (discussing § 24A.8). In that regard, § 24A.8(A) provides that “[l]aw enforcement agencies shall make available for public inspection and copying, if kept, the following records:”

1. An arrestee description, including the name, date of birth, address, race, sex, physical description, and occupation of the arrestee;
2. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer;
3. A chronological list of all incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred;
4. Radio logs. . .
5. Conviction information . . .
6. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person;
7. A crime summary, including an agency summary of crimes reported and public calls for service by classification or nature and number;
8. Jail registers, including jail blotter data or jail booking information recorded on persons at the time of incarceration showing the name of each prisoner with the date and cause of commitment, the authority committing the prisoner, whether committed for a criminal offense, a description of the prisoner, and the date or manner of discharge or escape of the prisoner;

9. Audio and video recordings from recording equipment attached to law enforcement vehicles or associated audio recordings from recording equipment on the person of a law enforcement officer . . . ; and
10. a. Audio and video recordings from recording equipment attached to the person of a law enforcement officer . . .

Further, “[e]xcept for the records listed in [§ 24A.8(A)] and those made open by other state or local laws, law enforcement agencies may deny access to law enforcement records. . . .” § 24A.8(B); *Cummings*, ¶ 7,849 P.2d 1087, 1089 (discussing § 24A.8).

Here, most of the records identified in § 24A.8 are records directly related to arrests. For instance, § 24A.8(1) – (3) each require information concerning an arrestee, the arrest and the investigation leading to or conducted as a result of the arrest to be released pursuant to the ORA. In this case, however, as the development of a factual record during the course of litigation would have shown, the arrest, arrest reports, and any investigation preceding or subsequent to the arrest would have been done by the arresting agency, the Shawnee Police Department. (ROA, MTD, pp. 28, 35-36). But, the PCPSC Trust was not involved in any way with the arrest or criminal investigation or charges against Mr. Given, and no PCPSC Trust employee authored any report concerning the arrest of Mr. Given. (ROA, MTD, pp. 28, 35-36).

Further, Section 24A.8(8) does identify information which should be released by a jail, *i.e.*, “[j]ail registers, including jail blotter data or jail booking information recorded on persons at the time of incarceration...” A review of the booking and release sheets provided to Appellees here in response to Daniel’s open records request reveals that the mandatory information was provided within those reports. (ROA,

MTD, pp. 8, 35-36). The PCPSC Trust is not required to create a separate report containing that information. *See* 51 O.S. § 24A.8(A), (C). Instead, the booking and release report, which were provided, satisfies those requirements.

Finally, the only audio and video recordings specifically identified as open law enforcement records under in § 24A.8 are audio and video recordings attached to a law enforcement vehicle or an audio and video recordings attached to or on the person of law enforcement, *i.e.*, body cameras. § 24A.8. There were no PCPSC Trust video or audio or video recording attached to any person. Notably, no jail surveillance videos or internal jail investigative records, are identified as an open, law enforcement record subject to mandatory disclosure in § 24A.8.

**B. PCPSC Trust’s internal, investigative records and jail surveillance video are not “open records” under the general provisions of the ORA.**

Additionally, the jail surveillance video and PCPSC Trust’s internal, investigative records do not fall within the general definition of a record under the ORA (51 O.S. § 24A.3(1)). In that regard, a “record” under the ORA is, as previously explained, defined as “all documents . . . 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.” 51 O.S. § 24A.3(1). In other words, not all records maintained by a public body are “open” records under the ORA. Instead, the ORA limits open records to “information which is ‘in connection

with the transaction of public business, the expenditure of public funds or the administering of public property.” *Fabian*, ¶ 11, 100 P.3d 705 (quoting § 24A.3(1)).

Here, however, as the development of a factual record during the course of litigation would have shown, the requested video and internal, investigative reports are not connected “with the transaction of public business, the expenditure of public funds or the administering of public property.” *Fabian*, ¶ 11, 100 P.3d at 705 (quoting § 24A.3(1)). And regardless, 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.

Again, when considering intent, courts “may look at each part of the statute, other statutes on the same subject, and the consequences of any particular interpretation.” *Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶ 22, 474 P.3d 859, 866, *as corrected* (Sept. 30, 2020) (quoting *Okla. Ass'n of Broad.*, ¶ 16, 390 P.3d at 694). Here, the ORA does not specifically list a jail’s “incident reports” or even internal, investigative records of a jail as an open record under the ORA. *See generally* § 24A.3(1). In contrast, the provision regarding law enforcement agency records § 24A.8 requires such agencies to provide public access to “[a] chronological list of all incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.” §24A.8(3). Considering the Legislature’s use of “incidents” and “offense reports” in that

provision, it follows that the Legislature's omission of "incident reports," like those Appellees request here, as an open record under the ORA was deliberate.

Further, while the general term "videos" is listed as a potential open record under the § 24A.3(1), the Legislature's 2014 amendment to § 24A.8 provides more direct guidance. In that regard, the Legislature amended said section to add the following, aforementioned provisions specifically for "recording equipment" that is attached "to law enforcement vehicles" "to the person of a law enforcement officer," *i.e.*, or body-camera and dash camera videos. *See* 51 O.S. § 24A.8(9), (10). Yet, the Legislature did NOT include jail surveillance videos in said provision or in any other provision of the ORA. *See generally* 51 O.S. § 24A.1, *et seq.* Again, this clearly indicates that the Legislature did not intend for such videos to be open records within the meaning of the ORA.

In sum, the district court erred in determining that the at-issue jail surveillance video and PCPSC Trust internal, investigative records were "open records" under the ORA.

### **III. THE DISTRICT COURT ERRED IN PREMATURELY ENTERING JUDGMENT ON BEHALF OF APPELLEES.**

The trial court entered judgment on all of Appellees' claims at the motion to dismiss stage of the proceedings. In that regard, 12 O.S. § 2012(b)(6) motions to dismiss are generally only granted "when there are no facts consistent with the allegations under any cognizable legal theory," or "there are insufficient facts under a cognizable legal theory" under which the Court can grant relief. *Wilson v. State ex rel.*



*State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157 (citing *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208). In considering a motion to dismiss, the trial court was to take as true the facts alleged by plaintiff, and draw reasonable inferences from them. *Ladra v. New Dominion, LLC*, 2015 OK 53, ¶ 8, 353 P.3d 529, 531. The burden of proof regarding the legal insufficiency of a plaintiff's petition rests with the defendant. *Id.* (citing *Tuffy's, Inc., v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163. Further, "a motion to dismiss will be treated as one for summary judgment when matters outside the pleadings are presented and not excluded." *Okla. Ass'n of Broad. Inc.*, ¶ 2, 390 P.3d at 691.

Here, Appellants did not present or rely on matters outside the pleadings in their Motion to Dismiss, Reply supporting same, or the Motion to Dismiss hearing. (ROA, MTD, pp. 21-43; ROA, Reply to MTD, pp. 54-59; ROA, Journal Entry, p. 62). In fact, both Appellants and Appellees' motion to dismiss-related briefing as well as counsel's arguments during the September 2, 2021 motion to dismiss hearing were limited to those issues presented in the parties' briefing, *i.e.*, whether dismissal of Appellees' claims against Appellants was warranted pursuant to 12 O.S. § 2012(b)(6). *Id.*; *see also* (ROA, Resp. to MTD, pp. 44-53; ROA, Journal Entry, p. 63). Nor did Appellants request or argue to the trial court that, when deciding whether to grant or deny Appellants' Motion to Dismiss, should immediately grant Appellees' the relief requested in their Petition. (ROA, Resp. to MTD, pp. 44-53; ROA, Journal Entry, pp. 61-62).

Even so, the trial court, *sua sponte* and without further argument/discussion from the parties on matters outside the pleadings or on issues not presented/required to be presented at that stage in the proceedings, entered judgment on Appellees' behalf on all Appellees' claims. (ROA, Journal Entry, pp. 62-63). This was error, however, as the judgment was entered and relief was granted before any party had an opportunity to conduct discovery and without further development of the record. *See Benedetti v. Cimarex Energy Co.*, 2018 OK 21, ¶ 7, 415 P.3d 43, 46 (error for the Court of Civil Appeals to treat a party's motion to dismiss as a motion for summary judgment when neither the parties nor the trial court had done so and discovery had not been conducted).

Indeed, because Appellants did not present or rely on matters outside the pleadings in their Motion to Dismiss and related filings/arguments, no discovery was conducted or record otherwise established as to: the PCPSC Trust's functions and whether same constituted "law enforcement agency" functions under such that 51 O.S. §§ 24A.3(5) and 24A.8 applied; whether the at-issue jail surveillance video and investigative records of the PCPSC Trust were "law enforcement records" under § 24A.8 or that same were did not meet any of specifically enumerated, "open" law enforcement records under § 24A.8(A); or that the at-issue video and records did not were not connected with the transaction of public business, expenditure of public funds, or administering of public property, and thus were "open" records under the general provisions of the ORA § 24A.5. Appellants were precluded from developing a

record to establish that the PCPSC Trust was a “public” or “express trust” to which 19 O.S. §§ 339(E) and 513.2(A) may apply. For instance, Appellants were denied the ability to conduct discovery and possibly establish for the record any CLEET records, and any corresponding testimony, reflecting that CLEET certified officers did work at PCPSC as well as CLEET’s understanding of whether the PSC Trust was the sponsoring agency for those officer. Similarly, Appellants were precluded from introducing the PCPSC Trust indenture as well as any other records or testimony determining what functions the Trust performed in operating the PCPSC. Appellants were also precluded from offering testimony, facts, or records concerning the at-issue records or video and the purposes of same, in order to determine whether they were, in fact, “open” records under the ORA.

Thus, the trial court’s entry of judgment for Appellees denied Appellants the ability to conduct any discovery or otherwise establish a sufficient record as to any of these matters, *See Benedetti v. Cimarex Energy Co.*, 2018 OK 21, ¶ 7, 415 P.3d 43, 46 (error for the Court of Civil Appeals to treat a party’s motion to dismiss as a motion for summary judgment when neither the parties nor the trial court had done so and discovery had not been conducted).

**IV. APPELLEES WERE NOT ENTITLED TO DECLARATORY RELIEF UNDER THE ORA OR A WRIT OF MANDAMUS.**

Additionally, for all the reasons explained in Propositions I-III above, Appellees were not entitled to declaratory or injunctive relief under the ORA. *See* 51 O.S. § 24A.17(B)(1); *Rivero*, 2021 OK 31, ¶ 37 & n.48, 489 P.3d 36, 51. Nor were

the entitled to writ of mandamus. Specifically, mandamus is an extraordinary legal remedy that is governed by the terms of 12 O.S. §§ 1451 and 1452. *Bd. of Cty. Comm'rs of Muskogee Cty. v. City of Muskogee*, 1991 OK 115, ¶ 9, 820 P.2d 797, 803, *overruled on other grounds, State ex rel. Macy v. Bd. of Cty. Comm'rs Cty. of Okla. v. City of Muskogee*, 1999 OK 53, 986 P.2d 1130. A typical case for mandamus has five elements:

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 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.

*Kent v. City of Okla. City*, 2020 OK CIV APP 21, ¶ 14, 476 P.3d 726, 730 (quoting *Miller Dollarhide, P.C. v. Tal*, 2006 OK 27, ¶ 10, 174 P.3d 559). “A party seeking mandamus “has the burden of proving the clear legal right in himself and a corresponding duty resting upon the defendant in order to authorize the issuance of the peremptory writ.” *Chandler U.S.A., Inc. v. Tyree*, 2004 OK 16, ¶ 25, 87 P.3d 598, 605 (quoting *Lee v. Myles*, 1964 OK 56, ¶ 8, 390 P.2d 489, 491).

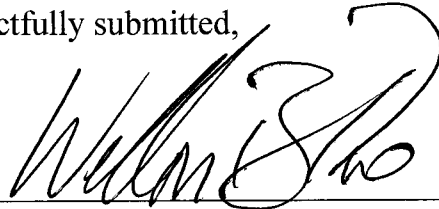
Here, Appellants provided prompt, reasonable access to the requested booking and release sheets. (ROA, MTD, pp. 31-32; ROA, Resp. to MTD, p. 58). Further, as explained in Propositions I-III above, the requested jail surveillance video and PCPSC Trust internal, investigative records were not open records under the ORA. Thus, Appellees had no legal right to those records and Appellants were not refusing to

perform any legal duties regarding them. In sum, Appellees' have failed to state any claim for mandamus relief and as such, their request should be denied.

**CONCLUSION**

For the foregoing reasons, the judgment for Appellees should be REVERSED.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Defendants/Appellants' Brief in Chief was mailed January 11, 2022 by depositing it in the U.S. Mail, postage prepaid, to:

Kathryn E. Gardner  
Reporters Committee for Freedom of the Press  
110 S. Hartford Avenue, Suite 2524  
Tulsa, OK 74120

***Attorney for Plaintiffs/Appellees***

I further certify that on January 11, 2022 a true and correct copy of Defendants/Appellants' Brief in Chief was deposited in the U.S. Mail, postage prepaid, to the Office of the Court Clerk of Pottawatomie County, Oklahoma for filing.



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Wellon B. Poe