



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

vs.)

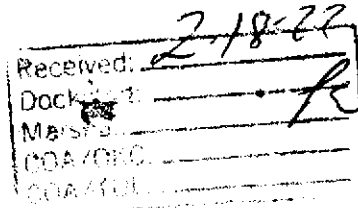
POTTAWATOMIE COUNTY PUBLIC)
SAFETY CENTER TRUST and)
BREONNA R. THOMPSON in her)
official capacity as EXECUTIVE)
DIRECTOR of POTTAWATOMIE)
COUNTY PUBLIC SAFETY CENTER)
TRUST,)
Defendants/Appellants.)

No. DF-119952

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 18 2022

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Honorable John G. Canavan, Trial Judge
District Court of Pottawatomie County, Oklahoma
District Court Case No. CV-2021-93

PLAINTIFFS'/APPELLEES' ANSWER BRIEF

Appeal From Judgment or Final Order of the District Court

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PLAINTIFFS'/APPELLEES' ANSWER BRIEF

Appellees, Frontier Media Group, Inc. (“The Frontier”) and Kassie L. Daniel (“Daniel”), hereby file their Answer Brief in this appeal from a judgment and final order of the district court brought by Appellants, the Pottawatomie County Public Safety Center Trust (“PCPSC Trust”) and Breonna R. Thompson in her official capacity as Executive Director of Pottawatomie County Public Safety Center Trust (“Thompson”). By and through this appeal, Appellants seek to continue to evade their obligations under the Oklahoma Open Records Act to provide Appellees with access to records necessary to the public’s understanding of how a man in the throes of a mental health crisis died after an incident at Appellants’ jail.

INTRODUCTION

The Frontier is a nonprofit news corporation that produces illuminating journalism as a public service for the benefit of all Oklahomans and makes its stories freely and openly available online. ROA, Petition, p.2. Daniel is a journalist and Senior Reporter at The Frontier, where she covers criminal justice and other issues across the state. ROA, Petition, p.2. This case concerns the Oklahoma Open Records Act (“ORA”), Okla. Stat. tit. 51, §§ 24A.1-A.33, which ensures and facilitates “the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.” *Id.* § 24A.2.

In her role as a reporter for The Frontier, Daniel submitted an ORA request to the PCPSC Trust for “access to and a copy of any 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.” ROA, Petition, Exhibit C, pp.13-14. The PCPSC Trust is a “public body” as defined by the ORA and

operates the Pottawatomie County Public Safety Center, the jail for Pottawatomie County. *See* 51 O.S. § 24A.3(2) (defining “public body”); ROA, Petition, p.2. Thompson is the Executive Director of the PCPSC Trust and is a “public official” within the meaning of the ORA. *See* 51 O.S. § 24A.3(4) (defining “public official”); ROA, Petition, p.2.

Ronald Gene Given (“Given”), the subject of Daniel’s ORA request, was deemed in need of emergency detention at a state behavioral health center following an episode at a store in January of 2019. ROA, Petition, pp.2-3. However, because every state behavioral health facility was at capacity, Given was instead taken to the Pottawatomie County Public Safety Center and died shortly thereafter. ROA, Petition, p.3. Following Given’s death, a spokeswoman for the Shawnee Police Department stated that the department was told there was a struggle between Given and jail staff. ROA, Petition, p.3.

A December 2020 federal civil rights action filed by Given’s estate alleges that before his death, Given was placed in a cell by himself whereupon he removed his clothing, prompting a jail employee to enter his cell. ROA, Petition, p.3. The jail employee allegedly struck Given, which caused him to fall to the floor and hit the back of his head on the cell’s concrete floor. ROA, Petition, p.3. Two additional jail employees then entered Given’s cell and attempted to restrain his arms while he laid flat on his back and a third officer placed his knee into Given’s neck until he showed signs of unconsciousness. ROA, Petition, p.3. Given was later transported to a hospital, but never regained consciousness. ROA, Petition, p.4. A report from the state’s medical examiner found Given died from organ failure caused by cardiac arrhythmia from struggling as officers restrained him and the medical examiner ruled his death a homicide. ROA, Petition, p.3.

In response to Daniel's ORA request seeking the jail's records concerning Given, the PCPSC Trust produced Given's booking sheet and release sheet. ROA, Petition, p.6. However, the PCPSC Trust denied Appellees access to any additional responsive records requested by Daniel including, but not limited to, "video of Given at the jail" and "incident reports related to use of force or injury." ROA, Petition, p.6; ROA, Petition, Exhibit C, pp.13-14. The Frontier and Daniel brought an ORA action in the District Court of Pottawatomie County, Oklahoma (CV-2021-93) on June 7, 2021, seeking access to all records responsive to Daniel's request. *See* 51 O.S. § 24A.17(B) (creating a statutory right for any person denied access to records of a public body or public official to bring a civil suit); ROA, Petition, pp.1-20.

The trial court entered judgment on behalf of Appellees finding that the records at issue were open records subject to mandatory disclosure under the ORA. ROA, Journal Entry, pp.1-4. Appellants brought the instant appeal in an effort to avoid producing open records in accordance with their obligations under the ORA and the trial court's order.

SUMMARY OF THE RECORD

Appellees' Petition for Violations of the Oklahoma Open Records Act alleged that Appellants violated the ORA by unlawfully withholding records responsive to Appellees' request¹ for "access to and a copy of *any and all records* related to the custody of Ronald Gene Given...." ROA, Petition, p.6; ROA, Petition, Exhibit C, pp.13-14 (emphasis added). Appellants moved to dismiss the Petition, arguing that Appellees failed to state a claim for

¹ Ms. Daniel originally submitted an ORA request to the PCPSC Trust on November 1, 2019, for related materials via fax. ROA, Petition, Exhibit A, pp.9-10. The PCPSC Trust did not accept Ms. Daniel's original ORA request due to it being faxed and instead, instructed her that ORA requests must be submitted in writing and presented in person at their administration office. ROA, Petition, Exhibit B, pp.11-12. Ms. Daniel then submitted an ORA request in writing and presented it in person on November 6, 2019, to PCPSC Trust's administration office. ROA, Petition, Exhibit C, pp.13-14.

violation of the ORA on four grounds and that Appellees were not entitled to a writ of mandamus. ROA, Motion to Dismiss, pp.1-23.

In support of their contention that Appellees' Petition failed to state a claim for violation of the ORA, Appellants argued, *inter alia*,² that "video of Given at the jail" and "incident reports related to use of force or injury" were not "records" as defined by the ORA because (1) they were not connected with the transaction of public business, the expenditure of public funds, or the administering of public property, and (2) that other provisions of the ORA indicated the Oklahoma Legislature did not intend for them to be considered records subject to disclosure. ROA, Motion to Dismiss, pp.4-8. In doing so, Appellants expressly conceded that "the PCPSC Trust is a 'public body' under the ORA," "that it 'operates the county jail,'" and that "the PCPSC Trust is NOT a law enforcement agency under the ORA." ROA, Motion to Dismiss, pp.5-6. Appellants further stated:

Clearly, the Trust is not a police department, sheriff, or any of the [ORA] listed State agencies. And again, [Appellees] allege the PCPSC Trust operates the jail, not that it is charged with enforcing criminal laws and/or initiating prosecutions. And as such, the general provisions of the ORA determine which of PCPSC Trust's records are considered open, not § 24A.8 [of the ORA].

ROA, Motion to Dismiss, p.6. Appellants also claimed that the trial court had "already implicitly found the requested video is not an open record subject to mandatory disclosure."

ROA, Motion to Dismiss, pp.9-11. Specifically, Appellants pointed to the fact that in the probate case that resulted from Given's death,³ a "detention video" sought by a subpoena

² In support of their claim that Appellees' Petition failed to state a claim for violation of the ORA, Appellants made four arguments: (1) Appellees could not pursue claims related to any items requested other than the video and incident reports; (2) the requested video and incident reports were not "records" under the ORA; (3) the trial court already implicitly found the requested video was not an open record subject to mandatory disclosure; and (4) the PCPSC Trust provided prompt, reasonable access to qualifying records under the ORA. ROA, Motion to Dismiss, pp.3-12.

³ *In re. Estate of Ronald Given*, PB-2020-75 (Pottawatomie Cnty. Dist. Ct. Aug. 14, 2020).

from the estate's personal representative was placed under a protective order by the trial court upon agreement of the parties. ROA, Motion to Dismiss, pp.9-11; ROA, Motion to Dismiss, Exhibits 2-3, pp.17-23. According to Appellants, by issuing an agreed-upon protective order in the probate case, the trial court had implicitly determined that the video at issue in this case⁴ is not an open record subject to "unrestricted publication." ROA, Motion to Dismiss, pp.10.

Appellants attached three exhibits in support of their Motion to Dismiss, including copies of the booking and release sheet from January 2019 related to Given, as well as a journal entry and a protective order from the probate case related to Given's death. ROA, Motion to Dismiss, Exhibits 1-3, pp.15-23. Both parties relied on the exhibits in their briefing on Appellants' Motion to Dismiss. *See* ROA, Plaintiffs' Response to Motion to Dismiss, p.6; ROA, Defendants' Reply in Support of Motion to Dismiss, p.4.

Following briefing and a hearing on Appellants' Motion to Dismiss, the trial court entered judgment in favor of Appellees. ROA, Journal Entry, pp.1-4. A journal entry memorializing the hearing stated in relevant part:

Taking into consideration the briefing and arguments of counsel, the Court denied [Appellants'] Motion to Dismiss, determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records subject to mandatory disclosure, and instructed [Appellants] to answer [Appellees'] Petition within 20 days. The Court then granted [Appellees'] request in their Petition for Relief, pursuant to 12 O.S. §§ 1451-1462, requiring that [Appellants] were to immediately disclose the requested records to [Appellees], and declared that order to be a final judgment not allowing or requiring any further pleadings.

ROA, Journal Entry, p.2. From this judgment, Appellants now appeal.

⁴ Appellees requested "*any and all records* related to the custody of Ronald Gene Given." ROA, Petition, Exhibit C, pp.13-14 (emphasis added).

ARGUMENT & AUTHORITY

As an initial matter, Appellants urge this Court to find that the PCPSC Trust is a “law enforcement agency” under the ORA. Appellants, however, not only waived this Court’s consideration of that argument by failing to first present it to the trial court, but also *expressly conceded* in the trial court that the PCPSC Trust is a public body under the ORA—not a law enforcement agency. Appellants’ attempted about-face for the purposes of this appeal is impermissible. Moreover, in any event, even if this Court were to entertain this argument for the first time on appeal—which it should not do—the law and the record on appeal make clear that the PCPSC Trust is not a “law enforcement agency” as defined by the ORA.

The records at issue in this case are “records” as defined by the ORA and are thus subject to disclosure. And that is true *even if* the record on appeal could support application of the ORA’s section pertaining to law enforcement agencies (51 O.S. § 24A.8)—which it cannot. The trial court thus committed no error by entering judgment on behalf of Appellees. The trial court correctly determined that the records at issue were open records subject to mandatory disclosure under the ORA, and fashioned appropriate declaratory relief. Additionally, the writ of mandamus entered by the trial court was neither against the clear weight of the evidence nor contrary to the law. For all these reasons, this Court should affirm the judgment of the trial court.

I. Appellants expressly argued below that the PCPSC Trust is not a law enforcement agency under the ORA and have waived any arguments to the contrary.

Appellants argue to this Court that the PCPSC Trust should be considered a “law enforcement agency” under the ORA, as defined by 51 O.S. § 24A.3(5). But Appellants argued the opposite to the trial court. Accordingly, Appellants cannot secure reversal on an alleged error they invited by assuming a position on appeal inconsistent with their arguments

below that the PCPSC Trust was a public body and not a law enforcement agency under the ORA. Appellants further waived the issue by failing to first present it to the trial court. Even if this Court were to reach the issue, the record on appeal does not support a finding that the PCPSC Trust is “law enforcement agency” under the ORA.

A. Appellants expressly conceded below that the PCPSC Trust is a public body and not a law enforcement agency within the meaning of the ORA; they cannot secure reversal on an alleged error they invited.

Appellants are bound in this appeal by the arguments they presented to the trial court. *Home-Stake Prod. Co. v. Minnis*, 1968 OK 57, ¶18, 443 P.2d 91, 99 (citing *Midwest Eng'g & Constr. Co. v. Elec. Regul. Corp.*, 1967 OK 174, syllabus at 7, 435 P.2d 89, 91 (“In an appeal of a case to the Supreme Court, the parties are bound by the theories upon which they tried it in the lower court, and cannot secure reversal on an error they invited there, or by assuming a position inconsistent with that taken there.”)). Below, Appellants definitively asserted—correctly—that the PCPSC Trust is not a law enforcement agency. ROA, Motion to Dismiss, pp.5-6. Yet Appellants now urge this Court to conclude that the PCPSC Trust is a law enforcement agency under the ORA, in direct opposition to their stated position in the trial court. Appellants’ Brief-in-Chief, pp.12-19.

In response to Appellees’ Petition, Appellants filed a Motion to Dismiss pursuant to Okla. Stat. tit. 12, § 2012(B)(6), in which they argued that Appellees’ Petition failed to state a claim for violation of the ORA and that Appellees were not entitled to a writ of mandamus. ROA, Motion to Dismiss, pp.1-23. Appellants devoted the largest portion of their Motion to Dismiss to arguing that the “requested video and incident reports are not ‘records’ under the ORA.” ROA, Motion to Dismiss, pp.4-8. Appellants asserted that the ORA only requires disclosure of qualifying records of public bodies and public officials, and that, in their view,

the records at issue did not qualify. ROA, Motion to Dismiss, pp.4-8. In support of this argument, Appellants explicitly defined the PCPSC Trust as a public body and further stated “the PCPSC Trust is NOT a law enforcement agency under the ORA.” ROA, Motion to Dismiss, pp.5-6. Appellants argued:

Clearly, the Trust is not a police department, sheriff, or any of the listed State agencies. And again, [Appellees] allege the PCPSC Trust operates the jail, not that it is charged with enforcing criminal laws and/or initiating prosecutions. And as such, the general provisions of the ORA determine which of PCPSC Trust’s records are considered open, not § 24A.8.

ROA, Motion to Dismiss, p.6. In response to Appellants’ Motion to Dismiss, Appellees agreed that the PCPSC Trust was a public body under the ORA, and thus governed by the general provisions of the ORA rather than 51 O.S. § 24A.8. ROA, Plaintiffs’ Response to Motion to Dismiss, p.4.

Notwithstanding their clear position in the trial court, Appellants now argue that the PCPSC Trust should be considered a law enforcement agency as defined by the ORA in 51 O.S. § 24A.3(5). Appellants’ Brief-in-Chief, pp.12-19. In doing so, Appellants ignore their past briefing expressly conceding this issue and mischaracterize the record below. For example, Appellants inaccurately claim that they “never got the chance” to make arguments regarding the PCPSC Trust’s status as a law enforcement agency under the ORA. Appellants’ Brief-in-Chief, p.13. But Appellants most certainly had a chance to make these arguments in their Motion to Dismiss, when they expressly conceded that the PCPSC Trust was “NOT a law enforcement agency.” ROA, Motion to Dismiss, p.6. Appellants are not permitted to now argue otherwise to this Court.

B. Appellants waived any argument that the PCPSC Trust should be considered a law enforcement agency, as defined by 51 O.S. § 24A.3(5) of the ORA, by not first presenting it to the trial court.

It is well settled law in Oklahoma that parties are not permitted to argue for the first time on appeal “questions not raised in the trial court by the pleadings in that court.” *Butterick Co. v. Molen*, 1943 OK 202, ¶7, 138 P.2d 89, 91; *see also Nichols v. State ex rel. Dep't of Pub. Safety*, 2017 OK 20, ¶17, 392 P.3d 692, 696 (“[G]enerally, issues raised for the first time on appeal are not subject to review.”); *Okla. Dep't Secs. ex rel. Faught v. Wilcox*, 2011 OK 82, ¶17, 267 P.3d 106, 110 (declining to hear multiple issues raised on appeal that were not first raised in the trial court); *Jernigan v. Jernigan*, 2006 OK 22, ¶26, 138 P.3d 539, 548 (“Matters not first presented to the trial court are generally excluded from consideration by an appellate forum.”). Appellants did not argue in the trial court that the PCPSC Trust “should be considered a law enforcement agency under the provisions of the Oklahoma Open Records Act, 51 O.S. § 24A.3(5).” To the contrary, Appellants argued the opposite; they expressly conceded that Appellees had correctly alleged that the PCPSC Trust is a public body and *not a law enforcement agency*. ROA, Motion to Dismiss, pp.5-6. Consequently, the trial court was never required to address any argument to the contrary. Because Appellants conceded that the PCPSC Trust is not a law enforcement agency as defined by 51 O.S. § 24A.3(5) of the ORA, they have waived this issue.

C. The record on appeal does not support a finding that the PCPSC Trust is a law enforcement agency within the meaning of 51 O.S. § 24A.3(5).

Even if Appellants had not expressly conceded that the PCPSC Trust is not a law enforcement agency and waived any argument to the contrary (which they have), their argument that the PCPSC Trust is a law enforcement agency under the ORA fails on its own terms. First, the PSCPSC Trust is a public body under the plain language of the ORA because it is a “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). Second, the PSCPC Trust does not fall within the ORA's definition of "law enforcement agencies." The ORA defines law enforcement agencies as public bodies 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." *Id.* § 24A.3(5). There is no evidence in the record that the PSCPC Trust is an agency that "enforc[es] state or local criminal laws and initiat[es] criminal prosecutions." While Appellants urge this Court to overlook the plain language of the ORA to hold the PCPSC Trust falls within that statutory definition (which Appellants admit, even on appeal, the PCPSC Trust is not "a classic 'law enforcement' agency" under § 24A.3(5) of the ORA), the language of the statute is clear. Appellants' Brief-in-Chief, p.8.

Moreover, Appellants' assertions regarding the tasks and duties of the PCPSC Trust are not supported by the record on appeal. For example, Appellants argue for the first time to this Court that the duties of the PCPSC Trust are in line with that of a law enforcement agency because they allegedly include "supervision of inmates, investigation of events or crimes within the jail, and enforcement of court orders related to criminal matters." Appellants' Brief-in-Chief, p.8. But this contention is not supported by the record on appeal; nor could it be, as explained above, Appellants expressly agreed in the trial court below that PCPSC Trust was a public body and not a law enforcement agency. ROA, Motion to Dismiss, pp.5-6. A party may not supplement an appellate record, as Appellants attempt here, to show facts necessary to an element of that party's claim or cause of action in the trial court (*i.e.*, that the PCPSC Trust is charged with enforcing state or local criminal laws and

initiating criminal prosecutions) by merely asserting facts in their brief to this Court. *State ex rel. Bd. of Regents of Univ. of Okla. v. Lucas*, 2013 OK 14, ¶40, 297 P.3d 378, 396 (“[A] litigant may not supplement an appellate record to show a fact that is a necessary element to that party’s claim or cause of action in the trial court by merely asserting that fact in his or her brief [on appeal].”). A finding that the PCPSC Trust is a law enforcement agency within the meaning of 51 O.S. § 24A.3(5) is not supported by the record on appeal.

II. The records at issue are open records subject to mandatory disclosure under the ORA.

The trial court correctly “determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records subject to mandatory disclosure.” ROA, Journal Entry, p.2. This Court should affirm the trial court’s judgment because “video” and “internal investigative records”—as well as any other responsive records that may exist—clearly meet the definition of a record under 51 O.S. § 24A.3(1). Further, even if the record on appeal could support a finding that the PCPSC Trust is a law enforcement agency under the ORA to which § 24A.8 applied—which it cannot—51 O.S. § 24A.8 does not bar disclosure of the records at issue.

A. Video and internal investigative records, as well as any additional records that are responsive to Appellees’ ORA request, are open records under 51 O.S. § 24A.3(1) of the ORA.

Appellees’ ORA request to the PCPSC Trust sought “access to and a copy of any 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.” ROA, Petition, Exhibit C, pp.13-14. While the entire universe of records responsive to that request is not clear from Appellants’ briefing in either the trial court or this Court (and Appellees are not the custodians of the records at issue), the ORA defines the

term “record” broadly. *See* 51 O.S. § 24A.3(1). And its broad definition of a record clearly encompasses any materials responsive to Appellees’ ORA request, including, but not limited to, the video and internal investigative reports of the PCPSC Trust.

The ORA defines “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.

As to the video requested by Appellees, a record as defined by the ORA expressly includes both “film recording[s]” and “video record[s].” *Id.* Moreover, the Oklahoma Supreme Court has already laid to rest “any question of a video being a record.” *Okla. Ass’n of Broads., Inc. v. City of Norman*, 2016 OK 119, ¶14, 390 P.3d 689, 694 (“We laid any question of a video being a record to rest in *Fabian & Assocs. v. State ex rel. Dep’t of Pub. Safety*, 2004 OK 67, ¶ 10, 100 P.3d 703, 705, wherein we found that the [ORA’s] definition of a record was sufficiently broad to include ‘any method of memorializing information.’”). And, as to the PCPSC Trust’s internal investigative records, the ORA’s broad definition of a record encompasses any method of memorializing information including “all documents... or other material regardless of physical form or characteristic...[,]” which would include internal investigative records. *See Fabian & Assocs. v. State ex rel. Dep’t of Pub. Safety*, 2004 OK 67, ¶10, 100 P.3d 703, 705 (quoting 51 O.S. § 24A.3(1)).

Rather than contend with the plain language of the statute, Appellants argue for reversal based on a legislative intent analysis. Appellants contend that the Legislature did

not intend for a jail's incident reports or surveillance videos to be considered open records⁵ because the ORA does not specifically list "incident reports" or "internal, investigative records of a jail" in the expressly non-exhaustive list set forth in 51 O.S. § 24A.3(1)'s definition of a record, whereas § 24A.8 of the ORA specifically requires law enforcement agencies to provide 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." 51 O.S. § 24A.8(A)(3). For this reason, Appellants argue that the Legislature's omission of "incident reports" in 51 O.S. § 24A.3(1) should be interpreted as a deliberate decision to carve such documents out of the definition of record. And even though Appellants admit "video" is expressly included in § 24A.3(1), they argue that because the Legislature amended 51 O.S. § 24A.8 in 2014 to add audio and video recordings of body camera and dash camera to the list of open records law enforcement agencies are required to make available for public inspection and copying, but did not specifically list jail surveillance video in that provision or anywhere else in the ORA, that the Legislature did not intend for such video to be an open record. Neither of Appellants' arguments merit reversal of the trial court's order.

Critically, there is no cause for this Court to inquire as to the Legislature's intent behind the definition of a record under § 24A.3(1). When, as here, a statute is unambiguous, its language is to be applied without further inquiry as to its meaning. *Ball v. Multiple Injury Tr. Fund*, 2015 OK 64, ¶6, 360 P.3d 499, 502 (citing *St. John Med. Ctr. v. Bilby*, 2007 OK 37, ¶6, 160 P.3d 978, 979). The language of § 24A.3 unambiguously and broadly defines a

⁵ Appellants' briefing repeatedly characterizes the records at issue differently. To be clear, the trial court's order refers to video and internal investigative records of the PCPSC Trust, ROA, Journal Entry, p.2., and Appellants' briefing does not specifically identify or address any additional responsive records.

record under the ORA. That definition explicitly includes: “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.” 51 O.S. § 24A.3(1) (emphasis added). Moreover, the words “all” and “any” and the phrase “including, but not limited to” clearly indicate the enumerated list is not exclusive. *See e.g., JPMorgan Chase Bank v. Specialty Rests., Inc.*, 2010 OK 65, ¶¶14-16, 243 P.3d 8, 14, as corrected (Nov. 22, 2010) (“The term ‘any’ is all-embracing and means nothing less than ‘every’ and ‘all.’ Utilization of the word ‘including’ along with the phrase ‘without limitation’ denotes an intention of non-exclusivity. The term ‘including’ is neither limiting nor exclusive.”); *see also e.g., Okla. Pub. Emps. Ass'n v. State ex rel. Okla. Off. of Pers. Mgmt.*, 2011 OK 68, ¶13, 267 P.3d 838, 845 (finding the phrase “such as,” when used in the context of the ORA, was not a term of strict limitation; rather, the phrase was used to indicate that there are other matters intended to be included within the statutory limits which are not specifically enumerated by the legislative language). To read a definition that explicitly encompasses types of records not expressly enumerated as Appellants urge this Court to do, would run afoul of basic principles of statutory interpretation and create ambiguity where there is none.

Unless a contrary legislative intent plainly appears, a statute’s words are to be given their common meaning. *Okla. Ass’n of Broads., Inc.*, 2016 OK 119, ¶16, 390 P.3d at 694-95 (citing Okla. Stat. tit. 25, § 1 (“Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.”)); *Welch v. Crow*, 2009 OK 20, ¶10, 206 P.3d 599, 603). The Legislature’s expressed policy for the ORA is to vest

the people of Oklahoma “with the inherent right to know and be fully informed about their government.” 51 O.S. § 24A.3(1). “The Legislature’s emphatic message to government agencies is, unless otherwise specifically excluded, the public must have prompt and reasonable access to records,” broadly defined. *Okla. Ass’n of Broads., Inc.*, 2016 OK 119, ¶15, 390 P.3d at 694 (citing *Fabian & Assocs.*, 2004 OK 67, ¶¶11-12, 100 P.3d at 705-06; *City of Lawton v. Moore*, 1993 OK 168, ¶¶ 5-6, 868 P.2d 690, 704-05). “Because of the strong public policy” of providing “public access to governmental records, [the Court] 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.” *Id.* (citing *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶12, 73 P.3d 871, 875).

Appellants’ narrow construction of 51 O.S. § 24A.3(1), which seeks to rewrite the plain language of the statute to deny access to records not specifically enumerated in the ORA’s broad and non-exclusive definition of a record, is contrary to the legislative purpose of the ORA. This Court should give the words of § 24A.3(1) their common meaning and find that the definition of a record under the ORA—specifically as it relates to “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”—includes video and internal investigative records of the Pottawatomie County Public Safety Center as well as any additional records responsive to Appellees’ ORA request.

Finally, while Appellants do not dispute that the records at issue were “created by, received by, under the authority of, or coming into the custody, control or possession of

public officials, public bodies, or their representatives[,]" Appellants contend that the records requested by Appellees are not information "in connection with the transaction of public business, the expenditure of public funds or the administering of public property." See 51 O.S. § 24A.3(1). This argument is frivolous.

As the trial court correctly determined below, the Pottawatomie County Public Safety Center serves as the county jail for Pottawatomie County. ROA, Journal Entry, p.2. The records of a county jail—including the video and internal investigative records of the Pottawatomie County Public Safety Center that are at issue here—are plainly connected to the transaction of public business, the expenditure of public funds or the administering of public property. County jails (including those operated by a trust authority) are funded by taxpayer dollars and charged with a public safety responsibility; their business is the business of all people of the state. See e.g., Okla. Stat. tit. 19, § 904.1 (providing a mechanism for counties to establish a County Jail Trust Authority if it "would be conducive to the promotion and preservation of the public safety of the county").

In *Fabian & Associates v. State ex rel. Department of Public Safety*, the Supreme Court of Oklahoma held that audio recordings of implied consent hearings involving the revocation or suspension of a driver's license were public "records" within the meaning of the ORA. See 2004 OK 67, ¶¶11-12, 100 P.3d at 705-06. Although the hearings concerned individual drivers and their licenses, the Court held that the determination of whether one arrested for driving under the influence of alcohol was permitted to continue to drive on public roads was the business of all the people of the state, as the purpose of the revocation or suspension was to protect the public. *Id.* Here, the maintenance and operation of the Pottawatomie County Public Safety Center as the county jail for Pottawatomie County,

serves a public safety purpose. The video and internal investigative records are directly related to the jail's operations and its treatment of individuals in the jail's custody. This Court should therefore affirm the trial court's ruling that the video and internal investigative records of the Pottawatomie County Public Safety Center, as well as any additional records responsive to Appellees' ORA request, are "records" as defined by 51 O.S. § 24A.3(1).

B. Even if this Court could conclude that the PSPSC Trust is a law enforcement agency, which it cannot, 51 O.S. § 24A.8 would not bar disclosure of the records at issue.

As set forth *supra*, Appellants expressly conceded that the PCPSC Trust is not a law enforcement agency as defined by 51 O.S. § 24A.3(5) and waived any argument to the contrary, and, in any event, the record on appeal does not support any contrary finding. But even if this Court could conclude that the PCPSC Trust is a law enforcement agency under § 24A.3(5) of the ORA—which it cannot do—this Court still could not conclude, as Appellants' urge it to, that the "PCPSC Trust's internal, investigative records and jail surveillance video are not subject to disclosure under § 24A.8." Appellants' Brief-in-Chief, p.8.

Generally speaking, video and internal investigative records of law enforcement agencies under 51 O.S. § 24A.3(5) may be subject to disclosure under § 24A.8 of the ORA. That provision sets forth ten categories of records that must be made available by law enforcement agencies for public inspection and copying, including categories related to video and reports. *See* 51 O.S. § 24A.8(A). In addition, 51 O.S. § 24A.8 also requires law enforcement agencies to make available records that are made open by other state or local laws, as well as in instances where a court finds the public interest or an individual's interest outweighs the law enforcement agency's reason for denial. *See id.* § 24A.8(B). Here, the

record on appeal does not contain sufficient facts that would allow the Court to determine whether 51 O.S. § 24A.8 applies.

III. The trial court correctly entered judgment on Appellees' behalf.

Where, as here, matters outside the pleadings are presented to and not excluded by the court, a motion to dismiss for failure to state a claim upon which relief can be granted shall be treated as one for summary judgment. *See* 12 O.S. § 2012(B); *see also Okla. Ass'n of Broads., Inc.*, 2016 OK 119, ¶2, 390 P.3d at 691 (finding a district court implicitly treated a motion to dismiss as one for summary judgment in an ORA case where the moving party presented a criminal case record and provided a video recording at the hearing on the motion to dismiss); *Davis v. Progressive N. Ins. Co.*, 2012 OK CIV APP 98, ¶7, 288 P.3d 270, 271 (converting a motion to reconsider a motion to dismiss for failure to state a claim to one for summary judgment where affidavits and correspondence were attached as exhibits to the motion to reconsider) (citing *State ex rel. Wright v. Okla. Corp. Comm'n*, 2007 OK 73, ¶48, 170 P.3d 1024, 1039).

In support of their Motion to Dismiss, Appellants attached three exhibits. ROA, Motion to Dismiss, Exhibits 1-3, pp.15-23. Exhibit 1 was comprised of two documents related to Given's custody in January 2019: the booking sheet and release sheet. ROA, Motion to Dismiss, Exhibit 1, pp.15-16. Exhibits 2 and 3 respectively were a journal entry and protective order from the probate matter involving Given's estate, which Appellants used to argue that Appellees' Petition failed to state a claim for violation of the ORA because the trial court supposedly had already "implicitly found" the requested video was "not an open record subject to mandatory disclosure." ROA, Motion to Dismiss, Exhibits 2-3, pp.17-23; ROA, Motion to Dismiss, p.10. Appellees cited Appellants' exhibits in their response to the

Motion to Dismiss. ROA, Plaintiffs' Response to Motion to Dismiss, p.6. And Appellants further relied on those exhibits in their reply in support of that motion. ROA, Defendants' Reply in Support of Motion to Dismiss, p.4.

Furthermore, the journal entry that followed the hearing does not state that any matters outside the pleadings (*i.e.*, Appellants' exhibits) were specifically excluded by the trial court in its consideration of the issues. ROA, Journal Entry, pp.1-4. The trial court therefore implicitly treated Appellants' Motion to Dismiss as one for summary judgment and entered judgment on behalf of Appellees. This Court should affirm the trial court's judgment.

If it appears that there is no substantial issue of material fact and that one party, including the non-moving party, is entitled to judgment as a matter of law, a court shall render judgment for that party. Okla. Stat. tit. 12, ch. 2, app. Rules for District Courts of Oklahoma, § Rule 13(e). This Court reviews summary judgment under a *de novo* standard as it presents a question of law. *See Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, ¶7, 951 P.2d 1079, 1082. For the reasons further laid out in Section II (*i.e.*, that the records at issue are open records subject to disclosure) and Section IV (*i.e.*, that Appellees were entitled to both declaratory relief and a writ of mandamus) of this Answer Brief, Appellees were entitled to judgment as a matter of law and this Court should affirm the trial court's judgment in favor of Appellees.

IV. Appellees were entitled to both declaratory relief and a writ of mandamus.

The trial court entered judgment on behalf of Appellees stating in part:

Taking into consideration the briefing and arguments of counsel, the Court denied [Appellants'] Motion to Dismiss, determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records

subject to mandatory disclosure, and instructed [Appellants] to answer [Appellees'] Petition within 20 days. The Court then granted [Appellees'] request in their Petition for Relief, pursuant to 12 O.S. §§ 1451-1462, requiring that [Appellants] were to immediately disclose the requested records to [Appellees], and declared that order to be a final judgment not allowing or requiring any further pleadings.

ROA, Journal Entry, p.2. The trial court did not commit error when it determined that the records at issue were open records subject to disclosure and fashioned declaratory relief accordingly. Further, the writ of mandamus entered by the trial court was not contrary to the law, nor was it against the clear weight of evidence in the present case. This Court should therefore affirm the trial court's judgment and not disturb the writ of mandamus.

A. Appellees were entitled to a declaratory judgment and the trial court fashioned its relief appropriately.

The district courts of Oklahoma may, "in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to... any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed...." Okla. Stat. tit. 12, § 1651. Appellees sought in their Petition a declaration of the rights and responsibilities of Appellants as to the public records sought by Appellees in their ORA request. ROA, Petition, pp.1-20. Specifically, Appellees requested the trial court declare that (1) the records sought by Appellees were public records for the purposes of the ORA, (2) Appellees were entitled to prompt disclosure of the requested records, and (3) Appellants' withholding of public records responsive to Appellees' Second Request was unlawful. ROA, Petition, p.7. Such a request was lawful and contemplated by 12 O.S. § 1652, which allows a party to seek declaratory relief through a variety of pleadings, including "as incident to or part of a petition."

In response to Appellees' Petition, Appellants filed a Motion to Dismiss arguing in part that (1) the requested video and incident reports were not records under the ORA, (2) the trial court had already implicitly found the requested video was not an open record subject to mandatory disclosure, and (3) that Appellants had already provided prompt, reasonable access to qualifying open records under the ORA. ROA, Motion to Dismiss, pp.4-12. Following a hearing on Appellants' Motion to Dismiss, the trial court entered judgment on behalf of Appellees. ROA, Journal Entry, pp.1-4. The journal entry memorializing said hearing and judgment stated in pertinent part:

Taking into consideration the briefing and arguments of counsel, the Court denied [Appellants'] Motion to Dismiss, determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records subject to mandatory disclosure, and instructed [Appellants] to answer [Appellees'] Petition within 20 days.

ROA, Journal Entry, p.2.

In reviewing a trial court's declaratory judgment, an appellate court will determine if the trial court committed error in construing the statute in the manner it did. *See City of Chandler v. State ex rel. Dep't of Hum. Servs.*, 1992 OK 137, ¶9, 839 P.2d 1352, 1354 (citing *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 1966 OK 155, 422 P.2d 840). For the reasons further discussed in Section II of this Answer Brief, the trial court did not commit error when it determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records subject to mandatory disclosure.

Further, "the Declaratory Judgment Act makes provision for granting further relief based upon a determination of rights, status, or other legal relations." *Seventeen Hundred Peoria, Inc. v. City of Tulsa*, 1966 OK 155, ¶18, 422 P.2d 840, 844 (recognizing that in an

action for declaratory relief, the court may grant such relief as equity dictates and is warranted by the proof) (citing 12 O.S. § 1652). As part of their Petition, Appellees also sought an order “requiring [Appellants] to immediately disclose all records requested by [Appellees] pursuant to the ORA.” ROA, Petition, p.7. While Appellees stated vehicle for relief regarding this request was either an injunction or writ of mandamus, “when a party seeks other relief, a court may grant declaratory relief where appropriate.” 12 O.S. § 1652. As the trial court had determined that the video and internal investigative records of the Pottawatomie County Public Safety Center, which serves as the Pottawatomie County jail, were open records subject to mandatory disclosure, it was also appropriate for the trial court to require Appellants to immediately disclose the requested records to Appellees. Indeed, the trial court “has wide discretion in determining what relief is proper and in prescribing the time within which such relief should become effective.” *Seventeen Hundred Peoria, Inc.*, 1966 OK 155, ¶19, 422 P.2d at 844 (quoting 26 C.J.S. Declaratory Judgments § 160). This Court should therefore affirm the declaratory judgment of the trial court as it was not entered in error and was fashioned appropriately to effectuate relief.

B. Mandamus was a proper vehicle for relief where the trial court had determined the records at issue were open records subject to mandatory disclosure.

A writ of mandamus may be issued by a district court “to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station.” 12 O.S. § 1451. The appellate courts may only disturb a writ of mandamus where it is contrary to the law and against the clear weight of evidence. *See Equalization Bd. of Okla. Cnty. v. Ford Motor Co.*, 1936 OK 576, ¶5, 61 P.2d 251, 252. Here, the trial court’s granting of the writ of mandamus was not contrary to the law or against the clear weight of evidence.

A typical 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 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. *See Chandler, Inc. v. Tyree*, 2004 OK 16, ¶24, 87 P.3d 598, 604-05.

As to the availability of a plain and adequate remedy in the ordinary course of the law, Appellees took all steps required of them under the ORA to examine the public records at issue by filing a request with the PCPSC Trust according to their required procedures. *See* 51 O.S. § 24A.5; ROA, Petition, Exhibit C, pp.13-14. Despite Appellees' actions, Appellants refused to provide Appellees with access to any records responsive to Appellees' ORA request besides the January 2019 booking sheet and release sheet related to Given. ROA, Petition, p.6. Additionally, Appellees have a clear legal right to the 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." 51 O.S. § 24A.2. The outstanding records at issue, including the video and internal investigative records of the Pottawatomie County Safety Center, are records within the meaning of the ORA as explained in Section II of this Answer Brief and as recognized by the trial court's ruling. ROA, Journal Entry, p.2. The Appellees therefore have a clear legal right to both inspect and obtain a copy of the public records at issue.

The Appellants have a plain legal duty to provide Appellees with access to the public records as 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" subject to limited

exceptions. 51 O.S. § 24A.5. “[I]t is ‘well-settled’ the statutory wording *shall* connotes a mandatory duty[,]” even in the ORA context, and thus Appellants’ duty does not involve the exercise of discretion. *Lawson v. Curnutt*, 2010 OK CIV APP 78, ¶8, 239 P.3d 192, 195 (emphasis in original) (citing *TIB Corp. 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.”)). Despite the statutory requirement that Appellants must make public records available to Appellees for inspection and copying, Appellants continue to deny Appellees access to the records. ROA, Petition, p.6. Accordingly, Appellees set forth a proper claim for mandamus relief and the trial court’s granting of the writ was not contrary to the law or against the clear weight of evidence. The writ should therefore not be disturbed by this Court.

CONCLUSION

Appellants expressly argued below that the PCPSC Trust is not a law enforcement agency under the ORA and therefore waived any arguments to the contrary on appeal. Because the records at issue are open records subject to mandatory disclosure under the ORA, the trial court correctly entered judgment on Appellees’ behalf, as Appellees were entitled to both declaratory relief and a writ of mandamus.

For the foregoing reasons, Appellees respectfully request this Court affirm the trial court’s judgment in their favor, or in the alternative, remand for further proceedings where appropriate. Reversal of the trial court’s judgment, as Appellants urge, is not warranted.

Dated: February 17, 2022

Respectfully submitted,

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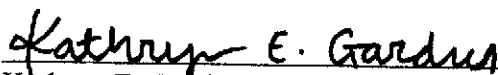
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs'/Appellees' Answer Brief was mailed this 17th day of February 2022 by depositing it in the U.S. Mail, postage prepaid to:

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