



IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

ZIVA BRANSTETTER and BH Media
Group Inc. d/b/a *TULSA WORLD*,
Plaintiffs,

OCT 16 2015

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v.

Case No. CV-14-2372
Judge Patricia G. Parrish

MARY FALLIN, in her official capacity as
GOVERNOR OF THE STATE OF
OKLAHOMA; MICHAEL C.
THOMPSON, in his official capacity as
COMMISSIONER OF THE OKLAHOMA
DEPARTMENT OF PUBLIC SAFETY,

Defendants.

GOVERNOR MARY FALLIN'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

COMES NOW, Mary Fallin, in her official capacity as Governor of the State of Oklahoma, and in response to Plaintiffs' Motion to Compel Discovery Responses and Document Production (Plaintiffs' Motion), respectfully requests this court DENY Plaintiffs' Motion. In support thereof, Governor Fallin states the following:

BACKGROUND FACTS

On April 20, 2015, Governor Fallin received Plaintiffs' Request for Production Interrogatories. Plaintiffs' so called "targeted discovery" requested information and documentation far beyond the scope of permissible discovery and far beyond the scope of Plaintiffs' allegations contained in Plaintiffs' Petition filed on December 22, 2014. In fact, Plaintiffs requested information and documentation prior to Governor Fallin's first inauguration on January 11, 2011. Despite the unreasonable requests contained in Plaintiffs' RFP's and Interrogatories, on May 20, 2015, Governor Fallin responded to Plaintiffs' Request for Production of Documents and

Interrogatories, identifying 39 witnesses and producing 286 pages of responsive documents. These responses and documents were mailed to Bob Nelon and Katie Townsend on July 10, 2015.

Governor Fallin never requested an extension of time to respond to Plaintiffs' discovery, although Governor Fallin was aware Plaintiffs' counsel had extended that courtesy to Commissioner Thompson. It should also be noted on July 8, 2015, Governor Fallin released over 122,000 pages of documents responsive to the Open Records request No. 2014-10, which immediately preceded the first Open Records request regarding executions.¹

At the time Plaintiffs served Governor Fallin with their discovery requests, Plaintiffs had been repeatedly informed in hearings before this court that the undersigned counsel was also the same attorney primarily responsible for processing Open Records requests within the Office of the Governor. Plaintiffs were also repeatedly informed the undersigned counsel was in the process of responding to the Open Records request just preceding the first Open Records request regarding executions. Plaintiffs were also informed proceeding with the discovery process would inevitably delay the release of the Open Records Plaintiffs were seeking.

In Ms. Townsend's August 4, 2015 email, she requested a meet and confer regarding Governor Fallin's discovery responses and deposition dates for six (6) witnesses. On August 5, 2015, undersigned counsel responded to Ms. Townsend's email dated August 4, 2015.² In that correspondence (attached hereto as Exhibit A), undersigned counsel advised Ms. Townsend Plaintiffs could conduct depositions of any of four witnesses, Steve Mullins, General Counsel to the Governor, Audrey Rockwell, paralegal responsible for assisting in processing Open Records

¹ The first Open Records requests received by this office regarding the execution of Lockett and Warner was received from the Associated Press. However, because Plaintiffs' request was similar, it was fulfilled at the same time the AP's request was fulfilled.

² Although Plaintiffs' state "a true and correct copy of that email correspondence *between* Plaintiffs' counsel and Ms. Chance is attached" to Plaintiffs' Motion as Exhibit E, Plaintiffs' counsel failed to include Ms. Chance's response to that email.

requests, Alex Weintz, Communications Director, and undersigned counsel on four (4) days in early October. Undersigned counsel also advised Plaintiffs' counsel one of the witnesses, Jasmine House, an intern, no longer worked in the office, the remaining witness, Stephen Babcock, an intern, would be back in law school in October. (See Exhibit A) The dates given to Plaintiffs' counsel for the depositions of four (4) key witnesses have come and gone, and no other dates have been requested by Plaintiffs.

On August 7, 2015, a telephonic meet and confer occurred. During that meet and confer, Plaintiffs' counsel refused to narrow any portion of their discovery requests, continuing to claim their requests were "narrowly tailored" in spite of the fact the requests sought information far beyond the scope of this lawsuit. During the meet and confer, undersigned counsel thoroughly explained the process by which open records are processed in this office, thoroughly explained the use of sorting responsive documents into categories such as "red flags" during the process, and advised Plaintiffs counsel she was currently processing the execution Open Records requests. Undersigned counsel also offered to run additional searches for electronic documents based on search terms proposed by Plaintiffs. (See Plaintiffs' Exhibit G attached to Plaintiffs' Motion) To date, Plaintiffs have not requested undersigned counsel perform any additional searches.

On August 31, 2015, undersigned counsel, via email, thoroughly addressed Plaintiffs' extensive list provided after the meet and confer. (See Exhibit B) In so doing, undersigned counsel advised she was currently processing the execution Open Records request. On October 8, 2015, Governor Fallin produced over 41,000 pages of documents responsive to Plaintiffs' Open Records request regarding the execution of Clayton Lockett and Charles Warner. In fact, Plaintiffs received their records earlier in the queue due to a similar request received eight days prior to their request, as is the practice under Governor Fallin's Open Records policy. On the same date this Response

was filed, Governor Fallin provided Plaintiffs with Supplemental Responses to their discovery requests consisting of 1,123 pages of additional documents, not including the over 41,000 pages of documents responsive to discovery produced in response to Plaintiffs' Open Records Request regarding the execution of Clayton Lockett and Charles Warner. Unfortunately, Plaintiffs' have refused to reasonably tailor their discovery requests to address only the allegations Plaintiffs chose to include in their Petition, and have requested this court require Governor Fallin to respond to abusive and unreasonable discovery requests.

ARGUMENT AND AUTHORITY

For the sake of the convenience of the court and the parties, Governor Fallin will address Plaintiffs' arguments and claims generally in the order in which they are contained in Plaintiffs' Motion.

1. "Boilerplate" Objections:

Plaintiffs complain of Governor Fallin's general objections contained at the beginning of Governor Fallin's discovery responses. The only complaint regarding these *general* objections is that they fail to meet the basic standard of Oklahoma's discovery code that objections and assertions of privilege be made expressly and adequately describe the nature of the documents or information withheld so as to enable the other party to assess the applicability of the privilege or protection. *See* 12 O.S. §3226 (Supp. 2014). However, Governor Fallin does not rely on the general objections section of her responses in asserting objections to *specific* discovery requests. In fact, on each and every interrogatory and RFP to which she objects, Governor Fallin *specifies* her objections and *specifies* her reason for said objections. Plaintiffs have cited no grounds upon which this court has the authority to "disregard" Governor Fallin's general objections.

2. Specific Objections on the Basis of the Claim of Privilege and Plaintiffs' Demand for a Privilege Log:

Governor Fallin asserted privileges on only 5 of Plaintiffs' 38 discovery requests. The discovery requests to which Governor Fallin asserted privileges fall into two categories: privileges related to "red flagged" documents and privileges related to attorney client communications in previous or pending lawsuits to which Governor Fallin is a party.

More specifically, Governor Fallin asserted attorney-client privilege in response to RFP No. 8 which requests, "[a]ll communications between Fallin and any person relating to the Open Records Act and/or any request for access to public records from January 1, 2011 to the present" and RFP No. 9 which requests, "[a]ll communications between Northrup and any person relating to the Open Records Act and/or any request for access to public records from January 1, 2011 to the present."

In her assertion of the attorney-client communication privilege to RFP No. 8 and No. 9, Governor Fallin specified communications related to *Gregory v. Fallin et al*, Oklahoma County Case number CV-2013-686, *Vandelay Entertainment v. Fallin, et al*, Oklahoma County Case number CV-2013-763, and/or *Take Shelter Oklahoma v. Mary Fallin, et al.*, Oklahoma County Case Number CV-2014-374, and the above styled cause. Further, Governor Fallin has submitted supplemental responses to RFP No. 8, which are not subject to the attorney client privilege in the listed causes of action.

Certainly, Governor Fallin's and Denise Northrup's communications regarding lawsuits filed against each of them personally and/or in their capacities a Governor of the State of Oklahoma, or Chief of Staff for the Governor, would fall squarely under the attorney-client privilege. Governor Fallin's objection complied with Title 12 Section 3226(B)(5)(a), as she described the nature of the documents and communications as attorney client communications, and specified how, by listing specific civil actions filed against her and Ms. Northrup, those communications qualify for that privilege.

Governor Fallin asserted executive privilege, attorney-client privilege and attorney work product privilege to three (3) discovery requests regarding “red flagged” or sensitive documents. Plaintiffs’ attorney falsely claims undersigned counsel has “failed to respond to Plaintiffs’ inquiries concerning this issue.” (See Plaintiffs’ Motion at p.7) Quite to the contrary, counsel has had *extensive* conversations with Plaintiffs’ counsel during the meet and confer telephone conference had on August 7, 2015, explaining the process of generating “red flagged” documents during the review of potentially responsive documents to Open Records requests, and counsel has provided written explanations regarding the purpose and nature of “red flagged” documents. (See Exhibit B)

Plaintiffs complain that even where Governor Fallin has objected to a specific RFP or interrogatory on the basis of a claim of privilege, she has failed to produce a privilege log. However, the Oklahoma discovery code does not require a privilege log. To the contrary, Section 3226(B)(5)(a) requires a party claiming privilege as a basis to withhold information otherwise discoverable, “the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected” will enable the other party to “assess the applicability of the privilege or protection.” 12 O.S. §3226(B)(5)(a) (Supp. 2014). Governor Fallin has complied with her obligations under Section 3226(B)(5)(a).

3. Objections Regarding Time Frame of Discovery Requests:

Plaintiffs erroneously assert Governor Fallin objected to discovery requests on the basis the information sought “is not relevant to this lawsuit.” (See Plaintiffs’ Motion at p. 8) Rather, Governor Fallin *validly* objected to the overly broad time frame contained in many of the discovery requests on the basis the requests were not reasonably calculated to lead to the discovery of relevant or admissible evidence.

Plaintiffs request information in twenty-three (23) combined RFP's and interrogatories encompassing the time frame of January 1, 2011 to present. Governor Fallin was not sworn in as governor until January 11, 2011. The process by which open records are processed and have been processed since Plaintiffs' Open Records request, which is the subject of this lawsuit, has been in place since 2012. The central and only issue in this case, which has been framed by Plaintiffs in their Petition and in open court is whether the process by which Open Records requests are processed is reasonable.

Plaintiffs erroneously asserts, "[a]ccording to the Governor, those "procedures" were developed and put in place in 2011 and 2012" citing Governor Fallin's responses to Plaintiffs' Interrogatories. (See Plaintiffs' Brief at p. 9) This is false. The policies and procedures currently in place, and that have been in place since Plaintiffs made their Open Records requests regarding the execution of Clayton Lockett and Charles Warner were put in place by Steve Mullins, General Counsel to the Governor, who only became employed with Governor Fallin's in February 2012.

Plaintiffs argue "information concerning how those procedures were developed and/or changed" is discoverable. (See Plaintiffs' Motion at p. 9) However, this information is not discoverable because the information sought is outside the scope of permissible discovery and is not reasonably calculated to lead to the discovery of admissible evidence. *See* 12 O.S. §3226(B)(1)(a). Whether a policy/procedure has or has not been changed, and how a policy may have been changed, has no bearing on whether the current policy is *reasonable*.

Plaintiffs are simply engaging in a fishing expedition, and case law has made clear fishing expeditions are not permissible. "Discovery is not without limitation. It must lead or tend to lead to relevant evidence. Fishing expeditions are not allowed upon the suggestion that something *might* be discovered." *Nitzel v. Jackson*, 1994 OK 49, 879 P.2d 1222, 1223, n.1 (emphasis added); *See*

also *S.E.C. v. Goldstone*, 301 F.R.D. 593, 643 (D. N.M. 2014), citing *McGee v. Hayes*, 43 Fed. Appx. 214, 217 (10th Cir. 2002) (stating “a district court is not... required to permit plaintiff to engage in a fishing expedition in the hope of supporting his claim.”); *Rivera v. DJO, LLC*, 2012 WL 386074, *8 (D. N.M.) (stating “discovery...is not intended to be a fishing expedition, but rather is meant to allow the parties to flesh out allegations for which they...have at least a modicum of objective support.”); *Quinn v. City of Tulsa*, 1989 OK 112, 777 P.2d 1331, 1342, citing *Herbert v. Lando*, 411 U.S. 143 (1979) (stating Fed.R.Civ.P. 26, the federal counterpart to 12 O.S. § 3226, which requires, “that the material sought in discovery be ‘relevant,’” should be “firmly applied” and further that “the district courts should not neglect their power to restrict discovery”); and *Zenith Elecs. Corp. v. Exzec, Inc.*, 1998 WL 9181, *2 (N.D. Ill.) (cautioning “the legal tenant that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery”).

4. Objections Regarding RFP 18, 19, & 20:

Plaintiffs’ complaints regarding Governor Fallin’s objections to RFP’s No.18 and No.19 are moot as a result of Governor Fallin’s Supplemental Discovery Responses containing the responses to ORR 2014-11 regarding executions produced to Plaintiffs on October 8, 2015.

RFP No. 20 requests, “[a]ll communications relating to plaintiff Ziva Branstetter since January 1, 2011.” First, this request has nothing to do with the processing of Open Records requests within the Office of the Governor. It is, on its face, a fishing expedition. Additionally, as counsel previously advised Plaintiffs, a search of Ms. Branstetter’s name within all documents store electronically yielded over 7,000 results, consisting of multiple pages for each result. Further, any email containing Ms. Branstetter’s name relating to the processing of her Open Records request has been produced as a result of Governor Fallin’s Supplemental Discovery Responses containing the

responses to ORR 2014-11 regarding executions produced to Plaintiffs on October 8, 2015. Further all documents regarding media coverage requested in RFP 18 and 19 have been produced.

Plaintiffs claim they are entitled to discovery regarding whether their open records request has been handled any differently by this office than other ORA requests because of “who they are.” (See Plaintiffs Motion at p.11) However, Plaintiffs has asserted absolutely *no allegations* claiming this office processed their request any differently than any other Open Records request received by this office, nor have Plaintiffs asserted any type of bad faith claim. (See Plaintiffs’ Petition, Attached hereto as Exhibit C). In fact, Plaintiffs’ Open Records request was processed *earlier* than it normally would be because of the policies and procedures in place. Specifically, Plaintiffs’ Open Records request at issue in this case was received on May 1, 2014, and was assigned number 2014-16 in the Open Records queue based upon when it was received. However, Plaintiffs received a response to their request at the same time the Associated Press (“AP”) received their response. The AP submitted an *earlier* Open Records request concerning executions on April 22, 2014, numbered 2014-11 in the Open Records queue.

Even assuming *arguendo* Plaintiffs are entitled to discovery regarding this issue, they are not entitled to any record referencing “Ziva Branstetter” having nothing to do with Open Records requests. Governor Fallin reasserts her arguments regarding impermissible fishing expeditions contained in section 3, above.

5. Applicability of Privileges to “Red Flagged” Documents (Interrogatory No. 7, 8 & RFP No. 7):

Executive privilege is an inherent power of the Governor. *Vandelay Entertainment v. Fallin*, 2014 OK 109 ¶12. In *Vandelay*, the Oklahoma Supreme Court stated,

“The sheer number, diversity and magnitude of discretionary decisions entrusted to the Governor demonstrate the public interest is best served by the

Governor seeking and receiving advice to aid in deliberations and decision-making. The United States Supreme Court has observed "[T]hose who assist [executive decision-makers] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974)(superseded by statute on other grounds). The Court further observed that "[T]he confidentiality of [advisory] conversations and correspondence [is grounded in] the necessity for the protection of the public interest in candid, objective, and even blunt or harsh opinions in [executive] decision making." *Id.*

Id. At ¶17.

As undersigned counsel has explained to Plaintiffs' counsel, potentially sensitive, potentially privileged "red flagged" documents are often separated from other generally responsive documents during the review of open records. Those documents are then discussed with the governor and members of her senior staff. Then, a decision is made whether the "red flagged" documents are released, whether privileges are waived, or documents are withheld due to privilege. If "red flagged" documents are released, they are released along with all other responsive documents with the Open Records request release.

Governor Fallin is clearly entitled to the deliberative process privilege in the identification and discussions regarding "red flagged" documents. "The primary purpose of the [deliberative process] privilege is to protect the frank exchange of ideas and opinions critical to the government's decisionmaking [sic] processes where disclosure would discourage such discussion in the future[.]"

Vandelay at ¶21. In *Vandelay*, the Supreme Court specifically stated,

The burden in cases involving advice from "senior executive branch officials" includes a showing that the advice was (1) pre-decisional, and (2) deliberative (i.e., involved personal opinions, as opposed to purely factual, investigative material). *Id.* at 1052. In addition, the burden in the case at hand would also include a showing that (1) the Governor solicited or received advice from a "senior executive branch official" for use in deliberating policy or making a discretionary decision, (2) the Governor and the "senior executive branch official" knew or had a reasonable expectation that the advice was to remain confidential at the time it was provided to the Governor, and (3) the confidentiality of the advice was maintained by the Governor and the "senior executive branch official." While

Governor Fallin did not define or specify whom she considers to be "senior executive branch officials," **this group would reasonably include the Governor's general counsel and staff...** (emphasis added)

Vandelay at ¶24.

Plaintiffs' Interrogatory No. 13 requests "[a]ll communications relating to "sensitive," "potentially sensitive," and/or "red flagged" PUBLIC RECORDS, as referred to in Paragraph 20 of the Chance affidavit, from January 1, 2011 to the present." Plaintiffs' RFP No. 7 requires Governor Fallin to "IDENTIFY all PUBLIC RECORDS "'red-flagged' for sensitivity," as described in Paragraph 20 of the CHANCE AFFIDAVIT, since January 1, 2011. Plaintiffs' RFP No. 8 requests, "[f]or each PUBLIC RECORD "'red-flagged' for sensitivity," as described in Paragraph 20 of the CHANCE AFFIDAVIT, since January 1, 2011, IDENTIFY the request(s) for PUBLIC RECORDS that it was responsive to. For purposes of this Interrogatory, IDENTIFY means to state: (i) the name of the requestor, (ii) the general subject matter of the request, (iii) the date the request was received, (iv) the date the request was fulfilled, and (v) the number of pages of records produced or made available in response the request.

Governor Fallin has provided supplemental responses to Interrogatory No. 13 without waiving any asserted objections. Any other communications regarding "red flagged" documents are squarely subject to her deliberative process privilege recognized by the Oklahoma Supreme Court in *Vandelay*. Governor Fallin's *general counsel and staff* are responsible for identifying "red flagged" documents and discussing those documents with other senior executive branch officials. The Oklahoma Supreme Court could not be clearer that the Governor's general counsel and staff are considered "senior executive branch officials." *Id.*

Further, the discussions among senior executive branch officials regarding specific "red flagged" documents are conducted by way of in person meetings. To the extent the scheduling of meetings has been memorialized by a record, those records have been produced as part of Governor

Fallin's Supplemental Responses. However, the content of those communications is clearly protected by Governor Fallin's deliberative process privilege. *Id.*

6. Governor Fallin has fully responded to RFP No. 4, No. 6, No. 9, and No. 10:

Governor Fallin has provided Plaintiffs with supplemental responses to RFP No. 4, 6, 9 and 10.

Governor Fallin has provided a supplemental response to RFP No. 6 because counsel *assumed* she failed to produce Open Records logs between September 23, 2014 and January 13, 2015. Prior to Plaintiffs' Motion, counsel had already addressed Plaintiffs' inquiry and confirmed there are *no missing logs*. (See Exhibit B). Plaintiffs' counsel simply refuses to believe undersigned counsel.

Between Governor Fallin's initial discovery responses and her supplemental responses provided in RFP No. 8, 9, and 10, she has processed and released over 41,000 pages of documents responsive to Plaintiffs' Open Records request which is the subject of this litigation. That delay was *only due* undersigned counsel's processing and release of over 41,000 pages of documents, of which Plaintiffs' counsel had been made *fully aware*. Governor Fallin has fully answered and complied with RFP No. 4, 6, 8, 9 and 10 subject to her objections regarding the permissible time frame and privileges, argued above.

7. Governor Fallin is entitled to an award of costs and reasonable attorney's fees in connection to the frivolous claims and erroneous representations contained in Plaintiffs' Motion.

Title 12 Section 3237(A)(4) allows the court to require the moving party or the attorney advising the motion, or both of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion. 12 O.S. §3237(A)(4)(Supp. 2010). Governor Fallin has diligently answered discovery responses requiring the review of thousands of documents, and identification of 39 witnesses. While Plaintiffs complain of Governor Fallin's discovery responses and filed a Motion to Compel the Governor to answer discovery clearly outside of the scope of

permissible discovery, Governor Fallin answered Plaintiffs' discovery without requesting any extension of time³. Additionally, Governor Fallin has diligently reviewed, processed and released tens of thousands of documents regarding Plaintiffs' Open Records request which is the subject of this litigation *and* are responsive to Plaintiffs' discovery requests. Plaintiffs are clearly seeking discovery of materials not within the scope of permissible discovery.

CONCLUSION

Governor Fallin responded within 30 days of receiving Plaintiffs' discovery requests, identifying 39 witnesses and providing 286 documents. Since receiving Plaintiffs' discovery responses, Governor Fallin's office has released over 160,000 pages of Open Records, including over 41,000 records responsive to Plaintiffs' open records request which is the subject of this lawsuit. Although Governor Fallin participated in good faith in the meet and confer, Plaintiffs' counsel offered *no amendment* to *any* one of their overly broad and abusive discovery requests. Governor Fallin offered four days in early October, as requested by Plaintiffs' counsel, to accommodate the depositions of four primary witnesses who are responsible for receiving and processing open records requests. Plaintiffs, themselves, chose not to depose key witnesses, thereby delaying the resolution of this lawsuit. Governor Fallin has complied with Plaintiffs' discovery requests, subject to her privileges, and to the extent they are allowable under the Oklahoma Discovery Code. For these reasons, Governor Fallin respectfully requests Plaintiffs' Motion to Compel be DENIED, and this court award her reasonable expenses and attorneys' fees, and any other relief deemed proper.

³ It should be noted Plaintiffs have agreed to allow Commissioner Michael Thompson until November 7, 2015 to answer discovery requests delivered the same day discovery requests were delivered to Governor Fallin.

Respectfully submitted,

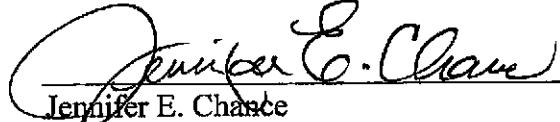


JENNIFER E. CHANCE, OBA #19320
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**ATTORNEY FOR
GOVERNOR MARY FALLIN**

VERIFICATION

I, Jennifer E. Chance, Deputy General Counsel to the Governor of the State of Oklahoma, have read the foregoing Response of Governor Mary Fallin to Plaintiffs' Motion to Compel Governor Mary Fallin, and am familiar with the contents thereof. These responses are based on the records and information still in existence, presently recollected, and thus far discovered in the course of preparation of these responses. Subject to these limitations, the responses are true and correct to the best of my knowledge and belief.

A handwritten signature in cursive script that reads "Jennifer E. Chance". The signature is written in black ink and is positioned above a horizontal line.

Jennifer E. Chance
Deputy General Counsel to the Governor
State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2015, a true and correct copy of the forgoing was served to the following:

Robert D. Nelon
Hall, Estill, Hardwick, Gable, Golden & Nelson
Chase Tower, Suite 2900
100 North Broadway
Oklahoma City, Oklahoma 73102
bnelon@hallestill.com
VIA HAND DELIVERY

Katie Townsend
The Reporters Committee for Freedom of the Press
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ktownsend@rcfp.org
VIA US MAIL AND EMAIL

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ATTORNEY FOR COMMISSIONER MICHAEL C. THOMPSON
VIA EMAIL



Jennifer E. Chance
Deputy General Counsel to the Governor
State of Oklahoma

Exhibit

A

From: Jennifer Chance
To: "Katie Townsend"; Robert A. Nance
Cc: BNelson@HallEstill.com; Adam Marshall
Subject: RE: Branstetter, et al. v. Fallin, et al.
Date: Wednesday, August 05, 2015 1:28:00 PM
Attachments: image007.png

Good afternoon:

I am available to discuss your issues with Governor Fallin's discovery responses tomorrow, Thursday August 6th anytime between 10 am and 2pm, or Friday, August 7th after 10am. Please let me know what time you would like to discuss. You may call me directly at (405)522-8836.

Steve Mullins, Audrey Rockwell, Alex Weintz, and I can be available for depositions Monday, October 5th and Tuesday October 6th. If those dates do not work, the same group of witnesses can be available Tuesday October 12th and Wednesday October 13th. The individual scheduling will be more complicated, so we will need to also discuss. Jasmine House no longer works in the office, so I will have to get back to you regarding her deposition. I do not have Steven Babcock's availability yet, as he will be back in law school at that time.

Sincerely,

Jennifer E. Chance

Deputy General Counsel
Office of Governor Mary Fallin
2300 North Lincoln Boulevard, Suite 212
Oklahoma City, Oklahoma 73105
(405)522-8836 direct

From: Katie Townsend [mailto:ktownsend@rcfp.org]
Sent: Tuesday, August 04, 2015 12:29 PM
To: Jennifer Chance; Robert A. Nance
Cc: BNelson@HallEstill.com; Adam Marshall
Subject: Re: Branstetter, et al. v. Fallin, et al.

Counsel: We have not received any response to my meet and confer correspondence of July 24 (below and attached). Please advise.

Thank you,

Katie Townsend · Litigation Director



1156 15th Street NW, Suite 1250, Washington, DC 20005
ktownsend@rcfp.org · (202) 795-9303
PGP: A2DD B1DA C63C E25E A237 CA8F C4BC 9E34 56BD A333

On 7/24/2015 3:24 PM, Katie Townsend wrote:

Counsel: First, I write to initiate the meet and confer process with respect to Governor Fallin's objections and responses to Plaintiffs' First Set of Requests for Production and First Set of Interrogatories, which we received on July 13. As discussed in more detail in the attached correspondence, Governor Fallin's responses and the accompanying document production are patently deficient. We hope those deficiencies can be resolved informally, without Court intervention, and look forward to your prompt response to the issues raised in the attached letter. If it would be productive to discuss any of those issues over the phone, we are more than happy to do so; please let us know what days/times you would be available to discuss.

Second, please propose dates for depositions of the following individuals in September and early October (no later than October 16). We anticipate that all issues with the Governor's written discovery responses will be resolved in advance of the depositions. For the convenience of all parties, and to keep costs down, we would like to schedule as many depositions as possible on concurrent dates, so we ask that you keep that in mind when proposing available dates.

- Steven Babcock
- Jennifer Chance
- Jasmine House
- Steve Mullins
- Audrey Rockwell
- Alex Weintz

Best regards,
Katie



Katie Townsend · Litigation Director
1156 15th Street NW, Suite 1250, Washington, DC 20005
ktownsend@rcfp.org · (202) 795-9303
PGP: A2DD B1DA C63C E25E A237 CA8F C4BC 9E34 56BD A333

Exhibit

B

From: Jennifer Chance
To: "Katie Townsend"
Subject: RE: Branstetter, et al. v. Fallin, et. al. - Summary of 8/6 M&C Call
Date: Monday, August 31, 2015 6:12:00 PM
Attachments: image007.png

Katie:

I will simply address your issues in the order in which they were presented in your email. My responses (indicated in blue font) are embedded in your email (which is in black font) I copied below for everyone's clarity and convenience. I am currently processing the execution ORA requests. Any time I spend reviewing documents for discovery takes time away from my review of the execution documents. I am prioritizing the processing of the execution records above the processing of discovery in this lawsuit. I apologize for the limitations, but that is simply the reality.

My responses to your M&C summary are as follows:

With regard to the scope of the Governor's Responses, you confirmed that the Governor is responding in her official capacity and in accordance with the definitions set out in Plaintiffs' RFPs and Rogs. We confirmed that Plaintiffs are only seeking discovery of documents and information in the possession, custody, or control of the Governor's office.

I agree.

- With regard to the search/es conducted to identify electronic documents responsive to the RFPs and Rogs, you represented that there is one central networked server where all electronic records, including email, are stored and are accessible, and that this server was searched using certain search terms. You did not provide us with those search terms, and indicated that you did not keep a record of the search terms used. However, you indicated a willingness to run additional searches based on search terms proposed by Plaintiffs. In addition, with respect to RFP No. 10, you indicated that you would look into which email accounts were searched and the search terms used to identify responsive documents.

RFP No. 10, requests, "All COMMUNICATIONS between MULLINS and any PERSON(S) relating to the ORA and/or any request(s) for access to PUBLIC RECORDS from January 1, 2011 to the present."

I am running additional searches on Mr. Mullins' email account, and will give you an update later this week. I will include the search terms with the update.

Generally, regarding electronic documents responsive to the RFPs and Rogs, I have not yet received any proposed additional search terms. I will consider that request if/when I receive it. I do not agree that any document containing your proposed search term(s) will be discoverable in this lawsuit. Additionally, depending on the size of the result, I reserve my ability to determine a review/production of those additional documents is objectionable for any reason.

With respect to the more specific issues identified in my prior meet and confer correspondence, you stated that the Governor would provide supplemental responses to the RFPs and Rogs, and address the following issues:

- To the extent that any documents and/or information is being withheld in response to the RFPs or Rogs on the basis of privilege, the Governor will provide a privilege log identifying what is being withheld, and the privilege that is being asserted.

I will respond to this issue in a separate email later this week.

- You will supplement the Governor's responses to Rogs calling for information concerning discussions regarding "red flagged" documents to include all responsive information within the Governor's possession, custody, or control.

I apologize for my confusion, but there are not interrogatories that request information regarding *discussions* of red flagged documents. There is, however, an RFP that references communications. For clarity, I will address all interrogatories and the RFP regarding red-flagged records individually.

Interrogatory No. 8 asks, "For each PUBLIC RECORD "'red-flagged' for sensitivity," as described in Paragraph 20 of the CHANCE AFFIDAVIT, since January 1, 2011, IDENTIFY the request(s) for PUBLIC RECORDS that it was responsive to. For purposes of this Interrogatory; IDENTIFY means to state: (i) the name of the requestor, (ii) the general subject matter of the request, (iii) the date the request was received, (iv) the date the request was fulfilled, and (v) the number of pages of records produced or made available in response the request."

I have responded fully to this interrogatory. As we discussed in our "meet and confer," documents that are red flagged during my review of the records are not maintained in a perpetual red flag record. Once those records have been reviewed by or discussed with other staff members or the governor, all of those documents are transferred into the "responsive" file to be produced in response to the open records request. In almost every open records production there are red flagged documents. We do not keep a record of how many documents are red-flagged for any given request. For requests that only require a very small amount of records, there may be no red-flagged documents. Thus, in response to Interrogatory No. 8, I referred you to the open records production log produced in RFP #6, which IDENTIFIES what you requested to be identified in Interrogatory no. 8. Also, I have been employed in this office since November 2013. Obviously, because of my date of employment, this response would only encompass the time I have been employed in this office.

Interrogatory No. 7. Asks: "IDENTIFY all PUBLIC RECORDS "'red-flagged' for sensitivity," as described in Paragraph 20 of the CHANCE AFFIDAVIT, since January 1, 2011."

As I stated above, we do not keep a record of how many or which documents are red-flagged for any given request. Documents that are red flagged during my (or previous attorney) review of the records are not maintained in a perpetual red flag record. There are no records within the possession of this office responsive to Interrogatory No. 7. However, if there were, I would assert the same objections I asserted in Governor Fallin's original discovery responses.

RFP No. 13 requests, "All COMMUNICATIONS relating to "sensitive," "potentially sensitive," and/or "'red-flagged" PUBLIC RECORDS, as referred to in Paragraph 20 of the CHANCE AFFIDAVIT, from January 1, 2011 to the present."

As I explained during our meet and confer, internal communications regarding sensitive, potentially sensitive or red-flagged records are verbal communications between or among governor's staff members and/or the governor. There are no documents in the possession of this office responsive to RFP No. 13. If there were, or if there ever are responsive documents, I would maintain the same objection, and also object on the basis of attorney/client privilege.

Additionally, the time limitation on this response would also be limited to my time of employment in this office since November 2013.

- With regard to Interrogatory No. 12, you will supplement the Governor's response to correct what appears to be a typo.

Response to Interrogatory No. 12 should read: See Governor Fallin's Response to Plaintiff's Request for Production Number 16.

I can specifically direct you to Page 2 of 2 of documents produced in response to RFP #16.

- With regard to RFP No. 6, you stated that you will look into the issue of ORA logs that appear to be missing from the Governor's production.

I have reviewed our response to RFP No. 6 and there are no ORA logs missing. There are logs from 2012, 2013, 2014, 2015. If you feel there are still "missing" logs, please be more specific. By way of information, the ORA logs did not exist in this office until September 2012.

- With regard to RFP Nos. 4 and 9, you represented that you will either identify responsive documents or supplement the Governor's responses to indicate that no responsive documents exist. We suggested during our telephone call that you identify the responsive documents by Bates number. However, upon further review, it appears that the documents produced by the Governor were not Bates numbered. For the general convenience of the parties moving forward, it would likely be easiest for the Governor to produce a Bates numbered set of documents in response to the RFPs and Rogs.

RFP No. 4 requests, "All internal COMMUNICATIONS relating to YOUR policies and/or procedures for responding to requests for access to PUBLIC RECORDS from January 1, 2011 to the present. This Request includes, but is not limited to, COMMUNICATIONS relating to both written and unwritten policies and/or procedures."

My response to RFP # 4 plainly answers this request. The last sentence of the Response states, "documents responsive to this Request under the current open records policy are attached in response to Request for Production No. 1 above." A quick review of the documents produced in response to RFP No. 1 reveal all documents relevant to RFP No. 4. Specifically, the policy labeled as RFP#1 Page 112 of 112. Further, every document produced in RFP No. 1 relates to our policies and/or procedures for responding to requests for access to PUBLIC RECORDS.

RFP No. 9 requests, "All COMMUNICATIONS between NORTHRUP and any PERSON(S) relating to the ORA and/or any request(s) for access to PUBLIC RECORDS from January 1, 2011 to the present."

I will address this issue in a separate email later this week.

Regarding Bates stamping- all documents produced were marked indicating to which RFP or Interrogatory the documents were responsive, and were marked with Page X of X. This can easily be used to identify specific documents, and specifically complies with the Oklahoma Discovery Code Title 12 O.S. Section 3234(B)(5)(a). I do not intend to produce an additional copy of documents in response to the RFPs and Rogs a different numbering system.

There are two main issues on which the parties substantively disagree. You indicated that

Steve Mullins was out of the office last week, and that you would discuss these (and any other issues for which you needed his input) with him this week, and get back to us:

- First, you reiterated the Governor's "relevance" objection to the timeframe identified in Plaintiffs' discovery requests (January 1, 2011 to the present), and have taken the position that Plaintiffs are not entitled to any documents or information that predate their ORA requests. As I indicated during our discussion, we view that objection to be frivolous. The timeframe we have selected is narrowly tailored to target information and documents relating to the Governor's 2012 adoption of the current policy for responding to ORA requests, including the reasons for the change in existing policy, and its impact. Such information is well within the scope of permissible discovery under Oklahoma law, and plainly relevant to the claims set forth in the Petition, and the arguments/defenses the Governor has asserted in this case.

I maintain my relevance objection. Your "narrowly tailored" time frame includes the *very day* Governor Fallin took office. I respectfully disagree with your claim my objection is frivolous and that your time frame is narrowly tailored. Further, your time frame makes otherwise reasonable requests unduly burdensome. I wholly disagree such information is "well within" the scope of permissible discovery under Oklahoma law. I am not inclined to withdraw any objections regarding the appropriate time frame for any discovery request.

- Second, you reiterated the Governor's "relevance" and "overbreadth" objections to RFP Nos. 18, 19, and 20. Again, as I explained in my prior meet and confer correspondence, and during our telephone conversation, Plaintiffs are members of the news media whose ORA requests were submitted to aid their reporting on the executions of Clayton Lockett and Charles Warner. Plaintiffs are entitled to conduct discovery relating to whether the subject matter of their requests and/or their status as members of the news media had any impact on the Governor's processing of their ORA requests. Nor are the requests overbroad or unduly burdensome. However, in an effort to reach a compromise on this issue that would avoid the need for motion practice, we are willing to consider potentially narrowing the scope of these requests to exclude the daily media "blast" emails that we discussed during our call. In an effort to facilitate that discussion, it would be helpful if you would provide us with a sample of such a "blast" email, as well as an estimate of the number of documents responsive to these RFPs if such emails are excluded from their scope.

RFP No. 18 requests, "All internal COMMUNICATIONS relating to media coverage of the execution of Clayton Lockett and/or Charles Warner. This request includes, but is not limited to, internal COMMUNICATIONS relating to media coverage by Tulsa World."

RFP No. 19 requests, "All COMMUNICATIONS between YOU and DPS relating to media coverage of the execution of Clayton Lockett and/or Charles Warner. This request includes, but is not limited to, COMMUNICATIONS relating to media coverage by Tulsa World."

RFP No. 20 requests, "All COMMUNICATIONS relating to plaintiff Ziva Branstetter since January 1, 2011."

I disagree to your assertion you are entitled to conduct discovery regarding whether the subject matter of a request and/or your clients' status as members of the news media had any impact on the Governor's processing of their ORA. Your Petition for Relief contains no allegations the Governor has discriminated against those who request open records based upon the subject matter, or an individual's status as a member of the media. Your clients claim the Governor is withholding records. All

three of these RFPs go well beyond the scope of this lawsuit and well beyond the scope of permissible discovery under Oklahoma law.

Unfortunately, excluding the daily media "blast" only decreases the amount of pages we would produce, and not the amount of records I would be required to review.

However, I am currently processing the execution open records requests. All documents responsive to RFP No. 18 and RFP No. 19 will be included in that ORA response. Thus, those records will be produced as soon as I can process the request. I am not willing to withdraw my objections to these three RFP's, but the production of the execution records will moot our disagreement on No. 18 and 19.

Regarding RFP No. 20, I maintain my objection to the relevance and the over broad/unduly burdensome nature of this request. There are absolutely no allegations in your Petition for Relief that this office has acted in bad faith or discriminated against Ms. Branstetter. We have searched our server for "Ziva" and "Branstetter," from January 1, 2011 to the present, which yielded over 7,000 files. I am not inclined to withdraw my objections to RFP No. 20.

Sincerely,

Jennifer E. Chance

Deputy General Counsel
Office of Governor Mary Fallin
2300 North Lincoln Boulevard, Suite 212
Oklahoma City, Oklahoma 73105
(405)522-8836 direct

From: Katie Townsend [mailto:ktownsend@rcfp.org]
Sent: Wednesday, August 26, 2015 8:59 AM
To: Jennifer Chance
Cc: BNelson@HallEstill.com; Adam Marshall
Subject: Re: Branstetter, et al. v. Fallin, et. al. - Summary of 8/6 M&C Call

Jennifer: We're still waiting for a response to my email, below, and an update on the items we discussed on August 6.

On 8/19/15 11:40 AM, Katie Townsend wrote:

Hi Jennifer: Per our telephone discussion on 8/6, we were anticipating an update from you yesterday. Please advise.

Thanks,
Katie

On 8/12/15 11:19 AM, Katie Townsend wrote:

Dear Jennifer: This email is intended to summarize the telephonic meet and confer discussion we had on Friday, August 6, 2015 concerning the Governor's responses (the "Responses") to Plaintiffs' first set of requests for production ("RFPs") and first set of interrogatories ("Rogs"). Please let me know if anything below is inconsistent with your understanding.

First, we were able to clarify the following during our discussion:

- With regard to the scope of the Governor's Responses, you confirmed that the Governor is responding in her official capacity and in accordance with the definitions set out in Plaintiffs' RFPs and Rogs. We confirmed that Plaintiffs are only seeking discovery of documents and information in the possession, custody, or control of the Governor's office.
- With regard to the search/es conducted to identify electronic documents responsive to the RFPs and Rogs, you represented that there is one central networked server where all electronic records, including email, are stored and are accessible, and that this server was searched using certain search terms. You did not provide us with those search terms, and indicated that you did not keep a record of the search terms used. However, you indicated a willingness to run additional searches based on search terms proposed by Plaintiffs. In addition, with respect to RFP No. 10, you indicated that you would look into which email accounts were searched and the search terms used to identify responsive documents.

With respect to the more specific issues identified in my prior meet and confer correspondence, you stated that the Governor would provide supplemental responses to the RFPs and Rogs, and address the following issues:

- To the extent that any documents and/or information is being withheld in response to the RFPs or Rogs on the basis of privilege, the Governor will provide a privilege log identifying what is being withheld, and the privilege that is being asserted.
- You will supplement the Governor's responses to Rogs calling for information concerning discussions regarding "red flagged" documents to include all responsive information within the Governor's possession, custody, or control.
- With regard to Interrogatory No. 12, you will supplement the Governor's response to correct what appears to be a typo.
- With regard to RFP No. 6, you stated that you will look into the issue of ORA logs that appear to be missing from the Governor's production.

- With regard to RFP Nos. 4 and 9, you represented that you will either identify responsive documents or supplement the Governor's responses to indicate that no responsive documents exist. We suggested during our telephone call that you identify the responsive documents by Bates number. However, upon further review, it appears that the documents produced by the Governor were not Bates numbered. For the general convenience of the parties moving forward, it would likely be easiest for the Governor to produce a Bates numbered set of documents in response to the RFPs and Rogs.

There are two main issues on which the parties substantively disagree. You indicated that Steve Mullins was out of the office last week, and that you would discuss these (and any other issues for which you needed his input) with him this week, and get back to us:

- First, you reiterated the Governor's "relevance" objection to the timeframe identified in Plaintiffs' discovery requests (January 1, 2011 to the present), and have taken the position that Plaintiffs are not entitled to any documents or information that predate their ORA requests. As I indicated during our discussion, we view that objection to be frivolous. The timeframe we have selected is narrowly tailored to target information and documents relating to the Governor's 2012 adoption of the current policy for responding to ORA requests, including the reasons for the change in existing policy, and its impact. Such information is well within the scope of permissible discovery under Oklahoma law, and plainly relevant to the claims set forth in the Petition, and the arguments/defenses the Governor has asserted in this case.

- Second, you reiterated the Governor's "relevance" and "overbreadth" objections to RFP Nos. 18, 19, and 20. Again, as I explained in my prior meet and confer correspondence, and during our telephone conversation, Plaintiffs are members of the news media whose ORA requests were submitted to aid their reporting on the executions of Clayton Lockett and Charles Warner. Plaintiffs are entitled to conduct discovery relating to whether the subject matter of their requests and/or their status as members of the news media had any impact on the Governor's processing of their ORA requests. Nor are the requests overbroad or unduly burdensome. However, in an effort to reach a compromise on this issue that would avoid the need for motion practice, we are willing to consider potentially narrowing the scope of these requests to exclude the daily media "blast" emails that we discussed during our call. In an effort to facilitate that discussion, it would be helpful if you would provide us with a sample of such a "blast" email, as well as an estimate of the number of documents responsive to these RFPs if such emails are excluded from their scope.

You indicated that you would provide us with an update concerning the above matters on or before next Tuesday (August 18). In addition, with regard to Plaintiffs' pending ORA requests, you informed us during our call that the records responsive to those requests been collected and are ready for your review. We look forward to receiving those records.

I appreciate your willingness to discuss the discovery issues we identified with respect to the Governor's responses to plaintiffs' first set of special interrogatories and requests for production, and hope that we'll be able to reach an informal resolution of these issues.

Best regards,
Katie

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**REPORTERS
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Exhibit

C

DEC 22 2014

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

TIM RHODES
COURT CLERK

35

ZIVA BRANSTETTER and BH Media
Group Inc. d/b/a *TULSA WORLD*,

Plaintiffs,

v.

MARY FALLIN, in her official
capacity as GOVERNOR OF THE
STATE OF OKLAHOMA; MICHAEL C.
THOMPSON, in his official capacity as
COMMISSIONER OF THE OKLAHOMA
DEPARTMENT OF PUBLIC SAFETY,

Defendants.

CV-2014-2372

Case No.

Judge: Patricia Parrish

RECEIVED

DEC 23 2014

OFFICE OF THE
GOVERNOR

**PETITION FOR RELIEF FOR VIOLATIONS OF THE OKLAHOMA OPEN RECORDS
ACT AND THE CONSTITUTION OF THE STATE OF OKLAHOMA**

The Plaintiffs Ziva Branstetter and BH Media Group Inc. d/b/a *Tulsa World* ("*Tulsa World*"), by and through their undersigned counsel, petition this Court for (1) an order pursuant to Okla. Stat. tit. 12, §§1381 *et seq.* temporarily and permanently enjoining Mary Fallin, Governor of the State of Oklahoma, and Michael C. Thompson, Commissioner of the Oklahoma Department of Public Safety ("DPS"), from continuing to deny access to specific public records in violation of the Oklahoma Open Records Act (Okla. Stat. tit. 51, §§24A.1 *et seq.*) ("ORA") and the constitution of the State of Oklahoma; (2) for a declaration of the rights and responsibilities of Defendants as to the public records sought by Plaintiffs; and (3) a writ of mandamus pursuant to Okla. Stat. tit. 12, §§1451 *et seq.* directing Defendants to produce the requested public records. In support of this Petition, Plaintiffs allege and state the following:

PARTIES

1. Plaintiff *Tulsa World* is the daily newspaper for the city of Tulsa, Oklahoma and

is widely circulated in the State of Oklahoma. It is a for-profit publication wholly-owned by BH Media Group. Founded in 1905, *Tulsa World* provides breaking news and in-depth reporting on issues impacting Oklahomans through its print and online editions (www.tulsaworld.com).

2. Plaintiff Ziva Branstetter (“Branstetter”) is a reporter and Enterprise Editor for *Tulsa World*. She covers state government issues, including executions carried out by the State of Oklahoma.

3. Defendant Mary Fallin (“Fallin”) is a natural person and is currently the Governor of the State of Oklahoma. She has held that office since 2011.

4. Defendant Michael C. Thompson (“Thompson”) is a natural person and is currently the Commissioner of the Oklahoma Department of Public Safety, a position he was appointed to by Fallin in 2011.

5. The Office of the Governor is a “public body” within the meaning of the Oklahoma Open Records Act. (Okla. Stat. tit. 51, §24A.3(2).)

6. The Oklahoma Department of Public Safety is a “public body” within the meaning of the Oklahoma Open Records Act. (Okla. Stat. tit. 51, §24A.3(2).)

7. As Governor of Oklahoma, Fallin is a “public official” within the meaning of the Oklahoma Open Records Act (Okla. Stat. tit. 51, §24A.3(4).)

8. As Commissioner of the Oklahoma Department of Public Safety, Thompson is a “public official” within the meaning of the Oklahoma Open Records Act (Okla. Stat. tit. 51, §24A.3(4).)

9. Fallin’s place of business as Governor, and Thompson’s place of business as Commissioner of the Oklahoma Department of Public Safety, are located within Oklahoma County, Oklahoma.

STATEMENT OF FACTS

Background Facts

10. Two men—Clayton Lockett and Charles Warner—were scheduled to be executed by the State of Oklahoma on April 29, 2014. Plaintiffs are informed and believe that during Lockett's execution, which began at or about 6:23 p.m. on April 29, and after the inmate was administered lethal execution drugs, his veins "exploded."¹ Plaintiffs are informed and believe that Lockett died from a "massive heart attack" at or about 7:06 p.m., after his attempted execution had been halted by the State.² Fallin thereafter issued an executive order delaying Warner's execution, which had been scheduled to begin at 8:00 p.m. Warner's execution is now scheduled for January 15, 2015.³ Oklahoma has four executions, including Warner's, scheduled for January 15 to March 5, 2015.

11. On or about April 30, 2014, Fallin issued an executive order appointing Thompson to conduct an independent review of the events leading up to and during the execution of Lockett. Pursuant to that executive order, the independent review (hereinafter the "DPS Investigation") was to include, *inter alia*, an inquiry into Lockett's cause of death, and an inquiry into whether the Oklahoma Department of Corrections correctly followed the agency's current protocol for executions.

12. As part of the DPS Investigation, over 100 interviews were conducted by DPS with various government officials and other persons who were involved with and/or witnessed

¹ Ziva Branstetter & Cary Aspinwall, Inmate Clayton Lockett dies of heart attack after botched execution; second execution postponed, Tulsa World (Apr. 30, 2014), http://www.tulsaworld.com/news/state/inmate-clayton-lockett-dies-of-heart-attack-after-botched-execution/article_80cc060a-cff2-11e3-967c-0017a43b2370.html.

² *Id.*

³ Death Row, Oklahoma Department of Corrections, http://www.ok.gov/doc/Offenders/Death_Row/ (last accessed Dec. 16, 2014).

Lockett's execution. Fallin and Thompson were among those interviewed by DPS. Plaintiffs are informed and believe that, as of August 12, 2014 at the latest, DPS had completed those interviews. DPS recorded those interviews and currently possesses audio recordings and/or transcripts of them.

13. Branstetter was among the journalists present at the Oklahoma State Penitentiary to observe Lockett's scheduled execution on April 29. She covered Lockett's botched execution, and has continued to provide coverage of its aftermath for *Tulsa World*, writing dozens of stories for the newspaper relating to the execution.⁴

14. As a witness to Lockett's botched execution, Branstetter was interviewed by DPS officials in connection with their independent review of the events leading up to and during Lockett's execution.

15. As alleged in more detail below, Branstetter is being denied access by Defendants to public records requested by her under Oklahoma's Open Records Act that pertain to Lockett's botched execution and the DPS's Investigation. In addition to being denied access to emails and other public records, Branstetter is being denied access to the transcript and/or recording of her interview by DPS officials, as well as the transcripts and/or recordings of the other interviews conducted by DPS.

Plaintiff Branstetter's Open Records Act Requests

16. On or about May 1, 2014, Plaintiff Branstetter, in her role as a reporter and

⁴ See, e.g., supra note 1; see also, e.g., Cary Aspinwall & Ziva Branstetter, Secrets still shroud Clayton Lockett's execution, *Tulsa World* (May 11, 2014), http://www.tulsaworld.com/news/state/secrets-still-shroud-clayton-lockett-s-execution/article_5513ea6b-1f24-519e-9340-66c42b109502.html; Ziva Branstetter, Inside Oklahoma's execution chamber: What happens in the small, dark room, *Tulsa World* (Sept. 14, 2014), http://www.tulsaworld.com/homepage2/inside-oklahoma-s-execution-chamber-what-happens-in-the-small/article_fac267f1-92cb-5d32-b2c6-6a9d59672eed.html.

Enterprise Editor for *Tulsa World*, sent the Office of Governor Fallin a written request for specified public records under the Oklahoma Open Records Act. Specifically, Branstetter requested “[a]ll records, including emails, associated with the execution of Clayton Lockett and Charles Warner dating from March 1 to the present.” In her request, Branstetter “agree[d] to limit [her] request to emails (whether on a personal email account or state email account) to email communications between the governor’s office and DOC Director Robert Patton, Jerry Massie or Anita Trammell; DPS Commissioner Michael Thompson; the governor’s legal staff including Steve Mullins; Denise Northrup; Attorney General Scott Pruitt or Melissa McLawhorn Houston (or assistants acting on their behalf) and of course any emails from the governor herself,” as well as “any communications between the governor’s office and the state Supreme Court justices or staff acting on their behalf.” A true and correct copy of Branstetter’s May 1 Open Records Act request is attached hereto as **Exhibit A**.

17. On or about May 2, 2014, the Office of Governor Fallin responded via email to Branstetter’s May 1 Open Records Act request. In that response, a true and correct copy of which is attached hereto as **Exhibit B**, the Office of the Governor stated that Branstetter’s request had been “placed [] in the queue of Open Record Requests” and assigned the number 2014-016.

18. As of the filing of this Complaint, it has been more than seven months since Branstetter submitted the May 1 Open Records Act request attached hereto as **Exhibit A**.

19. During the last seven months or so, Plaintiff Branstetter has contacted the Office of the Governor on several occasions concerning the status of her May 1 Open Records Act request.

20. As of the filing of this Complaint, the Office of Governor Fallin, has not produced

any records to Branstetter in response to her May 1 Open Records Act request.

21. On or about May 5, 2014, Branstetter, in her role as a reporter and Enterprise Editor for *Tulsa World*, sent DPS a written request for specified public records under the Oklahoma Open Records Act. Specifically, in an email to Cpt. George Brown, head of DPS public affairs, Branstetter requested “all email to or from Commissioner Michael Thompson and Steve Krise or assistants acting on their behalf—regardless of who sent or received these emails—regarding the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1.” A true and correct copy of that request is attached hereto as **Exhibit C**.

22. Brown confirmed receipt of that May 5 Open Records Act request in an email to Branstetter dated on or about May 7, 2014, in which he stated that he was “waiting to hear back regarding [her] email request.”

23. On or about August 12, 2014, Branstetter received an email from Brown on behalf of the DPS stating, among other things, that the DPS’s Legal Division was “conducting a review to determine which [email responsive to Branstetter’s May 5 Open Records Request], if any, may contain privileged or confidential information that is not subject to an open record request.” Brown estimated that review would “take up to another three months” to complete. A true and correct copy of that August 12 email is attached hereto as **Exhibit D**.

24. As of the filing of this Complaint, it has been more than seven months since Branstetter submitted the May 5 Open Records Act request attached hereto as **Exhibit C**.

25. During the last seven months or so, Branstetter has contacted DPS on several occasions concerning the status of her May 5 Open Records Act request.

26. As of the filing of this Complaint, DPS has not produced any records to Branstetter in response to her May 5 Open Records Act request.

27. On or about September 4, 2014, Branstetter, in her role as a reporter and Enterprise Editor for *Tulsa World*, submitted another written request to DPS for specified public records under the Oklahoma Open Records Act. Specifically, in an email to Brown, Branstetter requested "copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including Commissioner Michael Thompson," and "copies of statements by the paramedic and physician attending the execution." A true and correct copy of Branstetter's September 4 Open Records Act request is attached hereto as **Exhibit E**.

28. That same day, Branstetter received a response, via email, from Brown stating that he had "received your official open records request dated 9/4/14 and will review it for consideration and processing." A true and correct copy of DPS's response to Branstetter's September 4 Open Records Act request is attached hereto as **Exhibit F**.

29. On or about September 17, 2014, Branstetter, in a telephone call with Brown, inquired as to the status of her September 4 Open Records Act request to DPS. During that telephone call, Brown informed Branstetter that DPS was reviewing approximately 5,000 pages of material gathered in connection with its investigation, including transcripts of interviews. Brown further informed Branstetter that, after redacting from that material the information it was required by law to redact, DPS intended to make the material available to the public via its website.

30. As of the filing of this Complaint, it has been more than three months since Branstetter submitted the September 4 Open Records Act request attached hereto as Exhibit E.

31. During the last three months or so, Branstetter has contacted DPS on several occasions concerning the status of her September 4 Open Records Act request.

32. As of the filing of this Complaint, DPS has not produced any records to Branstetter in response to her September 4 Open Records Act request. Nor, to Plaintiffs' knowledge, has DPS made such records available to the public on its website, or otherwise.

33. Plaintiffs are informed and believe that certain of the material responsive to Branstetter's Open Records Act requests—including transcripts of interviews of witnesses conducted in connection with the DPS Investigation—were reviewed, redacted, and produced by DPS in connection with a civil lawsuit currently pending in the United States District Court for the Western District of Oklahoma—*Warner, et. al v. Gross, et. al*, No. CIV-14-665-F (W.D. Okla., filed June 25, 2014) (hereinafter the "*Warner Matter*"). Plaintiffs are informed and believe that those redacted transcripts were produced to the plaintiffs in that civil litigation on or around November 15, 2014.

34. On or about November 17, 2014, Branstetter, following up on her earlier Open Records Act requests, again asked that DPS provide copies of the interview transcripts related to the DPS's Investigation, citing their production in the *Warner Matter*. Specifically, in an email to Brown, Branstetter stated: "I request copies of all transcripts created in connection with the Clayton Lockett investigation in electronic format under the Open Records Act. I know Judge Friot ordered DPS to produce them [in the *Warner Matter*] by Nov. 15 and they're already redacted. Please inform me if the documents are not in electronic format and if I need anything else to obtain them." A true and correct copy of that email is attached hereto as **Exhibit G**.

35. Notwithstanding their production in the *Warner Matter*, as of the filing of this Complaint, none of the interview transcripts related to the DPS's Investigation has been provided to Branstetter in response to her Open Records Act requests.

CAUSES OF ACTION

I. Violation of the Oklahoma Constitution

36. Article II, section 1 of the Oklahoma Constitution states that “[a]ll political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it” Okla. Const. art II, §1.

37. Access to information about and from the State is a fundamental right necessary for the citizens of Oklahoma to exercise their political power. This is reflected in the preamble to the Open Records Act, which states that “[a]s the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, 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.” Okla. Stat. tit. 51, §24A.2.

38. Defendants in this case are withholding information from Plaintiff, a member of the news media, and accordingly, from the public, concerning the State of Oklahoma’s execution of criminal defendants.

39. Access to such information is critical for the citizens of Oklahoma to be informed about the workings of their government, and the conduct of their elected officials. Absent such information, citizens of Oklahoma cannot meaningfully engage and/or petition their elected representatives concerning policy and other issues relating to the manner in which death sentences are carried out by the State. The public’s need for access to this information is particularly pressing given that the State of Oklahoma has four executions scheduled to take place from January 15 to March 5, 2015.

40. Defendants’ withholding of the requested records infringes upon the inherent right

of the citizens of Oklahoma, including Branstetter, to engage in self-governance as guaranteed by Article II, section 1 of the Oklahoma Constitution.

II. Violation of the Oklahoma Open Records Act

41. Under the Open Records Act, "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. In order to effectuate this right of access, "[a] public body must provide prompt, reasonable access to its records" *Id.* at §24A.5(5).

42. The records sought by Plaintiffs are records of public bodies and public officials, as defined by the Open Records Act.

43. Despite Plaintiffs' requests for disclosure of those records, Defendants have failed to provide prompt, reasonable access to them, and have failed to assert any provision of the law that would allow them to withhold those records.

44. Defendants' withholding of the records requested by Plaintiffs amounts to an abrogation of their duties under the Open Records Act and is a violation of Oklahoma law.

45. Pursuant to Okla. Stat. tit. 51, §24A.17(B), Defendants' denial of access to the requested records is actionable by civil suit for declaratory relief; an injunction against continued refusal to comply with the law; and a writ of mandamus to compel Defendants to comply with the law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that Plaintiffs have a right to the requested information under Article II, section 1 of the Oklahoma Constitution;

2. Declare, pursuant to Okla. Stat. tit. 51, §24A.17(B), that the records sought by

plaintiffs are public records for the purposes of the Open Records Act, and that Plaintiffs are entitled to prompt disclosure of the requested records;

3. Grant an injunction, pursuant to Okla. Stat. tit. 51, §24A.17(B), or issue a writ of mandamus pursuant to Okla. Stat. tit. 12, §§1451 *et seq.*, requiring Defendants immediately to disclose all records requested by Plaintiffs pursuant to the Open Records Act.

4. Award Plaintiffs reasonable attorneys' fees in this action, pursuant to Okla. Stat. tit. 12, §24A.17(B)(2); and

5. Grant such other relief as the Court may deem just and proper.

Dated: December 22, 2014

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**



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**Pro Hac Vice Application Pending*
Counsel for Plaintiffs

**CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT**

DEC 22 2014

TIM RHODES Court Clerk
Oklahoma County


Subject: records request

From: "Branstetter, Ziva" <Ziva.Branstetter@tulsaworld.com>

Date: 5/1/2014 6:39 PM

To: Alex Weintz <Alex.Weintz@gov.ok.gov>

Alex: Please consider this a request under the Oklahoma Open Records Act for the following:

All records, including emails, associated with the execution of Clayton Lockett and Charles Warner dating from March 1 to the present.

I agree to limit my request to emails (whether on a personal email account or state email account) to email communications between the governor's office and OOC Director Robert Patton; Jerry Massie or Anita Trammell; DPS Commissioner Michael Thompson; the governor's legal staff including Steve Mullins; Denise Northrup; Attorney General Scott Pruitt or Melissa McLanhorn Houston (or assistants acting on their behalf) and of course any emails from the governor herself. I also request any communications between the governor's office and the state Supreme Court justices or staff acting on their behalf. Please make sure to include any attachments to the email that are responsive to this request.

Ziva Branstetter
Tulsa World Enterprise Editor
918.581.8306 (O) 918.528.0406
@ziyabranstetter

From: Audrey Rockwell [Audrey.Rockwell@GOV.OR.GOV]
Sent: Friday, May 02, 2014 5:22 PM
To: Branstetter, Ziva
Subject: Acknowledgement of Open Records Request

The office of Governor Mary Fallin has received your Open Records Request and placed it in the queue of Open Record Requests. Your request number is 2014-016. I have attached a copy of your request below please let me know if that is not a correct copy of your request.

Governor Mary Fallin and staff emails re: Execution of Clayton Lockett and Charles Warner from March 1, 2014 to May 1, 2014.

From: "Branstetter, Ziva" [Ziva.Branstetter@tulsaworld.com]
Sent: 05/05/2014 07:49 AM
To: George Brown <George.Brown@state.ok.us>
Cc: "Strain, Mike (Michael)" <Mike.Strain@tulsaworld.com>; "Worley, Joe (Joseph)" <Joe.Worley@tulsaworld.com>; "Ellerbach, Susan" <Susan.Ellerbach@tulsaworld.com>
Subject: Information request

Good morning George: We had talked a few days ago about the investigation into the execution. You were going to find out for me whether troop Z has anyone with medical training related to IV placement, drug interaction and related issues that will -- I assume -- be part of the investigation. I also request to know whether any outside agencies or experts will be included in this investigation and if so which ones, who they are.

Finally, please consider this a records request for all email to or from Commissioner Michael Thompson and Steve Krise or assistants acting on their behalf -- regardless of who sent or received these emails -- regarding the execution of Clayton Lockett and Charles Warner and any related policy issues since April 1.

Please be aware of the ORA's requirement that open records be provided in a prompt and reasonable time frame and that records cannot be withheld due to an ongoing investigation. If any emails contain exempt material please cite the applicable statute, redact the exempt portion of the record and provide the remainder of the record as required by the ORA.

Ziva Branstetter
Enterprise Editor
Tulsa World
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@zivabranstetter

From: GBrown@dps.state.ok.us [mailto:GBrown@dps.state.ok.us]
Sent: Tuesday, August 12, 2014 12:21 PM
To: Branstetter, Ziva
Subject: Re: Status of records request?

Ziva,

We are working to provide an update to our investigation of the execution of convicted murderer Clayton Lockett, and hope to release that update sometime this week. As the autopsy is a key component of our investigation, we can't move forward until it is released. We have completed all interviews, well over 100, and are in the final stages of our investigation. We look forward to releasing the report as soon as possible.

In response to your May 5th records request for email correspondence:

Section 24A.2 of the ORA states in part, "the agency to whom a request is made shall at all times bear the burden of establishing whether any records are protected by a confidential privilege". Therefore, our legal division is conducting a review to determine which ones, if any, may contain privileged or confidential information that is not subject to an open record request. This is a comprehensive review process which requires extended time.

Please note the ORA also states, "public bodies do not need to follow any procedures for providing access to public records except those specifically required by the Oklahoma Open Records Act".

The ORA allows an agency a reasonable time to respond and given the sheer size of the request, the slow process of reviewing each individual record, and the limited number of attorneys who are available to conduct a legal review, we believe we are on track. A fair estimation, assuming nothing interferes before then, is that it will take up to another three months before completion.

If you have any questions please feel free to contact me.

Respectfully,
Captain George Brown #47
Commander, DPS Public Affairs
405-425-7709

From: "Branstetter, Ziva" [mailto:Ziva.Branstetter@tulsaworld.com]
Sent: 09/04/2014 02:33 PM
To: George Brown <George.Brown@state.oh.us>
Cc: "Strain, Mike (Michael)" <Mike.Strain@tulsaworld.com>; "Worley, Joe (Joseph)" <Joe.Worley@tulsaworld.com>; "Ellerbach, Susan" <Susan.Ellerbach@tulsaworld.com>
Subject: Records request

George: Please consider this a request under the Open Records Act for copies of all full statements by the official media witnesses to the Lockett execution as well as statements by any public official who witnessed the execution, including Commissioner Michael Thompson.

Additionally, I request copies of statements by the paramedic and physician attending the execution. Please redact any identifying information including name, office locations etc. The ORA provides for redaction of exempt material from public records while requiring that the remaining document be provided.

I understand that there are transcripts of the statements but if transcripts do not exist I request the audiotapes of said interviews.

In the same spirit of transparency that DPS has pledged and displayed throughout this investigation, I believe release of full statements would enable the public to determine on its own what the witnesses said and how their views differed.

If any part of this request is denied, we request a written denial citing the reasons.

Thank you for your assistance with our request. Please let me know if you have any questions.

Ziva Branstetter
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918-520-0406 (c)
@zivabranstetter

Subject: Re: Records request

From: <GBrown@dps.state.ok.us>

Date: 9/4/2014 3:40 PM

To: Ziva Branstetter <ziva.branstetter@tulsaworld.com>

CC: <PIO@dps.state.ok.us>

Mrs. Branstetter,

I have received your official open records request dated 9/4/14 and will review it for consideration and processing.

CPT George Brown #47

Commander, OHP/DPS Public Affairs

Subject: Redacted Lockett Interview transcripts

From: <Ziva.Branstetter@tulsaworld.com>

Date: 11/17/2014 8:24 AM

To: George Brown <Gbrown@dps.state.ok.us>

CC: Susan Ellerbach <Susan.Ellerbach@tulsaworld.com>, Mike Strain <Mike.Strain@tulsaworld.com>

George: Are you all going to be releasing the redacted interview transcripts today? I request copies of all transcripts created in connection with the Clayton Lockett investigation in electronic format under the Open Records Act. I know Judge Friot ordered DPS to produce them by Nov. 15 and they're already redacted.

Please inform me if the documents are not in electronic format and if I need to do anything else to obtain them.

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