

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEC 22 2014

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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.

Case No.

CV-2014-2372

**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](http://www.tulsaworld.com/news/state/inmate-clayton-lockett-dies-of-heart-attack-after-botched-execution/article__80cc060a-cff2-11e3-967c-0017a43b2370.html), 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](http://www.ok.gov/doc/Offenders/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.**



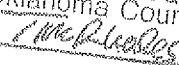
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**Pro Hac Vice Application Pending
Counsel for Plaintiffs*

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 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 McLaughorn 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
@zivabranstetter

From: Audrey Rockwell [Audrey.Rockwell@gov.ok.gov]
Sent: Friday, May 02, 2014 3:22 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@tulsa-world.com]
Sent: 05/05/2014 07:49 AM
To: George Brown <gbrown@dos.state.oh.us>
Cc: "Strain, Mike (Michael)" <Mike.Strain@tulsa-world.com>; "Worley, Joe (Joseph)" <Joe.Worley@tulsa-world.com>; "Ellerbach, Susan" <Susan.Ellerbach@tulsa-world.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
918-581-8386 (o)
918-520-0406 (c)
@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.ok.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
Enterprise Editor
Tulsa World
918-581-8306 (o)
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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