

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

VANDELAY ENTERTAINMENT, LLC)
d.b.a. THE LOST OGLE,)

Plaintiff,)

v.)

MARY FALLIN, in her official Capacity as)
GOVERNOR OF THE STATE OF)
OKLAHOMA; STATE OF OKLAHOMA,)
Ex rel. OFFICE OF THE GOVERNOR,)

Defendants,)

Case No. CV-2013-763

ORDER

The above styled case comes on for consideration of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment on the issue of Executive Privilege of the Defendant, Mary Fallin, as Governor of the State of Oklahoma. The Parties appeared for oral argument on June 12, 2014.

The parties set out in their briefs the main legal question to be resolved - Whether the Governor has met her burden in withholding certain documents requested by Plaintiff? The Plaintiff requested records relevant to the Governor's decision not to expand Medicaid as relating to the Affordable Health Care Act. Having considered the motions, briefs, and oral argument of the parties, the Court finds the following:

The parties agree that no Constitutional or Statutory authority exists as the basis of

Defendant's exercise of Executive Privilege. Pursuant to the Open Records Act, public officials must keep all public records open for inspection for proper purposes. 51 O.S. 24A.5

The Court must determine whether the requested documents are public records, and if so, whether there is an exception to the requirements of the Open Records Act. To be exempt from production under the ORA, the records must be specifically required by law to be kept confidential. *Id.*

The duty to justify the withholding of records rests with the public body urging the exemption as set out in *Citizens Against Taxpayer Abuse v. City of Oklahoma City*, 2003 OK 65 par 12.

The Defendant urges several privileges that allow the withholding of documents as confidential. First, the Defendant argues for Executive Privilege. The Plaintiff contends that Executive Privilege, which is taken from federal law associated with presidential duties and responsibilities, is not relevant to the State obligations of the Governor as it pertains to document seclusion. However, Attorney Client Privilege and Deliberative Process Privilege are subsets of Executive Privilege.

Second, the Defendant urges the finding of Attorney-Client Privilege. However, no argument has been made that the specific documents withheld contained discussions between the Governor and her General Counsel regarding legal matters.

Third, the Defendant argues the common law recognition of the Deliberative Process Privilege. The Deliberative Process Privilege is a common law privilege unique to the government. The main purpose of this privilege is to ensure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subjected to public ridicule or criticism. *Coastal States Gas Corporation v. Department of Energy*, 617 F2d 854, 866 (D.C. Cir 1980).

In order for an exception to the ORA to exist in Oklahoma, there must be some connection between the noted exceptions and the category of documents at hand. The Deliberate Process Privilege is explained as protecting communication that may be pre-decisional and advisory or deliberative. *Gwich'in Steering Comm*, 10 P3d at 578. *To be pre-decisional, the communication must have been made before the deliberative process was completed.* The public policy behind the privilege is to promote frank advice to help government shape policy decisions, and it fosters informed and sound deliberations. *Freedom Foundation*, 310 P3rd at 1262.

All parties agree the documents at issue fall within the definition of the Deliberative Process. The remaining issue is whether the Deliberative Process Privilege is recognizable in Oklahoma.

In order for the documents to be exempt from the ORA, they must be specifically required by law to be kept confidential. 51 O.S. 24A.5(1). In this case, the Court must determine what statutory authority might cause these documents to be deemed

confidential. To that end, The Oklahoma Evidence Code addresses evidentiary privileges in 12 O.S. Sec 2501.

"Except as otherwise provided by constitution, statute, or rules promulgated by the Supreme Court no person has a privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or record; or (4) Prevent another from being a witness or disclosing any matter or producing any object or record."

12 O.S. Sec.2501

Therefore, if neither constitutional nor statutory authority exists, only a Supreme Court rule would provide authority for the existence of the Deliberative Process Privilege.

In title 12 O.S. Sec 2, the Supreme Court Rule provides that common law remains in full force unless a statute explicitly provides to the contrary, citing FDIC v. Hamilton, 1995 CA Okla 10, 58 F 3d 1523.

Common law usage of the Deliberative Process Privilege in Oklahoma has been relied upon in Oklahoma as set out in Exhibits 1-4 in Plaintiff's brief. Specifically, the Oklahoma Securities Department, an Executive Branch Agency, relied on the privilege in Oklahoma Department of Securities vs. Global West, 2009 WL 4798885, CJ-09-2773, December 4, 2009.

Therefore, the Court finds the Deliberative Process Privilege is recognized under common law in Oklahoma, and it is supported by Supreme Court rule as an exception

to the Oklahoma Open Records Act. The court finds the Deliberative Process Privilege thus may be used by the Defendant to protect the content of the documents withheld by the Defendant.

Further, the Defendant is ordered to produce a privilege log of the 100 documents at issue. Pursuant to the privilege, only the content of the emails may be withheld. At Defendant's request, Defendant may have 20 days to prepare the privilege log which must include dates, sender, recipients and re: lines included.

It is so ordered,

Dated this 17th day of June, 2014.

Barbara Swinton

BARBARA G. SWINTON, DISTRICT JUDGE

CERTIFICATE OF MAILING

This is to certify that on the 17th day of June, 2014, a true and correct copy of the above and foregoing instrument was sent via U.S. mail to:

Neal Leader
Senior Assistant Attorney General
313 N.E. 21 Street
Oklahoma City, Oklahoma 73105

Brady R. Henderson
ACLU of Oklahoma Foudation
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