

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 10 2014
Rule 1.301, Form No. 5
MICHAEL S. HUMIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

#113187

Vandelay Entertainment, LLC)
d.b.a. The Lost Ogle,)
)
Plaintiff/Appellant,)
vs.)
Mary Fallin, in her official)
capacity as Governor of the)
State of Oklahoma; State of)
Oklahoma, ex rel. Office of the)
Governor,)
)
Defendant/Appellee.)

No. _____

PETITION IN ERROR

☒ PETITION IN ERROR
☐ AMENDED OR SUPPLEMENTAL PETITION
☐ CROSS PETITION
☐ COUNTER-PETITION
DATE FIRST PETITION IN ERROR FILED: _____

I. TRIAL COURT HISTORY

COURT/TRIBUNAL: DISTRICT COURT OF OKLAHOMA COUNTY
COUNTY: OKLAHOMA
CASE NO.: CV-2013-763
JUDGE: THE HONORABLE BARBARA SWINTON, DISTRICT JUDGE
NATURE OF CASE: OKLAHOMA OPEN RECORDS ACT CIVIL ACTION
(e.g., Divorce, Personal Injury)

NAME OF PARTY OR PARTIES FILING THIS PETITION IN ERROR:
VANDELAY ENTERTAINMENT, LLC, D.B.A. THE LOST OGLE

THE APPEAL IS BROUGHT FROM: (Check one)

☒ Judgment, Decree or Final order of District Court.
☒ Appeal from order granting summary judgment or motion to dismiss where
motion filed after October 1, 1993 (Accelerated procedure under Rule 1.36).
☐ Appeal from Revocation of Driver's License (Rule 1.21(b)).
☐ Final Order of Other Tribunal.
(Specify Corporation Commission, Insurance Department,
Tax Commission, Court of Tax Review, Banking Board or

Banking Commissioner, etc. _____)
____ Interlocutory Order Appealable by Right.
____ Other _____

II. TIMELINESS OF APPEAL

1. Date judgment, decree or order appealed was filed: June 17, 2014.
2. If decision was taken under advisement, date judgment, decree or order was mailed to parties: June 17, 2014.
3. Does the judgment or order on appeal dispose of all claims by and against all parties?
X Yes No.
If not, did district court direct entry of judgment in accordance with 12 O.S. § 994? Yes No.
When was this done? _____
4. If the judgment or order is not a final disposition, is it appealable because it is an Interlocutory Order Appealable by Right? Yes No.
5. If none of the above applies, what is the specific *statutory* basis for determining the judgment or order is appealable? _____
6. Were any post-trial motions filed?

<u>Type</u>	<u>Date Filed</u>	<u>Date Disposed</u>
<u>Motion to Reconsider</u>	<u>June 27, 2014</u>	<u>August 7, 2014</u>
_____	_____	_____
_____	_____	_____
7. This Petition is filed by: X Delivery to Clerk, or
 Mailing to Clerk by U.S. Certified Mail, Return
Receipt Requested, on _____ (date)

III. RELATED OR PRIOR APPEALS

List all prior appeals involving same parties or same trial court proceeding: [None]

List all related appeals involving same issues: [None known to Plaintiff]

(Identify by Style, Appeal Number, Status, and Citation, if any. If none, so state.)

IV. SETTLEMENT CONFERENCE

Is appellant willing to participate in an attempted settlement of the appeal by predecisional conference under Rule 1.250? ____ Yes X No

V. RECORD ON APPEAL

____ A Transcript will be ordered.

 X No Transcript will be ordered because no record was made and/or no transcript will be necessary for this appeal

____ A Narrative Statement will be filed

____ Record is concurrently filed as required by Rule 1.34 (Driver's License Appeals, etc.) or Rule 1.36 (Summary judgments and motions to dismiss granted).

VI. JUDGMENT, DECREE OR ORDER APPEALED -- EXHIBIT "A"

(Attach as Exhibit "A" to the Petition in Error a certified copy of the judgment, decree or order from which the appeal is taken. If a post-trial motion extending appeal time under Rule 1.22 was filed, a certified copy of the order disposing of the motion must be attached also.)

Attached below.

VII. SUMMARY OF CASE -- EXHIBIT "B"

Attach as Exhibit "B" a brief summary of the case *not to exceed one 8 ½"x 11" double spaced page.*

Attached below.

VIII. ISSUES TO BE RAISED ON APPEAL -- EXHIBIT "C"

Attach as Exhibit "C" the issues proposed to be raised. Include each point of law alleged as error. Avoid general statements such as "Judgment not supported by law."

Attached below.



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

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

JUN 17 2014

TIM RHODES
COURT CLERK

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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

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

SEP 08 2014

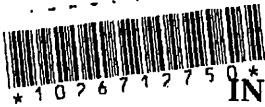
TIM RHODES Court Clerk
Oklahoma County
Tim Rhodes

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
3000 Paseo Drive
Oklahoma City, Oklahoma 73103



IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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

AUG - 7 2014

TIM RHODES
COURT CLERK

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Case No: CV-2013-763

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

Judge: Swinton

ORDER OVERRULING PLAINTIFF'S MOTION TO RECONSIDER AND
OVERRULING IN PART DEFENDANT'S MOTION TO EXTEND TIME TO FILE
PRIVILEGE LOG

NOW on this 7TH day of August, 2014, Plaintiff having filed a Motion to Reconsider in the above-styled cause, Defendant having responded timely thereto, and Defendant having filed a Motion to Extend Time to File Privilege Log, and counsel for both parties having appeared this date in chambers, the Court orders the following:

After due consideration, the Court OVERRULES Plaintiff's Motion to Reconsider. The Court's Order of June 17, 2014 therefore stands as entered.

After due consideration, the Court OVERRULES IN PART Defendant's Motion to Extend Time to File Privilege Log, and orders said Privilege Log to be filed by August 13, 2014.

IT IS SO ORDERED.

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

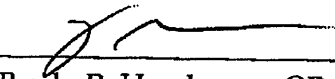
SEP 08 2014

TIM RHODES Court Clerk
Oklahoma County


Tim Rhodes

Barbara Swinton
Judge of the District Court

Approved as to Form:



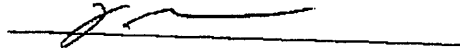
Brady R. Henderson, OBA#21212
ACLU of Oklahoma Foundation
3000 Paseo Drive
Oklahoma City, OK 73103
(405) 524-8511, (405) 524-2296 (fax)
Attorney for Plaintiff



Neal Leader, OBA#5310
Senior Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
(405) 522-4393
Attorney for Defendant

CERTIFICATE OF DELIVERY

The undersigned does hereby certify that on the day of filing, a true and correct copy of the above and foregoing is being delivered to Senior Assistant Attorneys General Neal Leader and Sandra Rinehart at the office of the Attorney General of Oklahoma, via First Class U.S. Mail, postage prepaid.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line, positioned above a solid horizontal line.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA



1026711181

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 el. OFFICE OF THE GOVERNOR,

Defendants.

Case No. CV-2013-763

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

AUG 12 2014

TIM RHODES
COURT CLERK

75 *[Signature]*

FINAL ORDER

On June 17, 2014, this Court issued its Order which granted Defendant's Motion for Summary Judgment on the legal issue presented by finding the Deliberative Process Privilege exists in Oklahoma. This ruling constituted a denial of Plaintiff's Motion for Summary Judgement. Plaintiff filed a Motion to Reconsider which was denied by this Court August 7, 2014.

Within days of this Court's August 7, 2014, Order denying the Plaintiff's Motion for Reconsideration, the Governor voluntarily provided Plaintiff with the thirty-one documents at issue in this cause. Because the Governor voluntarily released the records at issue in this cause, the second stage of this bifurcated proceeding need not be conducted, and the Court's Order of August 7, 2014, should be adopted as the Court's Final Order in this case.

WHEREFORE, it is the Order of this Court, that as of the filing of this Order, the Court's Order of August 7, 2014, which resolved Defendant's Motion for Summary Judgement on the legal

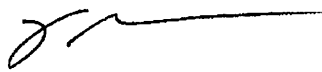
issue presented by recognizing the existence of the Deliberative Process Privilege in Oklahoma, is


adopted as the final Order of the Court in this cause.

Dated this th12 day of August, 2014.


BARBARA G. SWINTON
JUDGE OF THE DISTRICT COURT

Approved as to form:


Brady R. Henderson, OBA #21212
ACLU of Oklahoma Foundation
3000 Paseo Drive
Oklahoma City, Oklahoma 73103
Attorney for Plaintiff


Sandra D. Rinehart, OBA #11873
Senior Assistant Attorney General
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Attorney for Defendant

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

SEP 08 2014

TIM RHODES Court Clerk
Oklahoma County


EXHIBIT "B" - SUMMARY OF CASE

On April 9, 2013, Plaintiff filed a petition in Oklahoma County District Court seeking declarative and injunctive relief from Governor Mary Fallin's decision to withhold thirty-one documents that were responsive to Plaintiff's previous request for disclosure and inspection of records pursuant to the Oklahoma Open Records Act. These records, related to the Governor's decisions regarding expansion of Medicaid, were withheld based on claims of three privileges; Attorney-client Privilege, Executive Privilege, and Deliberative Process Privilege. Plaintiff sought from the court both an order compelling release of these records and a declaratory judgment that neither Deliberative Process Privilege nor Executive Privilege are recognized as exceptions to the Oklahoma Open Records Act's duties of disclosure. The case was assigned to Judge Barbara Swinton.

Both sides moved for summary judgment. Following briefing, a hearing was held on June 12, 2014, after which the District Court entered an Order on June 17, 2014. This Order, while not explicitly disposing of either side's motions, has since been recognized by subsequent court orders of August 7, and August 12, 2014, as having effectively granted Defendant's Motion for Summary Judgment in part, and denied Plaintiff's Motion for Summary Judgment.

Specifically, the Order of June 17 rejected Defendant's claims of Executive Privilege (as lacking any supporting authority) and Attorney-Client Privilege (as lacking factual foundation), but found for Defendant on the claim of a common-law Deliberative Process Privilege. The Order of June 17 allowed the Governor's office to continue withholding the sought documents, but did order the filing of a "Privilege Log" detailing certain information about the records, though not their content itself.

Plaintiff filed a Motion to Reconsider on June 27, 2014, alleging, among other things, that the District Court's recognition of Deliberative Process Privilege was clearly contrary to law and barred by statute. On August 7, 2014, Judge Swinton denied the Motion to Reconsider and reaffirmed her Order of June 27, 2014.

On August 11, 2014, the Governor voluntarily released the thirty-one documents sought by Plaintiff, and provided notice of this to the court. As such, Judge Swinton signed an agreed order drafted by the parties on August 12, which set out that the order to provide a Privilege Log was now moot and that the dispositive issues in the case had reached finality in the District Court.

Plaintiff now appeals the Court's judgment on the remaining declarative issue of whether a claim of common-law Declarative Process Privilege allows the Governor to withhold records from the disclosure requirements of the Oklahoma Open Records Act.

EXHIBIT “C” - ISSUES TO BE RAISED ON APPEAL

While this case presents an issue of profound and wide-ranging implications for government accountability and transparency in Oklahoma, it is a purely legal rather than factual issue and is relatively straightforward:

As set out in its Order of June 17, the District Court recognized a common law Deliberative Process exemption to the requirements of the Oklahoma Open Records Act that otherwise place a clear duty of disclosure on the Governor. The exception lacks substantive basis in Oklahoma law and its creation is forestalled by Oklahoma’s statutes. Specifically, Plaintiff asserts the following errors in recognizing this privilege claim:

1. The Court appropriately opined that pursuant to the Oklahoma Evidence Code, absent constitutional or specific statutory authority, “only a Supreme Court rule would provide authority for the existence of the Deliberative Process Privilege.” Order of June 17, at 4, citing 12 O.S. §2501. However, the Court incorrectly found that such an applicable rule exists, citing in its purported place the Oklahoma statute that states common law remains in force and effect unless a statute explicitly provides to the contrary. *Id.*, quoting 12 O.S. §2.
2. In this case, a statute explicitly provides to the contrary. 12 O.S. §2509 plainly bars recognition of any government privilege, unless created by Constitution or statute, or required by federal law. 12 O.S. §2509. It is clear and unambiguous.
3. Even assuming for the sake of argument that 12 O.S. §2509 were ambiguous or somehow inapplicable, the purported common law basis for the claim of Deliberative Process Privilege is lacking, as no appellate authority or even adjudicated examples of reliance upon it have been provided or cited by the Court.

As such, Plaintiff now seeks reversal of the District Court’s holding that a Deliberative Process Privilege legally may be claimed by Governor Fallin and used to exempt records from disclosure and inspection under the Open Records Act.

IX. NAME OF COUNSEL OR PARTY, IF PRO SE

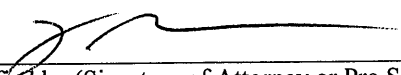
ATTORNEY FOR APPELLANT

Name: Brady Henderson
OBA No.: 21212
Firm: American Civil Liberties Union of Oklahoma Foundation
Designated Case-Specific Email Address: bhenderson@acluok.org
Secondary Email Address: [n/a]
Address: 3000 Paseo Drive, Oklahoma City, OK 73103
Telephone: (405) 524-8511

ATTORNEY FOR APPELLEE

Name: Neal Leader
OBA No.: 5310
Firm: Office of the Attorney General of the State of Oklahoma
Designated Case-Specific Email Address: neal.leader@oag.ok.gov
Secondary Email Address: [n/a]
Address: 313 NE 21st, Oklahoma City, OK, 73105
Telephone: (405) 521-3921

DATE: September, 8, 2014



Verified by (Signature of Attorney or Pro Se Party)

ACLU of Oklahoma Foundation
Firm

bhenderson@acluok.org
Designated Case-Specific Email Address *[if applicable]*

Secondary Email Address *[if applicable]*

3000 Paseo Drive,
Oklahoma City, OK 73103
Address

(405) 524-8511
Telephone

X. CERTIFICATE OF MAILING TO ALL PARTIES AND
COURT CLERK

I hereby certify that a true and correct copy of the Petition in Error was mailed this 8th day of September, 2014, by depositing it in the U.S. Mail, postage prepaid, and by electronic mail to Neal Leader and Sandy Rinehart, Counsel for Defendant, at the Office of the Attorney General, Oklahoma City, Oklahoma.

I further certify that a copy of the Petition in Error was mailed to, or filed in, the Office of the Court Clerk of Oklahoma County on the 8th day of September, 2014.

