CASE NO. CV-2015-2098

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

A PERFECT CAUSE 2013, INC (d.b.a. A PERFECT CAUSE);
THE OKLAHOMA OBSERVER,
Plaintiffs,

v.

MARY FALLIN, in her official capacity as GOVERNOR OF THE STATE OF OKLAHOMA,
Defendant.

Civil action for injunctive relief brought under the Oklahoma Open Records Act, 51 O.S. §24A.1 et seq.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted,

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

A PERFECT CAUSE 2013, INC	)	
(d.b.a. A PERFECT CAUSE);	)	
THE OKLAHOMA OBSERVER;	)	
Plaintiffs,	)	
	)	
vs.	)	Case No: **CV-2015-2098**
	)	
MARY FALLIN, in her official	)	Assigned Judge: **Stuart**
capacity as GOVERNOR OF THE	)	
STATE OF OKLAHOMA;	)	
Defendant.	)	

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

The Oklahoma Open Records Act carries with it a clear and unambiguous duty for the public officials and public bodies within its scope. This duty is simple: Provide "prompt, reasonable access" to public records within one's custody or control. 51 O.S. §24A.5(5). Plaintiffs separately sought such access from Defendant Fallin more than two years ago. About nine hundred days later, they still don't have it.

The question presented to this Court is whether forcing Oklahoma citizens to wait for an unknown time period in excess of two and a half years before allowing access to the public records they seek to inspect fulfills Defendant's duty to provide "prompt, reasonable access" to her public records. Plaintiffs argue it does not.

Statement of the Case

The two Plaintiffs present factually distinct causes of action, but share the same legal issue. Plaintiff A Perfect Cause 2013 (hereinafter "A Perfect Cause") is an Oklahoma non-profit organization dedicated to raising awareness of widespread abuse and neglect in Oklahoma's nursing homes, as well as combating the State of Oklahoma's extremely lax regulation of nursing facilities and consistent failure to investigate and prosecute nursing home abuse and neglect.

Plaintiff Oklahoma Observer (hereinafter "Observer") is an Oklahoma for-profit news publication, established in 1969. It seeks to provide critical oversight of public figures and officials, and a means for Oklahomans to reach informed opinions about issues of common concern. Since 2014, the Observer has partnered with the Oklahoma Observer Democracy Foundation, a 501(c)(3) non-profit foundation, to provide free access to reporting on and analysis of public policy issues via the okobserver.net website.

In 2014, each Plaintiff made requests for access to public records held by Governor Fallin. A Perfect Cause's request was received on May 13, 2014, and asked for access to inspect a variety of public records dealing with communications between Fallin or her staff and the nursing home industry. The request owes to the Governor's conspicuous lack of attention to gross failures in multiple executive agencies' duties of regulation and oversight of nursing homes, combined with the Governor's

connections to elements of the nursing home industry openly operating deficient facilities.

The Observer's request, received by the Governor's office on July 16, 2014, seeks the public records relating to controversial clemency requests from two men convicted of first-degree murder and since put to death by the State of Oklahoma. As of the filing of this Brief and the Motion for Summary Judgment accompanying it, neither Plaintiff has received access to any of the records sought. In the case of Plaintiff A Perfect Cause, this represents a period of **915 days** elapsed without records access since the Governor's receipt of its request, according to Plaintiff's calculations. For the Oklahoma Observer, **848 days** have elapsed without any responsive records made available for inspection. These protracted denials of access to public records place the Governor wildly out of compliance with the requirements of the Oklahoma Open Records Act.

Standard of Review

It is well-recognized that Oklahoma courts are compelled to enter summary judgment when a party is entitled to judgment as a matter of law and there are no dispositive facts in dispute. *See* Carmichael v. Beller, 914 P.2d 1051, 1996 OK 48, ¶2, *citing* Ross v. City of Shawnee, 683 P.2d 535, 1984 OK 43, ¶7. The undisputed facts are listed in Plaintiffs' Motion for Summary Judgment (and summarized above). When the law discussed below is applied to these facts, it renders a simple result. Plaintiffs are

entitled to judgment as a matter of law because Defendant has failed to perform her legal duty under the Oklahoma Open Records Act. *See* Okla. Const. art. VI, §1 (requiring the Governor to perform not only constitutional duties but also those "prescribed by law").

I. Defendant has a plain and unambiguous duty to provide prompt, reasonable access to the public records sought by the Plaintiffs.

The Oklahoma Open Records Act (hereinafter "Act") derives its purpose directly from the people's inherent power under the Oklahoma Constitution. As the Act opens, expressing its legislative purpose:

> As 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... The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.

51 O.S. §24A.2. The Act is designed to preserve balance in the fundamental relationship between Oklahoma's government and her people. As the Act's purpose statement expresses unequivocally, to do their jobs as informed and responsible citizens, Oklahomans require the ability to obtain information about what their government is doing on their behalf, and on their dime.

To fulfill this design and purpose, the Act requires that most government officials and agencies, including the Governor, keep all their public records "open to any person for inspection, copying, or mechanical reproduction during regular business hours." 51 O.S. §24A.5. By its plain language, this mandate is not just for access to public records, but effectively instantaneous access. In practical terms, of course, such instant access is not always workable. In the age of electronic records and communications archives that may have to be searched to find the public records a citizen seeks, some leeway is inherently necessary to allow for this process.

The Open Records Act allows for just that. Public bodies and agencies may create their own procedures for production of these records, but with a very important limitation. *See* 51 O.S. §24A.5(5). Any such procedures must ensure "prompt, reasonable access," but may include reasonable protocols to preserve the essential functions of the public body, according to the plain language of the Act, which states:

> A public body must provide prompt, reasonable access to its records but may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions. Any public body which makes the requested records available on the Internet shall meet the obligation of providing prompt, reasonable access to its records as required by this paragraph.

51 O.S. §24A.5(5). While the Act specifies "prompt, reasonable access" and that any procedures impacting that access must be "reasonable," there is otherwise no explicit

specification for a specific period of time in which records must be produced if they are unable to be made available instantaneously. *Id.*

The key question, therefore, is what constitutes "prompt, reasonable access" when some delay in production may be inherently required for searching or compiling records. Plaintiffs humbly submit that a period of two and a half years (and growing) is neither prompt, nor reasonable. As such, it constitutes a denial of the public records access required by law.

II. Defendant's denial of Plaintiffs' right of access to public records for 915 days and 848 days respectively is presumptively unreasonable.

The Open Records Act clearly and unambiguously contemplates, and in fact mandates, that an Oklahoman has the right to walk into the office of a public body, inspect records, and leave with copies, all during a normal eight-hour business day. *See* 51 O.S. §24A.5. There is thus an inherent disconnect when Plaintiffs have requested records and still do not have access around nine hundred days later.

a. Defendant's denial of access is unreasonable because it defeats the fundamental legislative purpose of the Open Records Act.

The Oklahoma Open Records Act exists to protect and promote the fundamental integrity of the democratic process. The Oklahoma Supreme Court explicitly observed this in *Oklahoma Public Employees Association v. Oklahoma Office of Personnel Management*, noting the following:

> "Openness in government is essential to the functioning of a democracy…In order to verify accountability, the public must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. It gives private citizens the ability to monitor the manner in which public officials discharge their public duties and ensures that such actions are carried out in an honest, efficient, faithful, and competent manner."

Okla. Public Employees Assoc. v. State ex rel. Okla. Office of Personnel Management, 267 P.3d 838, 2011 OK 68, at ¶36.

With a response period in excess of two years, an official easily may delay disclosure of records that might show his or her failure to perform state functions honestly, efficiently, faithfully, or competently until after his or her next election, or into the term of his or her successor. Such may be the case here. Unless Defendant's speed in facilitating public records access improves exponentially, a public records request made of the Governor today would not result in production of records until at least 2019, after Governor Fallin's term-limited retirement at the end of 2018. Such a failure of timely production negates the ability of Oklahoma citizens to act on the information contained in the public records that they are entitled to view. It thus defeats the essential purpose of the Open Records Act itself. *See* 51 O.S. §24A.2.

It cannot be rationally concluded that the Governor's denial of access, sufficiently severe to defeat the very purpose of the Open Records Act, can then still be considered "prompt [and] reasonable." 51 O.S. §24A.5(5). A response period expressed

in years is neither prompt nor reasonable, as can be further demonstrated by comparing response and production periods prescribed by other open records laws throughout the United States.

b. Defendant's denial of access is presumptively unreasonable under the consistent standards of open records laws throughout the United States.

Requirements such as promptness and reasonableness abound in the open records laws of other states. Fortunately, we may draw guidance from many of these analogous state statutes that go on to define specific periods or maximum time spans required for presumptive compliance founded on the same essential standard as that given in Oklahoma law.

In Alaska, for example, agencies are required to make records available "under *reasonable* rules during regular office hours." Alaska Stat. §40.25.110(a). (emphasis added). In interpreting and effecting the reasonableness requirement, the Alaska Administrative Code requires government agencies to furnish the public records no later than the tenth working day after the agency receives the request. *See* Alaska Admin. Code tit. 2, §96.325(a)(1)-(2). This deadline can be extended another ten days under some conditions, resulting in a twenty day maximum for compliance. *See* Alaska Admin. Code tit. 2, §96.325(d)-(e).

California law provides a similar window in which an agency must produce records not immediately available. The California Government Code specifies that a

response must be rendered in ten (10) days, with an extension of up to an additional fourteen (14) days possible only upon written notice setting forth the reasons needed—a 24-day maximum. *See* Cal. Gov't Code §6250-6255.

Some states' windows for reasonable access or similar terms are far shorter. In Colorado, the open records statutes mandate that for records not readily available for inspection during business hours, inspection must be allowed within a "reasonable time after the request" in similar fashion to Oklahoma. Colo. Rev. Stat. Ann. §43-72-203. Colorado's statute then mandates that a "reasonable time" be presumed by law to be "three working days or less." *Id.*, at §203(3)(b). In Georgia, records also are to be produced within a "reasonable amount of time not to exceed three business days." Ga. Code Ann. §50-18-71(b)(1)(A). The same three-day period for reasonable compliance is mandated in Idaho, Kansas, Kentucky, and Missouri. *See* Idaho Code Ann. §74-103; Kan. Stat. Ann. §45-218; Ky. Rev. State. Ann. §61.872(5); Mo. Rev. Stat. §610.023.1.

Slightly longer periods (though still approximately 99% shorter than that taken by Defendant Fallin thus far) are no less common in other states whose laws reference a firm number of days in defining what is reasonable for open records production. Connecticut law gives its agencies four business days to respond on denial of a records inspection, though with up to ten days allowed in some circumstances. *See* Conn. Gen. Stat. §1-206. Four business days is also the response standard in Nebraska. *See* Neb. Rev. Stat. §84-712(4).

Five days are allowed for public agencies in Illinois to comply with or deny a request, with another five-day extension possible. 5 Ill. Comp. Stat. 140/1. Virginia allows its responding agencies up to five days as well, as do West Virginia and Louisiana. *See* Va. Code Ann. §2.2-3704; W. Va. Code §29B-1-3(d); La. Rev. Stat. Ann. §44-35.

Up to seven (7) working days are allowed under Mississippi law if required by an agency's "reasonable written procedures," which are expressly barred from authorizing any longer period. Miss. Code Ann. §25-61-5. Oregon elected officials who fail to affirmatively grant or deny access to a requested public record within seven (7) days are deemed by law to have denied it, allowing an aggrieved citizen to institute court proceedings for an injunction to obtain access. *See* O.R.S. §92.465. The same is true in Tennessee. *See* T.C.A. §10-7-505.

Ten (10) days is the default requirement in Utah, where records must be provided "as soon as reasonably possible." Utah Code Ann. §63G-2-204. This can be extended for extenuating circumstances. *Id.* In Vermont, by contrast, ten (10) days is the maximum *with* unusual circumstances factored in. 1 V.S.A. §318. Otherwise, only five (5) days are allowed. *Id.*

Delaware, like Oklahoma and the other states discussed above, employs a reasonable access standard, which the statute defines as "as soon as possible, but in any event within fifteen (15) business days..." for most requests. Del. Code Ann. tit. 29

§10003(h)(1). A fifteen-day maximum is also permitted for Michigan agencies and officials, who normally must produce or deny within five (5) days, but may extend it ten (10) more days by giving a statutory notice of need. *See* Mich. Comp. Laws. §15-235(2). New Mexico's maximum is set at fifteen (15) days as well, with extensions allowed under some circumstances. *See* N. M. Stat. Ann. §14-2-8(D). Likewise, agencies serving the citizens of South Carolina must furnish records within fifteen (15) days. S.C. Code Ann. §30-4-30.

Iowa law allows for a "good-faith, reasonable delay" to search and vet potentially exempted documents, defining the same to be no more than twenty (20) calendar days. Iowa Code §22.8(4). In New York, any agency requiring more than twenty (20) days is required to state the reasons in writing and provide a date certain on which compliance will be completed, in order to overcome the effective presumption of non-compliance that results when records are not produced within the 20-day time period. *See* N.Y. Pub. Off. Law §89(3)(a).

Pennsylvania law, which substitutes the phrase "good faith effort" for "reasonable," sets the maximum period of time for production of public records at thirty (30) days unless the requester voluntarily agrees to longer, and only if the thirty days is required for redaction and legal review. 65 P.S. §§67.901-902. Otherwise, requests must be processed in five days. *Id.* Rhode Island also sets a thirty (30) day

maximum, the last twenty (20) days of which are only available for specific circumstances of voluminous or challenging requests. *See* R.I. Gen. Laws §38-2-3.

Many of the response and production times noted above (though certainly not all) can be extended or supplemented for voluminous or challenging requests. Thus Plaintiffs do not cite these twenty-seven statutes and regulations for the proposition that all records requests always can be completed in timeframes of a few days. Rather, these figures of three to thirty days represent reasonable norms for compliance determined by diverse states throughout America whose agencies and public officials, just as their counterparts in Oklahoma, face the same challenges of balancing government efficiency with transparency and responsiveness.

While many states specify precise periods in their statutory law, some do not. Thus, a few state appellate courts have had to confront the same fundamental question that this Court must in the instant case—how long is too long? Their answers consistently support the Plaintiffs' cause.

In Arizona, which employs similar open records law to Oklahoma's, two appellate decisions are informative. The first looked at Arizona's requirement that agencies "promptly furnish" records, and found respective delays of 143 and 141 days in producing requested records "failed as a matter of law, to meet [the agency's] burden of establishing that it promptly responded." Phoenix New Times v. Arpaio, 177 P.3d 275 (Ariz. Ct. App. 2008).

In Ohio, where the state's open record laws require prompt access but do not specify a time period, just like Oklahoma's Open Records Act, the Ohio Supreme Court found a delay of eight months sufficient to constitute a failure to produce public records "within a reasonable period of time" as required by Ohio law, and awarded statutory damages to the citizen aggrieved. *See* State ex rel. Di Franco v. S. Euclid, 144 Ohio St.3d 565 (Ohio 2015).

Denying access to records for over eight hundred days presumptively fails the open records requirements of every state discussed above by a massive margin. Moreover, when looking in closer focus at the six states bordering Oklahoma, their respective officials are required to make records available in a tiny fraction of the time being taken so far by Governor Fallin. From the flatlands to the Ozarks, Colorado, Kansas, and Missouri all require action in three business days. *See* Colo. Rev. Stat. Ann. §43-72-203; Kan. Stat. Ann. §45-218; Mo. Rev. Stat. §610.023.1. South of the Red River, Texas requires compliance or a showing of good cause for delay within ten days. *See* Tex. Gov't Code Ann. §552.221. A stone's throw west of Black Mesa, New Mexico's relatively leisurely allowance is fifteen days. *See* N. M. Stat. Ann. §14-2-8(D). East of Fort Smith, Arkansas law requires production in three business days even of records in active use or storage. *See* Ark. Code Ann. §25-19-105(e).

Despite the variance in other states' response periods and mechanisms for exceptions, there remains an abundantly clear consensus that having reasonable access

to public records means obtaining that access within a few days, or in some circumstances a few weeks—not a few years.

c. The Oklahoma Discovery Code presumes a 30-day period to be reasonable for document production.

The reasonability of that consensus is also demonstrated in Oklahoma law. Figures of between thirty (30) days and sixty (60) days are suggested by Oklahoma's Discovery Code, one of few other examples of an Oklahoma statute prescribing a legal duty dealing with production of documents or information. In 12 O.S. §3234, for example, requests for production of documents normally must be responded to within thirty (30) days of service. 12 O.S. §3234(B)(4)(a).

Answers to interrogatories, which can include or be substituted by the production and inspection of records in lieu of answers, are subject to a thirty-day standard. 12 O.S. §3233(A). Likewise, requests for admission receive the same thirty-day period. 12 O.S. §3236(A). While these differ from the duty of production under the Open Records Act in some ways, the responses to interrogatories and requests for admission necessarily include similar practical requirements of searching and analysis of a person or entity's records, including evaluating substantive responsiveness and any issues of confidentiality or privilege prior to disclosure.

Comparing the Discovery Code's deadlines set by law for the reasonable administration of civil justice to the Governor's denial of access in the present case

yields a stark contrast. The Governor has, so far, taken about 2,900% of the time statutorily allotted to a litigating party in producing documents. Put another way, had A Perfect Cause been engaged in litigation against the state in May 2014 and requested the same public records via the discovery process instead of the Open Records Act, the Governor's responsive document or production would have been due approximately 880 days ago, unless extended by a court.

This is not to suggest that thirty days would always be practical for full production of voluminous documents, but it does suggest that few, if any, courts would consider it reasonable to extend a deadline from thirty days to 915 days absent exceptional showing of good cause. The right of speedy trial and need for efficient administration of justice that compel timely discovery equate with the right of public access and need for transparency that should compel equally timely compliance with the Open Records Act.

Furthermore, common sense dictates that in the context of an Act framed by the regular day-to-day business of state government and designed around a simple single-day walk-in interaction between citizen and public agency, a response period of several *years* to a citizen's request to view public records simply does not fit. It is wildly out of line with the letter, spirit, and purpose of the Open Records Act. It is wildly out of line with analogous laws in other states. And it is wildly out of line with common sense.

III. Defendant has not justified the presumptively unreasonable denial of access by showing any exceptional necessity for it.

Having established the extreme presumptive unreasonableness of the Governor's denial of access to the public records under her control, this Court must then look to whether the Governor has justified that denial. In this matter, the Governor's Office has made no showing of any necessity for it, beyond merely admitting two facts to be true; (1) that multiple pending requests are purportedly handled in the order in which they come in, one at a time. Defendant's Answer, at 4 (admitting ¶17 of Plaintiffs' Petition), and (2) that "records subject to release are reviewed by legal staff, and are scanned into a reviewable format." *Id.*, at 2.

It should be noted that both the handling of multiple or voluminous requests and the requirement of legal review or format conversion can be concomitant with records production under the Oklahoma Discovery Code and the public records statutes of the twenty-seven states cited above.

Indeed the Open Records Act itself, which allows delay only when procedures are required to protect the integrity of records, does not make "prompt, reasonable access" a rule that requires exemption when an agency's convenience dictates. On the contrary, "prompt, reasonable access" is already the exception to the rule. That rule is not merely prompt access, but immediate access during all regular business hours. *See* 51 O.S. §24A.5. Any attempt to justify the extreme period of denial wrought by the

Governor in the present case is to request an exception to the exception, and one that defeats the very purpose of the rule.

Conclusion

Defendant Fallin has failed to comply with a plain and non-discretionary duty to allow members of the public access to the records her office produces and maintains on their behalf, and on their dime. This Court is empowered with the authority and responsibility to enforce the Oklahoma Open Records Act's mandate and restore the rights of Plaintiffs, and all other Oklahomans, to obtain prompt and reasonable access to the Governor's public records.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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 Assistant Attorney General Jeb Joseph, counsel for Defendant Fallin, at the office of the Attorney General of Oklahoma, via First Class U.S. Mail, postage prepaid.