

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

FEB - 7 2017

RICK WARREN
COURT CLERK

34

Center for Media and Democracy, a
Wisconsin corporation,

Plaintiff,

v.

Scott Pruitt, in his official capacity as
Attorney General of the State of
Oklahoma,

Defendant.

Case No.

CV-2017-223

MOTION FOR TEMPORARY RESTRAINING ORDER

The plaintiff, CENTER FOR MEDIA AND DEMOCRACY, a Wisconsin corporation (“Plaintiff” or “CMD”), pursuant to OKLA. STAT. tit. 12, §1381 *et seq.*, hereby moves the Court for a temporary restraining order against the defendant, Scott Pruitt, the Attorney General of Oklahoma, as well as his agents (“Pruitt” or the “AG”), and requests that the Court set a hearing for preliminary injunctive relief. In support of this motion, CMD shows the Court as follows:

STATEMENT OF FACTS

1. CMD has filed contemporaneously herewith a Petition for declaratory and injunctive relief alleging the defendant’s violations of the Oklahoma Open Records Act, and for injunctive relief against the destruction of certain records maintained by the AG’s office. The undersigned counsel hereby certifies to the Court, pursuant to OKLA. STAT. tit. 12, §1384.1, that he will provide notice to Pruitt and the AG’s office by service of all pleadings and this motion via personal service completed on February 7, 2017; and by delivery of this Motion for Temporary Restraining Order CMD will give or has given Pruitt and the AG’s office notice that CMD would be presenting this motion to the Court.

2. A temporary restraining order is necessary to protect CMD's rights and to preserve the status quo, for the reasons set forth below, until such time as the Court may afford the parties a hearing on CMD's request for temporary injunction, contained in its Petition, as immediate and irreparable injury, loss, or damage may result to CMD before a formal hearing.

3. As set forth in the Petition, CMD is a nonpartisan, nonprofit media watchdog group that conducts in-depth investigations into the influence of corporations in American democracy. CMD has filed nine (9) requests pursuant to the Oklahoma Open Records Act (OKLA. STAT. tit. 51, §§ 24A.1, *et seq.*) ("ORA") from January 2015 through January 2017, which to date have not been responded to by the AG's office.

4. CMD alleges in its Petition that Pruitt employs procedures in responding to ORA requests that require unnecessary actions designed to, and with the actual effect of, severely delaying production of public records sought under the ORA.

5. CMD is concerned that without a court order the AG's office may destroy or dispose of records (either under the ordinary course of business or pursuant to retention policies applicable to the AG's office) that may be responsive under CMD's various ORA requests.

6. Pruitt has been nominated by President Donald J. Trump to become the Administrator of the federal Environmental Protection Agency, and is currently awaiting a confirmation vote of the full United States Senate. During the confirmation process, Pruitt has evaded requests from certain United States Senators for documents related to his tenure as Attorney General for the State of Oklahoma, which are the subject of CMD's ORA requests and which, if produced, would be useful in evaluating Pruitt's potential performance

as head of the EPA.

7. CMD does not seek to shut down the AG's operations related to responding to ORA requests or force him to turn over records that may be unresponsive or irrelevant to CMD's ORA requests, but rather seeks only to make sure the status quo is maintained pending the resolution of this action. Specifically, CMD is concerned that the AG's office may maintain certain document retention policies that provide for the destruction of documents or records after a certain amount of time. Thus, CMD seeks only to ensure that no documents potentially responsive to its ORA requests are destroyed or disposed of prior to the resolution of the instant case.

8. For the reasons stated in the Petition, unless Pruitt and the AG's office are directly or indirectly, alone, or in concert with others, enjoined from destroying documents that are related or potentially responsive to its various ORA requests, CMD will be irreparably harmed by (1) not gaining access to documents that it has requested pursuant to the ORA for a period of more than two years, (2) being frustrated from access to the records of public bodies and public officials in contravention of OKLA. STAT. tit. 51, § 24A.5 and § 25A.6¹, and (3) present and future immeasurable loss from the destruction of the records requested.

9. CMD has no adequate remedy at law as it is impossible to quantify its damages, as the damages cannot be compensated by any remedy at law, and as any mismanagement or destruction of records will be irreparable.

10. Accordingly, CMD requests that this Court enter an order immediately

¹ OKLA. STAT. tit. 51, § 24A.5 states, in part, that "[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction...." OKLA. STAT. tit. 51, § 24A.6 provides that a public body or official such as Pruitt "must provide prompt, reasonable access to its records."

enjoining and restraining Pruitt and the AG's office from:

- a. Destroying or disposing of any record or document that has been identified by Pruitt or the AG's office as potentially responsive to any of the ORA requests submitted to Pruitt or the AG's office by CMD;
- b. Destroying or disposing of any record or document that has not been examined or identified by Pruitt or the AG's office, but that falls within the relevant time period of any of the ORA requests submitted to Pruitt or the AG's office by CMD, and is reasonably expected to be potentially responsive to such ORA requests;
- c. Destroying, altering or deleting any information related to the response or potential response to any of the ORA requests submitted to Pruitt or the AG's office by CMD; and
- d. Any and all other such acts as this Court deems appropriate for injunctive relief.

11. The requested relief is to maintain the *status quo* and to avoid irreparable injury to CMD pending a final determination of the merits. There is a substantial likelihood that CMD will succeed on the merits of its claims against Pruitt and the AG's office. Moreover, a balance of the equities between the parties clearly favors issuance of preliminary injunctive relief, and public policy favors the enforcement of protecting the records of the AG's office that may be responsive to CMD's various ORA requests from destruction or disposal.

ARGUMENT AND AUTHORITIES

A temporary restraining order has the purpose of preserving the *status quo*, in order to prevent irreparable injury until such time as the Court may determine a plaintiff's application for a preliminary injunction. *Morse v. Earnest, Inc.*, 1976 OK 31, ¶12. Such relief is clearly warranted in this action, since CMD has shown by its Petition that Pruitt and the AG's office have (1) failed to respond to CMD's various ORA requests over the course of the last twenty-four (24) months, and (2) may have destroyed or disposed of, or will possibly destroy

or dispose of, documents and records relevant and responsive to CMD's ORA requests, either through its own internal document retention policies or otherwise. The interference with any right of Pruitt or the AG's office by granting the restraining order will be minimal, while protecting CMD and the public from irreparable injury by preserving the *status quo* of the public documents properly identified and requested through CMD's ORA requests. CMD seeks only to make sure the *status quo* is maintained pending the resolution of this action. CMD seeks only to ensure that any responsive or potentially responsive document either identified or likely to be identified as responsive to its ORA requests is maintained in the custody and control of the AG's office and not destroyed or disposed of.

The purpose of a temporary injunction is to preserve the *status quo* at the last peaceful, uncontested status that preceded the controversy. *Weis v. Renbarger*, 1983 OK CIV APP 50, ¶7; *see also Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (citing *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975) ("The function of a preliminary injunction is to preserve the *status quo* pending a final determination of the rights of the parties.")).² Thus, a plaintiff is entitled to a preliminary injunction where it is shown that: (1) there is a likelihood that it will prevail on the merits of its claim; (2) there is a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs any threatened harm the injunction may have on other parties; and (4) the public interest will not be harmed by the issuance of an injunction. *Merrill Lynch v. Dutton*, 844 F.2d 726 (10th Cir. 1988); *Tri-State Generation &*

² The Oklahoma Rules of Civil Procedure have been modeled after the Federal Rules of Civil Procedure, and are substantially similar thereto. *See* Comments to Oklahoma Rules of Civil Procedure. The Court may use federal interpretation as a guide when a state rule is based on federal counterpart. *See Warner v. Hillcrest Medical Center*, 1995 OK CIV APP 123, ¶ 11 (citing *Unit Petroleum Co. v. Nuex Corp.*, 1991 OK 21).

Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986); *Smith v. Soil Conservation Serv.*, 563 F. Supp. 843 (W.D. Okla. 1982). Oklahoma law clearly permits the Court to enter a temporary injunction when it appears by the pleadings that a party is entitled to the relief demanded, and such relief consists of restraining an act, the continuance of which would produce injury to the plaintiff during the pendency of the litigation. *See* OKLA. STAT. tit. 12 §1382.

Here, Pruitt and the AG's office have failed to "provide prompt, reasonable access to its records" as required by OKLA. STAT. tit. 51 § 24A.5(6). Further, CMD is concerned that the AG's office may destroy or dispose of documents relevant or responsive to its various ORA requests unless enjoined by this Court from doing so. If such documents are destroyed or disposed of, significant damage to CMD will occur since it will no longer be able to access and review records that it has lawfully requested from the AG's office, and there is no adequate remedy at law because it will be impossible for CMD to access such documents once they are destroyed.

"It is not necessary that Plaintiff show positively that they will prevail on the merits before a preliminary injunction may be granted." *Atchison, Topeka & Santa Fe Railway Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). "It is only necessary that Plaintiff establish a reasonable probability of success, and not an 'overwhelming' likelihood of success, in order for a preliminary injunction to issue." *Id.* (citing *Lundgrin*, 619 F.2d at 63). "Preserving the status quo is quite different from finally determining the cause itself." *Id.* (citing *Penn*, 528 F.2d at 1185). The United States Supreme Court has explained that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at

a preliminary-injunction hearing.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The present facts provide a high degree of certainty and, at the very least the requisite “reasonable probability,” that CMD will prevail on the merits. Indeed, its Petition asserts that CMD *has not received a single document* in response to its various ORA requests, the first of which was made more than two years ago.

Lastly, Pruitt and the AG’s office would not be prohibited or delayed in conducting any of its regular business, and the requested injunction would only insure that certain documents and classes of documents (not all documents) would be preserved during the pendency of this action. Public policy favors compliance by a government official (Pruitt) and a governmental agency (the AG’s office) with clear statutory obligations³, and CMD’s claims simply ask the Court to require that Pruitt and the AG’s office provide CMD with the documents it has requested.

CONCLUSION

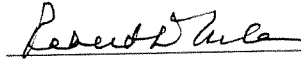
Based on the foregoing, a temporary restraining order should be granted enjoining Pruitt and the AG’s office directly, or in concert with others, indirectly, from:

- a. Destroying or disposing of any record or document that has been identified by Pruitt or the AG’s office as potentially responsive to any of the ORA requests submitted to Pruitt or the AG’s office by CMD;
- b. Destroying or disposing of any record or document that has not been examined or identified by Pruitt or the AG’s office, but that falls within the relevant time period of any of the ORA requests submitted to Pruitt or the AG’s office by CMD, and is reasonably expected to be potentially responsive to such ORA requests;
- c. Destroying, altering or deleting any information related to the response or potential response to any of the ORA requests submitted to Pruitt or the AG’s office by CMD; and

³ See footnote 1 above.

- d. Any and all other such acts as this Court deems appropriate for injunctive relief.

Respectfully submitted,



Robert D. Nelon, OBA #6610

Blake Lawrence, OBA #30620

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

100 North Broadway, Suite 2900

Oklahoma City, OK 73102-8865

Telephone (405) 553-2828

Facsimile (405) 553-2855

Of Counsel:

Arn H. Pearson, Maine Bar #008166

General Counsel

Center for Media and Democracy

122 West Washington Avenue, Suite 555

Madison, WI 53703

Telephone (202) 272-2886

and

Brady R. Henderson, OBA #21212

Ryan Kiesel, OBA #21254

ACLU of Oklahoma Foundation

3000 Paseo Drive

Oklahoma City, OK 73103

Telephone (405) 524-8511

Facsimile (405) 524-2296

**ATTORNEYS FOR PLAINTIFF,
CENTER FOR MEDIA AND
DEMOCRACY**

1466223.1:999914:00014

AFFIDAVIT


COUNTY OF MIDDLESEX)
)
STATE OF MASSACHUSETTS)

I, Arn H. Pearson, of lawful age, having been first duly sworn, upon oath state as follows:

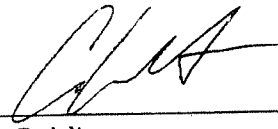
1. I am General Counsel and Policy Advisor for the plaintiff, Center for Media and Democracy (CMD).
2. Given that CMD has been unable to obtain access to any records requested from defendant Scott Pruitt for more than two years; that some of the records requested are now more than four years old; and that Pruitt may be leaving the Attorney General's office shortly, I am concerned that Pruitt may not retain all of the potentially relevant records.
3. Pruitt has been nominated by the President to serve as the Administrator of the Environmental Protection Agency, and his nomination hearing was conducted by the Environment and Public Works Committee (EPW) on January 18, 2017.
4. The records requested by CMD bear on environmental and energy policy and legal matters of intense interest to the public, and pertain to potential conflicts of interest that Pruitt may have as head of the EPA.
5. At his confirmation hearing, Pruitt faced a series of questions about his private meetings with major fossil fuel companies while chair of the Republican Attorneys General Association and fundraising for the Rule of Law Defense Fund—both subjects of outstanding CMD records requests. Senator Sheldon Whitehouse concluded his questioning telling Pruitt his testimony “just doesn't add up.”
6. In written Questions for the Record submitted by committee members following the hearing, several Senators asked Pruitt to disclose the records requested by CMD.
7. Pruitt responded to the Senators by telling them they should file their own open records requests, despite the fact that he has failed to produce a single document in response to an Open Records Act request for the past two years.
8. Democratic Senators felt so strongly about Pruitt's potential conflicts of interest and his failure to disclose the vital public information requested by CMD that they boycotted the EPW Committee's confirmation vote on February 1, 2017.
9. Pruitt is expected to face a full Senate vote next week, but still has not turned over a single public record involving his communications with fossil fuel industry giants or the advocacy groups that they fund.

10. All of the facts alleged therein are true and correct to the best of my knowledge.

Dated: February 7th, 2017


Arn Pearson

Sworn to before me this 7th day of February, 2017.


Notary Public

[SEAL]

