

CASE NO. **#115796**

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

FEB 23 2017

MICHAEL S. RICHIE
CLERK

CENTER FOR MEDIA AND DEMOCRACY, a Wisconsin corporation,

Plaintiff,

v.

MICHAEL J. HUNTER, in his official capacity as ATTORNEY GENERAL OF
THE STATE OF OKLAHOMA,

Defendant.

EMERGENCY MOTION TO STAY

Appeal from Oklahoma County Case No.: CV-17-223
The Honorable Aletia Haynes Timmons

Date of Order Appealed from: February 16, 2017
Effective Date of Order: February 27, 2017

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EMERGENCY MOTION FOR STAY

COMES NOW the Defendant, Michael J. Hunter, Attorney General for the State of Oklahoma, and moves this Honorable Court for an emergency stay of an injunction issued on February 16, 2017, which will take full effect on February 27, 2017. The injunction grants Plaintiff full relief on most of their claims in this suit, but was granted without affording Defendant the opportunity to file an answer, conduct discovery, submit briefs, or any meaningful opportunity to be heard on the vast majority of the relief the injunction grants. In effect, the district court below granted Plaintiff a *sua sponte* partial summary judgment. Because the challenged injunction presents a clear violation of Defendant's due process rights, is an abuse of discretion, and imposes highly onerous burdens on Defendant, this Court should stay the order of the Court below until this appeal can be fully litigated on the merits.

BACKGROUND

Plaintiff has submitted seven requests to the Oklahoma Attorney General's Office under the Oklahoma Open Records Act ("ORA").¹ The oldest of these requests occurred in January 2015 and the most recent occurred in January 2017.

On February 7, 2017, Plaintiff filed a petition in Oklahoma County District Court asking for declaratory and injunctive relief because the Plaintiff had not received records responsive to the open records requests it had made. Plaintiff also alleged that the Attorney General "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." *Pet.* ¶ 20, attached as Exhibit 1. The relief sought by Plaintiff is: (1) "declaratory relief" stating that the Attorney General "violated the ORA by failing to provide prompt and reasonable access to public documents"; (2) "injunctive relief ... for the immediate release of all records responsive to [Plaintiff's] ORA requests"; (3) "prompt *in camera* review of all potentially responsive documents for which any exemption from public disclosure is claimed"; and (4) attorneys fees. Ex. 1, ¶¶ 26, 31. Plaintiff also moved for a temporary restraining order preventing the Defendant from destroying any documents during the course of litigation. (*Motion to Temporary Restraining Order*, attached as Exhibit 2).

The District Court set a hearing on Plaintiff's Motion for 3:00 p.m. that day. Defendant was not notified of the hearing until approximately 1:00 p.m. After the Attorney General informed Plaintiff and the District Court that the requested Temporary Restraining Order was not necessary because existing state policy already prevented destruction of such documents, the Oklahoma County District Court, Honorable Aletia Haynes Timmons, denied

¹ Specifically, the Petition alleges requests filed on January 5, 2015; November 3, 2015; February 10, 2016; April 27, 2016; July 12, 2016; August 4, 2016; October 18, 2016; and two requests on January 2, 2017. At least three of these requests are duplicate requests.

the Plaintiff's Motion for Temporary Restraining Order and set the case for a "further hearing" nine days later, on February 16, 2017, to consider Plaintiff's Motion as a Motion for Temporary Injunction. (*Feb. 7, 2017 Hearing Transcript*, at 20-21, attached as Exhibit 3; *see also Order of (Feb. 15, 2017*, attached as Exhibit 4). At the hearing, the Court recognized that proper process should be afforded the parties when it advised them to confer and determine how much time would be needed to prepare for trial and then she would set deadlines. (Ex. 3 at 18-19).

Then, on February 10, 2017—and as indicated in an email to Plaintiff prior to its lawsuit—the Attorney General's Office issued its response to Plaintiff's January 5, 2015, ORA request, turning over the hundreds of non-privileged, responsive documents related to Plaintiff's request. Nonetheless, Plaintiff contended that the response to the January 5, 2015, ORA request was incomplete.

On February 16, 2017, the Parties appeared for the Plaintiff's Motion for Temporary Injunction. Again, Plaintiff's Motion for Temporary Relief was the same Motion for Temporary Restraining Order that the Court had overruled on February 7. Nevertheless, the Court took up the merits of Plaintiff's underlying case, to wit: whether the Defendant had violated the Open Records Act and whether the Court should order that the Defendant release records to the Plaintiff. (*Feb. 16, 2017 Hearing Transcript*, at 6-7, attached as Exhibit 5). Although it was unclear that the Court would be entertaining the merits of the case beyond the relief requested in Plaintiff's Motion for Temporary Restraining Order, the Parties agreed to continue limiting argument to a single Open Records Act request made by Plaintiff: the January 5, 2015 request. (Ex. 5 at 7).² Defendant advised the Court that the documents

²“THE COURT: So the claim that seems to be outstanding to be addressed today is whether there was a failure to provide prompt, reasonable access to the records of the Attorney

requested by Plaintiff on January 5, 2015, had already been produced. (Ex. 5 at 10). Regardless, the Court demanded to know why a delay in production had occurred. (Ex. 5 at 10-13). Defendant advised that these are answers that would be explored in discovery (Ex. 5 at 11, 13). The Court recognized that discovery would be the normal course and that it would “flesh out” concrete reasons for the delay (Ex. 5). The Court recognized that what would constitute a prompt response to a records request would turn on the facts in each case. (Ex. 5 at 16). Nevertheless, the Court refused to permit discovery and instead ordered the Defendant to produce all documents he had reviewed, whether responsive to the open records requestor or not, and to provide all documents over which privilege was claimed to the Court for *in camera* review. (Ex. 5 at 17-18, 21).²

But, rather than limiting the hearing to the January 5, 2015, request as agreed upon, the Court then went on without warning to determine the merits of the case, and found that the Attorney General had violated the Oklahoma Open Records Act and ordered that the Attorney General respond to *five* of Plaintiff’s Open Records Act requests within ten days: the ORA requests from November 2, 2015; February 10, 2016; April 27, 2016; July 12, 2016; and August 4, 2016. (Ex. 5 at 18-20).

The District Court’s injunction subjects the Defendant to a nearly Herculean task of responding to five large open records requests in a ten day period—and ignoring all other

General's office under the Open Records Act. In particular the argument has been regarding the January 5th, 2015 records; am I correct on that? Are we talking about the January 5th, 2015 and then November 2nd, 2015 or just the January 5th?

MR. JOSEPH: Just the January 5th, 2015 is what I heard, Your Honor.

THE COURT: That's my understanding also.

MR. NELON: We would agree to confine it to the January 2015 request.”

² The Court also required the Defendant to provide a privilege log, although no log is required by statute. (Ex. 5 at 14-15).

ORA requests submitted by other parties prior to Plaintiff's various requests. This was ordered by the Court after an irregular process wherein the Defendant was not provided with meaningful notice or a meaningful opportunity to be heard prior to the injunctions being issued. Rather, the District Court by-passed regular civil processes, disallowed discovery, and essentially granted Plaintiff all the relief it had requested on many of its claims, all before the Defendant had even filed an Answer to the Petition. It is from this injunction that Defendant appeals.

In order to succeed in his Motion to Stay, the Defendant must show the Court (1) that he is likely to succeed on appeal; (2) that there is a threat of irreparable harm if the relief is not granted; (3) whether there is potential harm to opposing party; and (4) whether there is a risk to the public interest. Sup.Ct.R. 1.15(C).

LIKELIHOOD OF SUCCESS ON THE MERITS

The Defendant appeals from the District Court's injunction because he was denied due process by the Court. Rather than permit the Defendant to utilize regular civil procedure, even in an expedited manner, the District Court simply determined that Plaintiff should prevail and granted full relief on most claims without the Defendant having a meaningful opportunity to present his case.

The core element of due process is the right to be heard. That right, however, has no value unless advance notice is afforded of the hearing at a meaningful time and in a meaningful manner. The person to be affected must be fairly and timely apprised of what interests are sought to be reached by the triggered process. Notice and opportunity to be heard must be provided in such a way that a person can intelligently decide in advance whether to appear at the hearing and contest the matters in issue. *Booth v. McKnight*, 2000

OK 49, ¶18, 70 P.3d 855. Due process is flexible and calls for such procedural protections as the particular situation demands. *Flandermeyer v. Bonner*, 2006 OK 87, ¶10, 152 P.3d 195. The purpose of due process is to afford the opportunity to each person to present evidence and arguments in a forum which provides fair and equal justice. *Jackson v. Indep. School Dist. No. 16 of Payne County*, 1982 OK 74, 648 P.2d 26, 31. It is quintessential that the higher the stakes at issue, the more process which must be afforded. *See Walters v. Oklahoma Ethics Com'n*, 1987 OK 103, 746 P.2d 172, 176 (Whether the due process clause requires that a particular right should obtain in a specific proceeding depends upon a complexity of factors including a consideration of the importance of the interest involved, the nature of the proceeding, and the possible burden on that proceeding). Litigants in a civil case are afforded high due process protections. *E.g., Payne v. Dewitt*, 1999 OK 93, ¶13, 995 P.2d 1088 (the right to cross examine witnesses before suffering a money judgment is a requirement of due process).

In the case at bar, Plaintiff has alleged that the Defendant, the Attorney General for the State of Oklahoma, has engaged in a deliberate scheme to violate the Oklahoma Open Records Act. (Ex. 1 at ¶20). A violation of the ORA subjects the Defendant to civil suits for declaratory and injunctive relief, and subjects the Defendant to the payment of attorney's fees. The consequences which may befall a Defendant for a violation of the ORA are those which implicate the Defendant's financial resources. Thus, Defendant should be afforded a high level of due process. Regardless, Defendant was denied a meaningful right to be heard. Defendant was required to participate in an irregular procedure, was denied the rights to conduct discovery and to put on evidence on his behalf.

The Act provides that a Plaintiff who has not timely received records pursuant to a valid Open Records Act request can file a lawsuit for Declaratory and Injunctive relief. This certainly contemplates that the regular procedures and procedural protections of a civil lawsuit will be maintained. This was even recognized by the District Court when it told the Parties to discuss how much time they would need for litigation and then the Court would set deadlines for the case to proceed. (Ex. 3 at 18-19). Instead, on February 16, 2017 the Defendant was sandbagged with arguments regarding the merits of the case without notice that the merits were at issue on that date, including with respect to almost all of Plaintiff's ORA requests. The Court then took an extraordinary step by ordering the Defendant to produce documents that clearly fall outside the scope of the ORA, and then further ordered Defendant, under an impossible deadline, to produce records from five additional open records requests. Defendant had no meaningful opportunity to gather evidence or present his case to the Court.

In other words, the District Court granted Plaintiff full relief on most of its claims in a *sua sponte* summary judgment order. But none of the requirements of summary judgment as set forth in Rule 13 of the Rule for District Courts were complied with. Plaintiff did not even *move* for summary judgment in compliance with Rule 13. Yet whether Defendant has reasonably complied with the ORA is a fact-intensive inquiry.³ *See* A.G. Opin. 99-58 ¶ 11 (finding that the time period for prompt and reasonable access is a question of fact; *see also* Ex. 5 at p.16, ln. 4-8, 10). For example, the most recent request that the District Court ordered produced is only six months old. But Defendant was not even afforded the time or opportunity to gather necessary evidence, including interviewing current and former

³ The District Court below acknowledged that the requirements of the ORA “depends largely on the facts in each case.” Ex. 5 at 16.

employees that process ORA requests and gathering internal process information, to even begin to address Plaintiff's claims. Nor was Defendant afforded the opportunity to present to the District Court potential justifications for delay, which may include: the number of requests received before Plaintiff's latest requests,⁴ the volume of those requests, the volume of Plaintiff's requests, the requests of other parties that Defendant has responded to showing an active and engaged ORA process, the constraints on attorney time posed by state budgets, the time necessary to gather information for any given request, the process and procedures necessary to determine what material is responsive or exempted, the time necessary to review documents to protect documents as the State's chief legal counsel including state employee personal information, attorney-client privileged documents, attorney work product, confidential investigatory documents, and other sensitive information. Defendant was not afforded the opportunity to present any such evidence—or even notice of the scope of the relief the court below was ready to grant—before the court granted the full relief requested on many of Plaintiff's claims. This is a clear denial of due process, and Defendant is likely to obtain success on the merits challenging the District Court's actions.

THREAT OF IRREPARABLE HARM

The District Court, while neither following regular processes nor granting a meaningful hearing to the Defendant, has required the Defendant to produce records from five significant Open Records Act requests. In responding to the first request which the Court required answered by February 21, 2017 personnel in the Attorney General's Office spent over 90 man hours over the weekend before the ordered production getting the documents reviewed and ready to produce. The Court's Order that five additional requests be responded

⁴ The District Court even acknowledged that it was ignorant of these relevant facts. *See* Ex. 3 at 15 (“But, you know, I don’t know what other workload you all have.”).

to in ten days is simply unworkable, will require an extraordinary expenditure of labor and will grind a significant portion of the Attorney General's Office to a halt. Moreover, a rushed process necessarily may compromise the review the Attorney General's Office will engage in, potentially causing inadvertent disclosure of privileged, confidential, personal, or otherwise exempted documents, personal email addresses which, due to the accelerated production schedule the OAG was unable to redact. Regardless, Plaintiff has placed the documents on their website. This harm cannot be rectified through money damages after the fact. See: *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶28, 39 P.3d 152 (Civ.App.Div. 2). A violation of a constitutional right weighs heavily on the Court's consideration of irreparable harm. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016).

THREAT OF HARM TO OPPOSING PARTY

There is no threat of harm to the opposing party. The Defendant has already produced records in response to Plaintiff's oldest records request and continues to process and review ORA requests in the order in which they are received. There is no harm to the Plaintiff in having to follow regular and ordinary civil process in attempting to hold the Attorney General liable for a violation of the Open Records Act.

RISK TO THE PUBLIC INTEREST

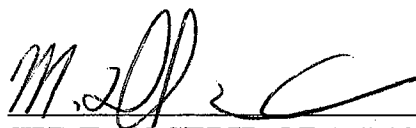
Certainly, the public has an interest in ensuring that the State's executive agencies comply with open records laws. The public also has an interest, however, in ensuring that the State's court utilizes regular and predictable process and that litigants are treated to the due process they deserve. Moreover, the public interest is injured by the fact that the District Court's order will require Defendant to prioritize Plaintiff's requests over all other ORA

requests, including those filed before Plaintiff's requests. This is fundamentally unfair to other members of the public with outstanding requests.

CONCLUSION

This Honorable Court should stay the injunction issued against the defendant during the course of appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of February 2017, I placed a copy of the above and foregoing document into the U.S. Mail, postage prepaid to:

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M. Daniel Weitman

CERTIFICATION OF COUNSEL

I, Jeb Joseph, hereby certify that the Emergency Motion to Stay was not filed earlier for the following reasons:

1. The district court entered its temporary injunction on February 16, 2017 wherein it required that the Defendant make a round of document production by Tuesday, February 21, 2017;

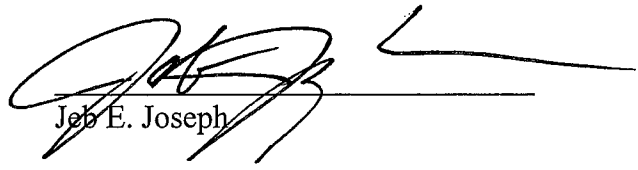
2. Pursuant to the Court's Order, attorneys and support staff for the State worked through the President's Day holiday weekend in order to provide the identified documents relating to Plaintiff's January 5, 2015 ORA request to (a) Plaintiff's counsel, and (b) to the Court for *in camera* review. In excess of 90 man hours was expended over the course of the weekend. Such production was successfully made on Tuesday, February 21, 2017.

3. On Friday, February 17, 2017, Attorney General Scott Pruitt was confirmed as administrator of the E.P.A. Governor Mary Fallin did not appoint a successor until Monday, February 20 at which time she appointed Michael J. Hunter to serve as Attorney General;

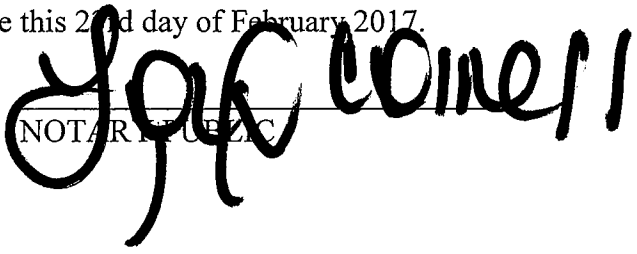
4. On Tuesday, February 21, the first work day of Hunter's administration, Attorney General Hunter made the decision less than twenty-four (24) hours after his appointment to appeal the Court's ruling of February 16. Thus, this request is made less than forty-eight (48) hours after Attorney general Hunter was appointed;

5. The deadline set by the district court for full compliance with the remainder of its order is Monday, February 27, 2017;

6. Thus, even with all diligence, counsel could not file the Emergency Motion any earlier nor could he, because of the tight deadline, file the Motion any earlier in relation to the deadline of the judge's order.


Job E. Joseph

SUBSCRIBED AND SWORN to before me this 20th day of February, 2017.


NOTARY PUBLIC

My Commission Expires:

