

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,)
)
 APPELLANT,)
 v.) Case No. F-2016-62
)
 THE STATE OF OKLAHOMA,) FILED UNDER SEAL
)
 APPELLEE.)

RESPONSE TO DEFENDANT’S MOTION TO UNSEAL THE PROCEEDINGS

Comes now the State of Oklahoma, by and through Attorney General Mike Hunter, and as directed by this Court on December 20, 2017, responds to the defendant’s *Motion to Unseal the Proceedings* (hereafter “Motion”), filed on August 2, 2017. Moreover, on August 29, 2017, the defendant filed an *Objection to Judge Henderson’s Ex Parte Findings of Fact and Conclusions of Law* (hereafter “Objection”). This Objection made arguments germane to providing an adequate response to this Court’s *Order Directing a Response* to the defendant’s August 2, 2017, motion.¹ Because the State interprets this Court’s Order to cover all unsealed documents filed at the time of the defendant’s original Motion as well as all documents since filed in this Court, the State will also refer to the defendant’s Objection where necessary to comply with this Court’s directive. However, it is to that extent – and that extent only – that the defendant’s Objection will be

¹ In his Objection, the defendant “renew[ed] his motion for this Court to unseal the proceedings” because he had not yet had an opportunity to review the transcripts of the remanded hearing or the District Court’s findings of fact and conclusions of law (Objection, p. 12).

addressed as this Court has directed the State to respond to the limited question of whether the sealed documents/information should remain sealed from public view.

The Office of the Attorney General again emphasizes that it does not support the sealing of any document or pleading in this Court, or any other legal forum, unless doing so is grounded in a good faith belief that such is necessary to comply with the law. Every action by the Office of the Attorney General in the unique litigation in this case over the past several months has been conducted in good faith, and driven by the sole desire to protect those whose legal rights are at stake and to fulfill all applicable constitutional and statutory mandates. In this case, however, the State's position is that all information deemed by the District Court to be confidential – and thus protected from public disclosure under Oklahoma law – should remain sealed.

As discussed below, the District Court's conclusion that the material at issue here qualifies as confidential personnel records is supported by the record. The District Court, having reviewed the materials tendered by the Office of the Attorney General to this Court on May 4, 2017, and thoroughly considered the full context and conditions in which they were generated in the remanded proceedings, decided that Oklahoma law did not authorize disclosure to the defendant. Those materials and all the information ultimately generated about

them in these proceedings should therefore not be unsealed and released to the public.

Further, the defendant's Motion must be distinguished from any constitutional right to *discovery* he may have to the sealed materials. Whether the defendant holds a constitutional right to discover the information now contained within the sealed documents in this Court does not, *a fortiori*, require that such information be disclosed to the public.

Documents accessible to the Defendant.

Initially, the State notes that circumstances have changed since the filing of the defendant's Motion on August 2, 2017. As of August 2, 2017, the defendant's counsel had not yet had the opportunity to review the record of the remanded proceedings together with all of the material sealed in this Court.² In addition, on August 24, 2017, this Court ordered the unsealing of some documents that now reveal much of the genesis of the central issues that are now pending, as well as how they have been handled by this Court, the District Court, and the Office of the Attorney General up to that point.³ Thus, more information

² On July 20, 2017, this Court issued a *Clarification Order* which permitted both counsel for the defendant and appellate counsel for the State to view the *in camera* transcripts and exhibits from the remanded proceedings, and the Findings of Fact and Conclusions of Law of Judge Henderson. The Findings of Fact were filed in this Court on August 7, 2017. An Amended Order of the District Court was filed in this Court on August 8, 2017. The transcript and exhibits were filed in this Court on August 10, 2017.

³ The Court ordered the unsealing of its May 30, 2017, *Interim Protective Order*, its July 20, 2017, *Clarification Order*, the State's July 18, 2017, *Emergency Motion*

about these proceedings that was previously sealed has been open to the defendant, as well as the public, for nearly five months since the filing of the defendant's Motion.

There now remain four documents currently sealed in this Court: the State's original motion (hereafter "Original Motion") filed May 4, 2017; this Court's *Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing* issued May 30, 2017; the defendant's instant Motion filed August 2, 2017; and the defendant's Objection filed August 29, 2017. All of these documents make specific reference to and discuss in detail the documents that have been the centerpiece of this litigation for the past several months. For the reasons set forth more fully below, these documents should remain sealed from public view.

With one exception, the defendant's counsel has now had the opportunity to review every pleading and order that is/was filed under seal in this Court. The record reflects that the defendant was not served with the State's Original Motion;

Requesting Guidance Regarding Transmittal of Record of Remanded Evidentiary Hearing, and the defendant's August 2, 2017, Motion for Order to Preserve Evidence. Release of this information effectively renders moot the defendant's initial wholesale request for the unsealing of *all* sealed information filed in this case (as well as his concomitant complaints over an alleged media "feeding frenzy over any scrap of information pertaining to the case[,] and that "because of the request for and granting of *complete* secrecy over this whole issue, counsel could not tell anyone of it") (Motion, pp. 5-7) (emphasis supplied).

the defendant also includes this particular instrument in the renewal of his Motion (see Objection, p. 12). Even though the defendant's counsel have not seen the Original Motion, it is clear they have been privy for quite some time to the reasons the State filed it with this Court under seal and the person to whom they relate (see Objection, pp. 3-8).⁴ The transcript and exhibits of the remanded proceedings, as well as the defendant's Objection to them, reflect defense counsel has now seen the actual material that was filed under seal with the Original Motion, as well as the underlying basis sought for sealing them from his and the public's view. At this point, the State sees no legal reason why the defendant's counsel should not also be able to view at the Court the Original Motion provided to this Court. However, because the Original Motion contains as attached exhibits the personnel records at issue, the Original Motion should not be released to the defendant until a legal determination is made concerning the defendant's right to discovery of these materials. Hence, the State does not object to the defendant's counsel viewing the State's Original Motion.

⁴ This fact is unambiguous, as this Court directed transmission of its *Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing* issued May 30, 2017 - less than a month after the State filed the Original Motion - to ". . . Appellant; and counsel of record" (*Order Remanding Cause to District Court of Oklahoma County for In Camera Hearing, Granting State's Motion for Interim Protective Order and Holding Appeal in Abeyance Pending Outcome of the In Camera Hearing*, p. 8).

As the defendant has been granted access to all the sealed documents filed in this Court *sans* the State's Original Motion supporting its request for a judicial finding (and something the State agrees he should now be able to view at the Court), the only question raised by the defendant's Motion is whether the material considered by the District Court and the Orders/pleadings concerning it should remain sealed from the public. Hence, the remainder of this response addresses only that question.

DISCUSSION

It is important to recall how the documents, pleadings, transcripts, and related orders now at issue became sealed and why. As detailed in the State's first filing on the matter, in early April 2017, the State came into possession of information generated after the defendant's trial that pertained to a single prosecution witness: OCPD chemist Elaine Taylor. After alerting the defendant's counsel to as much about the material that could legally be disclosed, and especially because it might be relevant to a specific claim already raised in the defendant's pending application for evidentiary hearing concerning the performance of his trial counsel, the undersigned gathered as much information about it as possible and provided it to this Court under seal. Because there is no procedure, as there is at the trial level, for *in camera* inspection of sensitive materials protected from disclosure by law before they are disclosed, the State requested a neutral judicial forum where the appropriate legal status could be

made. And until that determination was concluded, the State also asked for an interim protective order.⁵ This Court responded to the State's request for *in camera* inspection by remanding the case to the District Court for an *in camera* hearing, and that hearing was held.

As ordered by this Court, the District Court heard testimony about how, when, and why the materials submitted by the State on May 4, 2017, were generated, the District Court entered Findings of Fact and Conclusions of Law commensurate with this Court's remand Order.⁶ The District Court concluded,

⁵ The defendant's situation was made even more unusual by the fact that the District Attorney and Office of the Attorney General came into possession of the information – and thus knew its contents – before any *in camera* inspection could be made, as opposed to the typical situation prior to a trial where a party desires a category of materials, *e.g.*, personnel records of a witness, and those records (without either party knowing their contents) are ordered by a *third party* (*e.g.*, an employer) to be turned over to the trial judge for *in camera* review to determine the extent of relevance, materiality, and dissemination.

⁶ This Court's original remand Order was issued on May 30, 2017. On July 20, 2017, in a *Clarification Order* now unsealed and open to public view, the Court altered in some respects the Findings of Fact and Conclusions of Law required of the District Court on remand and the procedure by which the record would be transmitted and reviewed by the parties. Pursuant to the *Clarification Order*, the District Court was tasked with determining:

1. Whether the document is discoverable by Holtzclaw's appellate counsel;
2. Whether the document contains impeachment or exculpatory material;
3. If discoverable, which portion of each document is subject to discovery; and
4. The portion of each discoverable document which is subject to the confidentiality statute governing

in relevant part, that all of the material provided by the State and attendant information about them qualified as "personnel records" [REDACTED] [REDACTED] pursuant to 51 O.S.[Supp.2014], § 24A.7(A)(1)[,]" and were thus "subject to discretionary disclosure" (Amended Order, pp. 9, 11).⁷ The District Court further determined that the material was "not discoverable by Holtzclaw's appellate counsel" (Amended Order, p. 11). Thus, there has been a judicial finding – currently under review by this Court – that the items the defendant wishes to be exposed to public viewing (and anything relating to them) are confidential personnel records.

On remand to the district court for an evidentiary hearing, this Court generally upholds a district court's findings when they are supported by the record. *See, e.g., Warner v. State*, 2006 OK CR 40, ¶¶ 92-105, 144 P.3d 838, 873-75 (upholding district court's conclusion after remanded hearing that separation of the jury was not improper within meaning of statute governing jury separation during deliberations where the district court's finding was supported by the record).

personnel records.

(Clarification Order of July 20, 2017, p. 4).

⁷ The Amended Order is not paginated; these page numbers are provided as if the Amended Order had been paginated.

As the defendant correctly notes, the general policy of the Oklahoma Records Act (hereafter, "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.2011, § 24A.2. With this public policy, the Office of the Attorney General wholeheartedly agrees. But the Act also provides that "[e]xcept where specific state or federal statutes create a confidential privilege," some information generated by a public body may be withheld from public view. 51 O.S.2011, § 24A.2. One of those confidential privileges that is specifically created by Oklahoma law applies to personnel records. Section 24A.7(A) of Title 51 provides in pertinent part:

A. A public body may keep personnel records confidential:

1. *Which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or*
2. *Where disclosure would constitute a clearly unwarranted invasion of personal privacy such as employee evaluations*

51 O.S.Supp.2014, § 24A.7 (emphasis supplied). Here, after thoroughly examining materials submitted to this Court by the State, testimony about them, and the context in which all of it was generated, the District Court has concluded that all of the information the defendant now seeks to open to the public is

covered by 51 O.S.Supp.2014, § 24A.7 (Amended Order, pp. 9, 11). The District Court's finding to this effect is supported by the record. Consequently, unsealing is not proper.

This Court construes statutes according to the plain and ordinary meaning of their language. *State v. Stice*, 2012 OK CR 14 ¶ 11, 288 P.3d 247, 250. As the emphasized language above shows, the statute regarding "personnel records" covers those items that "relate to internal personnel investigations," then provides a list of those things that would obviously be included in such "internal personnel investigations." A plain reading of the statute then would cover all types of records that "relate" to *any* internal personnel investigation. That is what the materials here are about, and they fall into two general categories. [REDACTED]

[REDACTED]

[Page 11 redacted in its entirety]

[Page 12 redacted in its entirety]

[Page 13 redacted in its entirety]

[Page 14 redacted in its entirety]

[REDACTED]
[REDACTED]
[REDACTED]

The trial court's findings are all commensurate with the [REDACTED] testimony

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The defendant's arguments for wholesale release [REDACTED]

[REDACTED] are weak. The defendant first relies upon the discretionary language in 51 O.S. Supp. 2014, § 24A.7(A) to support his contention that even if the material at issue here qualified as confidential personnel information, its disclosure is still permissive "rather than mandatory" (Objection, p. 4). The defendant notes that the term "personnel records" is not defined by the Legislature and that the only personnel information "mandated to be kept secret is home addresses, telephone numbers, and social security

numbers of past or current employees” (Objection, p. 4) (citing 51 O.S.Supp.2014, § 24A.7(D)). To this extent, the defendant is technically correct. But the defendant seems to forget that there are two sides to discretionary release, *i.e.*, “may,” of confidential personnel records falling within 51 O.S.Supp.2014, § 24A.7(A): such information may *not* be released under certain circumstances. Merely because it may be permissible to release certain information does not mean it is required by the public body holding the discretion to do so. Therefore, the defendant’s apparent contention that this finding mandates their current public release is not compelling.

More importantly, however, is that the District Court has made a determination in this case, supported by the record, that the materials are confidential personnel records, and the appropriate body to make the discretionary determination whether they are released to the public is the “public body” that generated them; here, the City of Oklahoma City (hereafter “City”). See 51 O.S.Supp.2014, § 24A.7(A). The defendant wholly fails to show why the City should be forced to release confidential personnel information – information to which he has access – to the public when the Legislature has clearly given the City the option of deciding when and how much of such material may be kept confidential [REDACTED]

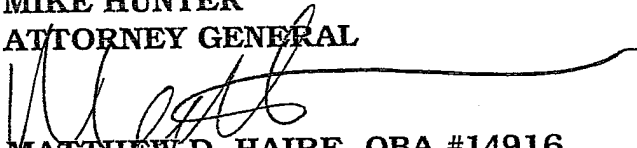
[REDACTED] When examining a statute, this Court “considers the

'natural or absurd consequences of any particular interpretation' of a statute." *Nesbitt v. State*, 2011 OK CR 19, ¶ 20, 255 P.3d 435, 440 (quoting *State v. Anderson*, 1998 OK CR 67, ¶ 3, 972 P.2d 32, 33). The Legislature could not have intended that public disclosure of such partial information clearly covered by the statute, without the mechanisms of due process that were supposed to be afforded the subject of that information, be required. Not only would it be unfair to Taylor, but the public is not well-served by receiving only part of the story.

The District Court's conclusions that the documents are personnel records are supported by the record. [REDACTED]

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL

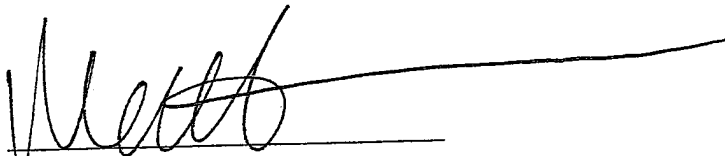

MATTHEW D. HAIRE, OBA #14916
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921
(405) 522-4534 (FAX)

CERTIFICATE OF MAILING

On this 15th day of February, 2018, a true and correct copy of the foregoing was mailed to:

James H. Lockard, OBA # 18099
Michael D. Morehead, OBA # 18114
Homicide Direct Appeals Division
P.O. Box 926
Norman, OK 73070


MATTHEW D. HAIRE