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,	)	
	)	
Appellee.	)	

APPELLANT'S OBJECTION TO JUDGE HENDERSON'S *EX PARTE* FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel, and pursuant to this Court's Clarification Order of July 20, 2017, objects to Judge Henderson's findings of fact and conclusions of law filed in this Court as an Order on August 7, 2017, and an Amended Order on August 8, 2017.[1] (For clarity and ease of citation, these orders will hereinafter be referred to as "Findings of Fact and Conclusions of Law.") Appellant respectfully requests that all of the exhibits filed by the State of Oklahoma with this Court on May 4, 2017, be unsealed and provided to Appellant's counsel. Appellant further renews his objection to the unnecessary secrecy shrouding these proceedings, filed under seal in this Court on August 2, 2017, and requests that all motions and orders, as well as the transcript of the proceedings of the *ex parte* hearing held on June 26 and 27, 2017, be unsealed and made available to public view, with copies of the State's original motion and the transcripts provided to Appellant's counsel.

A. INTRODUCTION

It is worth remembering at the outset that the current controversy began with the State coming forward with information to which counsel for the State, Matt Haire, conceded Appellant was entitled, at least in part, but which Mr. Haire felt he could not lawfully provide to Appellant's counsel without a court order.

[1] The Amended Order simply makes a minor clerical correction to the original order.

Though Appellant's counsel has still not seen the actual motion Matt Haire filed on 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 (hereinafter "Order Remanding Cause"), filed on May 30, 2017, specifically states on page four of the order, "The State agrees that some of the information it has received should be turned over to Holtzclaw's counsel, but states that not all of the information from the personnel investigation is germane to Holtzclaw's appeal." This is consistent with the telephone conversation Appellant's counsel had with Matt Haire shortly before he filed his motion on May 4.

Since that time, however, the State of Oklahoma has managed to obtain a legal ruling from Judge Henderson that all of the information is protected personnel information and that Appellant's counsel is not entitled to have access to any of the information, not even so much as the State had previously admitted should be turned over to Appellant's counsel. This finding came after an *ex parte* hearing to which not only was Appellant's counsel not invited or allowed to attend, but which counsel had no prior knowledge of. Nor was Appellant's counsel given any opportunity to provide the district court with any pertinent legal authority. Appellant vehemently objects to the illegal, *ex parte* manner in which the proceedings unfolded,[2] objects to the unnecessary shroud of secrecy in this matter,

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[2] At the conclusion of the *ex parte* hearing, Oklahoma County Assistant District Attorney Gayland Gieger described this Court's remand order as requiring the district court to "conduct this hearing under seal, ex parte." (*Ex Parte* Hrg. Tr. 338) This is a fundamental misreading of this Court's May 30 order remanding the case to the district court for an ***in camera*** hearing. The words "*ex parte*" do not appear anywhere in that order. To be sure, the remand order anticipated Judge Henderson reviewing the records outside of the presence of counsel. *See* Order Remanding Cause at 3. But the Court ordered more than just an in chambers review. The Court ordered an *in camera* **hearing** – *i.e.*, a hearing held with all spectators excluded, *see* BLACK'S LAW DICTIONARY 763 (7th ed. 1999) – and ordered transcripts of that hearing provided to counsel for both parties. Clearly the Court expected both parties to be able to participate in the remanded hearing. Even if confidentiality concerns required taking *some* of the testimony outside of the presence of Appellant's counsel, there is no reason that the *whole hearing* should have been held without counsel's

and to the factually and legally inaccurate findings and conclusions filed by Judge Henderson on August 7 and 8, 2017.

B. STANDARD OF REVIEW

Appellant asserts that Judge Henderson's Findings of Fact and Conclusions of Law are entitled to **no deference**. Judge Henderson's findings of fact are not well-supported by the record, and his conclusions of law are based on an inappropriate legal standard. Had Appellant's attorneys been permitted to participate in the proceedings, even if *some* of the testimony required counsel's brief and intermittent exclusion, these errors could have been avoided. But for reasons that defy comprehension, Appellant's attorneys were not permitted to know about or participate in the proceedings. Counsel were not given any opportunity to cross-examine any of the witnesses or otherwise offer contrary legal arguments on either the question whether these documents are protected in the first instance, or assuming they are protected, whether they must nevertheless be disclosed to Appellant's counsel. The only point of view Judge Henderson considered was that of the prosecution. To give his findings of fact and conclusions of law any amount of deference would be to adopt and perpetuate his violation of Appellant's due process rights.

C. ALL OF THE DOCUMENTS SUBMITTED TO THIS COURT BY THE STATE SHOULD BE DISCLOSED TO APPELLANT'S COUNSEL

The claim that the material at issue is protected from disclosure cites to Title 51, Section 24A.7. This provision, it should be noted, is not part of a "Right to Keep Things Secret from the Public Act." Rather, it is part of the "Oklahoma Open Records Act," the stated purpose of which is to protect the "inherent right"

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presence or awareness. There is no reason why counsel could not have been present to cross-examine the witnesses on matters that were clearly not confidential, and no reason why counsel could not at least have been afforded the opportunity to provide the district court with relevant legal authority and argument.

of the people of Oklahoma to "be fully informed about their government" and therefore 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." OKLA.STAT. tit. 51, § 24A.2 (2011). The privacy interest of individuals are expressly made subservient to the public's right to know. Section 24A.7 represents an exception to the requirement of disclosure and should be narrowly construed in light of the overall purpose of the act.

Appellant submits that the record of the proceedings below clearly demonstrates that the material at issue is not protected from disclosure by law. Even if any of portions of the documents submitted to this Court by the State may properly be found to be part of Ms. Taylor's "personnel file," and therefore subject to discretionary disclosure, the interests of justice and due process of law favor disclosure under the facts and circumstances of this case. Accordingly, all the materials at issue should be disclosed to defense counsel and/or made public.

1. The documents at issue are not protected from disclosure by law.

Title 51, Section 24A.7(A) states that a "public body *may* keep personnel records confidential." (Emphasis added.) It is important to note at the outset that this provision *does not mandate* confidentiality of personnel records. The use of the word *may* in a statute usually connotes a procedure that is permissive or discretionary, rather than mandatory. *See Mott v. Carlson,* 1990 OK 10, ¶ 6 & n.4, 786 P.2d 1247, 1249 & n.4; *Falconhead Prop. Owners Ass'n v. Fredrickson*, 2002 OK CIV APP 67, ¶ 5, 50 P.3d 224, 226. The only personnel information that is mandated to be kept secret is home addresses, telephone numbers, and social security numbers of past or current employees. § 24A.7(D).

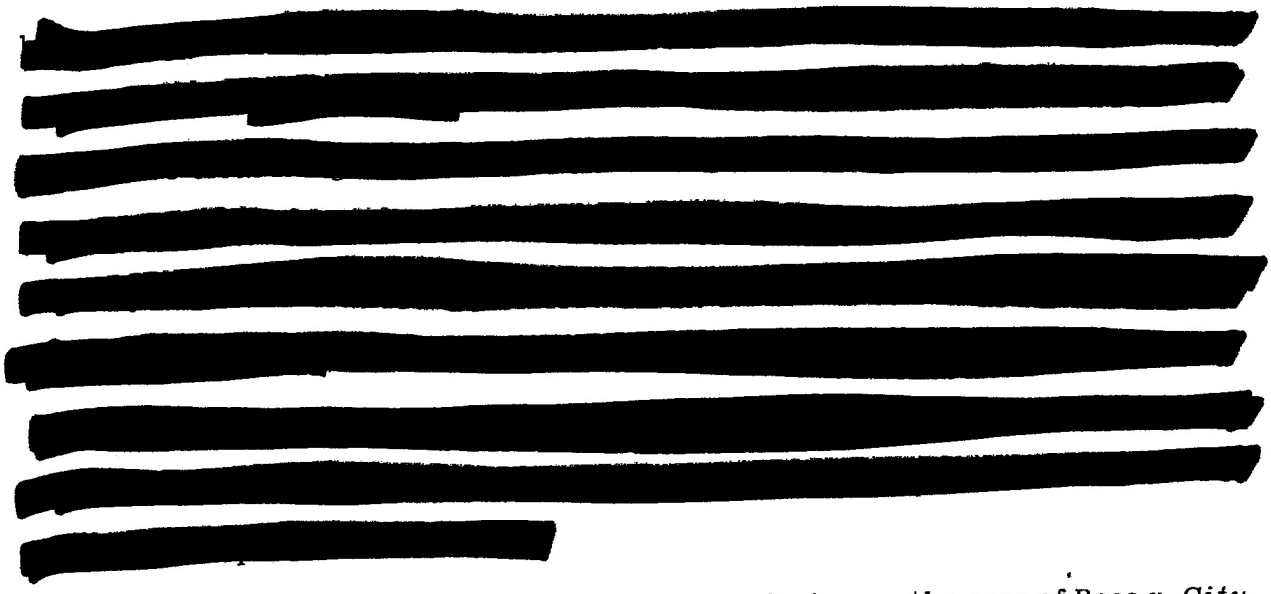
The statute does not define the term *personnel records*. However, the two subsections which follow provide an aid to interpretation of what types of information may be kept confidential. Subsection A(1) refers to records "[w]hich

relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation." While this list is non-exhaustive, the types of records described involve anticipated future or continued employment. It is undisputed that Elaine Taylor retired on February 2, 2017. [redacted] Subsection A(2), on the other hand, allows records to be kept confidential "[w]here disclosure would constitute a clearly unwarranted invasion of personal privacy." Appellant has seen nothing to indicate the information at issue constitutes any kind of invasion of privacy. Her work in this case is clearly a matter of public concern.[3]

[redacted]

[3] Ironically, the same entities who seem so reticent now [redacted] compunction against making every alleged violation of department policy, no matter how minor (including turning his computer off before arriving home, failing to fill out and return Field Interview Cards, and giving subjects rides in his patrol car), a substantial part of the State's case in chief against Appellant.

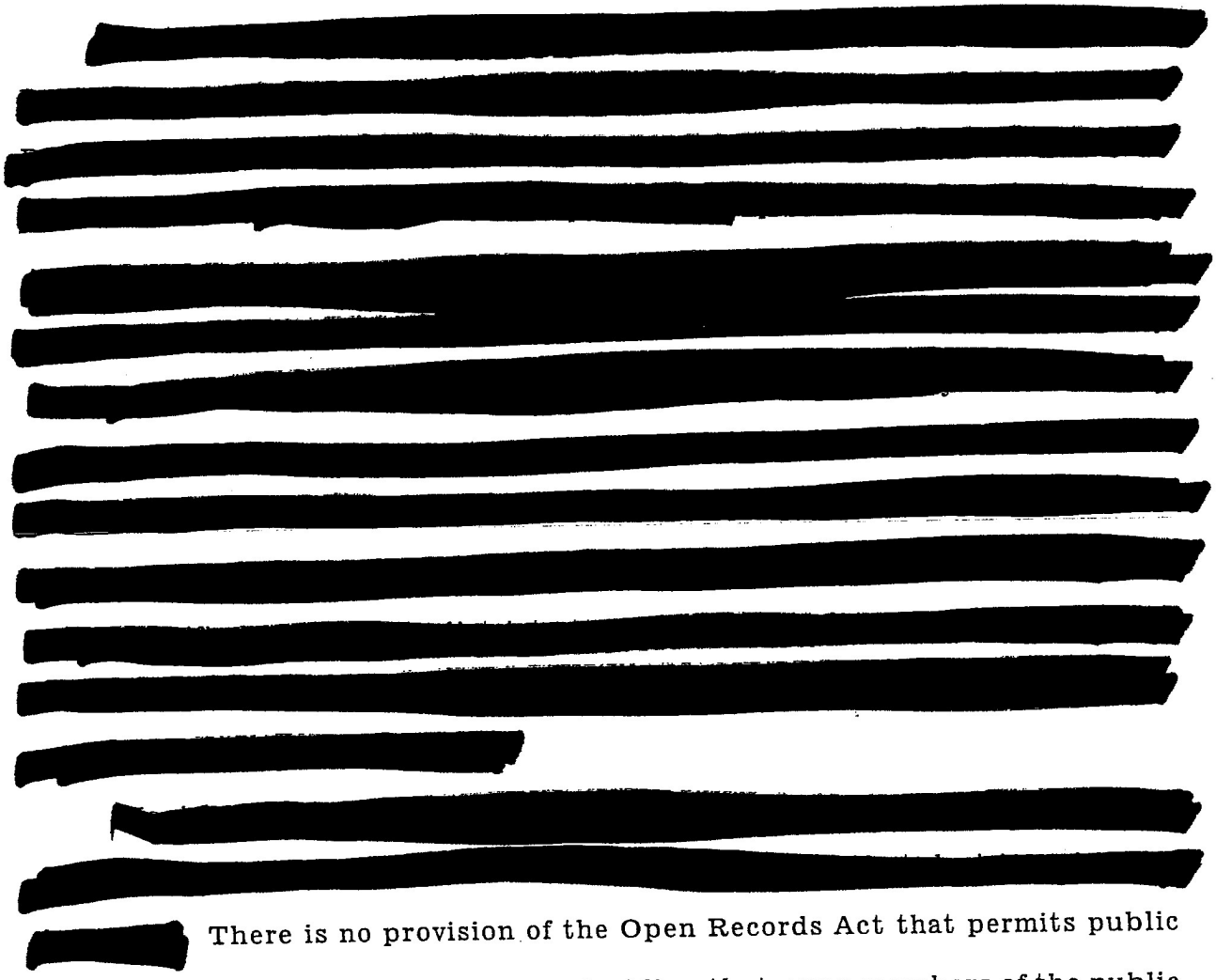
[Page 6 redacted in its entirety]



Judge Henderson relied in part for his conclusion on the case of *Ross v. City of Owasso*, 2017 OK CIV App 4, 389 P.3d 396, which he cited for the proposition, inapposite to the facts and circumstances of this case, that a personnel investigation does not become a matter of public disclosure merely because it involves allegations of criminal misconduct. Had Appellant's attorneys been permitted to participate in the proceedings, they could have directed Judge Henderson's attention to the very next sentence, which indicates that a public body's decision to keep personnel records is subject to review for an abuse of discretion. *Id.* at ¶ 10, 389 P.3d at 399.

The material at issue in *Ross* was generated while the subject was still an employee of the City of Owasso, and the court easily concluded that it constituted a personnel record. That did not end the inquiry, however. Noting that such records are not "*inherently confidential*," the court explained that Section 24A.7 "grants a public body *discretion* to keep such records confidential." *Id.* at ¶ 11, 389 P.3d at 400. In the end, the court found that it could not decide whether the Owasso City Council had abused its discretion in the matter, because the City Council had never actually made a decision wether the report should be declared confidential or publicly released. *Id.* at ¶ 18, 389 P.3d at 401. Accordingly, the court

remanded the case to allow the City Council "to properly respond to Ross's ORA request, at which point any decision to withhold or release the Report will be ripe for examination by the courts." *Id.*



There is no provision of the Open Records Act that permits public bodies to make selective disclosures, deciding that some members of the public may see official documents while other members of the public may not. Accordingly, even if the materials at issue are deemed "personnel records," within the meaning of Section 24A.7, the police department's decision not to keep these documents confidential means that they must be made publicly available and therefore should be disclosed to Appellant's counsel.

2. Even if the documents are determined to be confidential, *Brady* and *Giglio* nevertheless require their disclosure to Appellant's counsel.

In the event this Court nevertheless upholds Judge Henderson's erroneous decision that the documents at issue are protected from disclosure by Section 24A.7, Appellant submits that disclosure is nevertheless required pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Under *Brady*, the prosecution is required to disclose "evidence that is favorable to the accused ... where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 83 S.Ct. at 1196-97. In *Giglio*, that principle was extended to require disclosure of potential cross-examination information. 405 U.S. at 154-55, 92 S.Ct. at 766. Under these standards, Judge Henderson should have ordered disclosure. Even if the information contained within the documents is not considered "exculpatory," the information is certainly favorable to the defense, within the meaning of *Brady* and *Giglio*, because the information could provide useful cross-examination material.

[redacted] Again, this is an issue that could have been litigated more fully below had Appellant's counsel been permitted to participate

in the proceedings.

The standard of materiality requiring a showing that the outcome of the proceedings would have been different comes from the standards governing motions for new trial based on newly discovered evidence, because that is the context in which *Brady/Giglio* claims are usually raised – *i.e.*, favorable evidence is discovered by the defense after trial and presented to an appellate court in support of a request that the defendant's conviction(s) be reversed and remanded for a new trial. It has long been settled that even a violation of the United States Constitution does not automatically result in reversal of a conviction. The reasonable likelihood standard is simply part of the reviewing court's duty to assess whether any error is harmless. *See, e.g., Giglio*, 405 U.S. at 154, 92 S.Ct. at 766.

Appellant submits that this standard is not appropriate at the disclosure/discovery phase. Usually, when a court is determining whether to order disclosure of protected evidence, the trial has not yet occurred, so it would be virtually impossible for the court to assess whether there is a reasonable likelihood that the evidence would change the outcome. *See, e.g., United States v. Rudolph*, 224 F.R.D. 503, 514 (N.D. Ala. 2004); *United States v. Jordan*, 316 F.3d 1215, 1251 n.79 (11th Cir. 2003). As at least one court has observed, "Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999).

This is not to say that there will never come a time when it must be determined that there is a reasonable likelihood of a different outcome. [redacted]

[redacted] This Court's original May 30, 2017, remand order made provision to allow Appellant to supplement his application in light of any disclosures as a result of the *in camera* hearing. This Court will ultimately have the opportunity to consider the impact, if any, of this material, considered not just in isolation but also in combination with the other evidence already submitted to this Court, as well as in conjunction with other errors identified in Appellant's brief in chief. More importantly, this Court will be able to make this determination after *both parties* have had a full and fair opportunity to litigate the issues as an adversarial matter, consistent with the longstanding traditions of American jurisprudence.

D. Conclusion

In summary, the documents at issue here cannot be considered confidential personnel records, [redacted]. Finally, regardless of how the Court chooses to characterize the documents under the provisions of the Oklahoma Open Records Act, their production to the defense is required by the United States Constitution. *See Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97; *Giglio*, 405 U.S. at 154-55, 92 S.Ct. at 766.

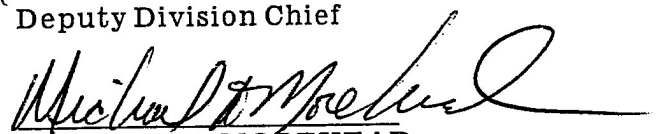
On August 2, 2017, Appellant filed in this Court, under seal, a Motion to Unseal the Proceedings. In an order dated August 24, 2017, this Court determined that motion was premature because Judge Henderson's sealed order, filed on August 7, 2017, had not been reviewed by the parties or this Court. Counsel for Appellant has now reviewed Judge Henderson's order, as well as the transcripts of the two-day hearing held without their knowledge, presence, or participation. In addition to the objection herein to Judge Henderson's erroneous findings of fact and conclusions of law, Appellant specifically renews his motion for this Court to unseal the proceedings. As the foregoing argument and authority clearly demonstrate, the materials at issue are not protected from disclosure by law and should be immediately made available for public viewing.

Based on the foregoing, Appellant respectfully requests that this Court order all documents previously filed under seal – including the State's original motion to file material under seal, filed in this Court on May 4, 2017; all material filed under seal, to wit: Exhibits A through E; the transcripts of the two-day *ex parte* hearing held in the district court on June 26 and 27, 2017; and any and all other motions and orders pertaining to this issue – be unsealed and made available to public view. Appellant further requests that a copy of the transcripts of the *ex parte* hearing be transmitted to Appellant's counsel.

Respectfully submitted,
DANIEL K. HOLTZCLAW

By: 

JAMES H. LOCKARD
Oklahoma Bar No. 18099
Deputy Division Chief



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CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.

JAMES H. LOCKARD