

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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|-------------------------------|---|--------------------------------|
| <b>DANIEL K. HOLTZCLAW,</b>   | ) |                                |
|                               | ) |                                |
| <b>APPELLANT,</b>             | ) |                                |
| <b>v.</b>                     | ) | <b>Case No. F-2016-62</b>      |
|                               | ) |                                |
| <b>THE STATE OF OKLAHOMA,</b> | ) | <b><u>FILED UNDER SEAL</u></b> |
|                               | ) |                                |
| <b>APPELLEE.</b>              | ) |                                |

**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.<sup>1</sup> 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

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<sup>1</sup> In his Objection, the defendant “renew[cd] 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).

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.<sup>5</sup> 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.<sup>6</sup> The District Court concluded,

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<sup>5</sup> 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.

<sup>6</sup> 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

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