

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

VANDELAY ENTERTAINMENT, LLC)
d.b.a. THE LOST OGLE,)
Plaintiff,)

vs.)

Case No: CV-2013-763

MARY FALLIN, in her official)
Capacity as GOVERNOR OF THE)
STATE OF OKLAHOMA; STATE)
OF OKLAHOMA, ex rel. OFFICE OF)
THE GOVERNOR,)
Defendants.)

Judge: Swinton

PLAINTIFF'S MOTION TO RECONSIDER
THE COURT'S ORDER OF JUNE 17, 2014

COMES NOW, Vandelay Entertainment, LLC, doing business as "The Lost Ogle," Plaintiff herein, by and through its attorney of record, Brady R. Henderson of the American Civil Liberties Union of Oklahoma Foundation, and respectfully moves this Honorable Court to reconsider its decision on the parties' cross motions for summary judgment, given by written Order on June 17, 2014, for the following reasons:

1. The Court's decision is plainly contrary to law, employing or creating a common law doctrine, the recognition of which is fully barred by the statutory mandates of the Oklahoma Evidence Code.

2. The Court's decision appears to be based on, and includes statements of, purported facts that are inconsistent with the actual record in this case.

3. The Court's order for a "Privilege Log" may not dispose of all public records that are the subject of this litigation and is insufficient to determine whether documents are protected under Deliberative Process Privilege.

Each of these contentions will now be discussed in greater detail below:

- I. **The Court's decision is plainly contrary to law, employing or creating a common law doctrine, the recognition of which is fully barred by the statutory mandates of the Oklahoma Evidence Code.**

While the Court's Order does not make clear the exact source of the Deliberative Process Privilege it recognizes in Oklahoma, it makes completely and unambiguously clear that this privilege is found in common law, rather than statute or the Oklahoma Constitution.¹ As such, it is explicitly barred by multiple statutes.

The Court's Order specifically quotes the first of these. 12 O.S. §2501 is a general statute dealing with privilege claims by any individual or entity, whether public or private, and which states in its entirety:

¹ See Court's Order of June 17, at 4.

Except as otherwise provided by constitution, statute or rules promulgated by the Supreme Court no person has a privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or record; or (4) Prevent another from being a witness or disclosing any matter or producing any object or record.²

This statute does not allow the recognition of a common law privilege unless adopted or mandated by the Oklahoma Supreme Court Rules, just as this Court finds on the Fourth page of its Order, in the second full paragraph.³ However, the Court's Order fails to take account of two things: First, no rule promulgated by the Supreme Court deals at all with recognition of any privileges or purports to authorize the recognition or incorporation of common law privileges. Second, Oklahoma's statute dealing specifically with government privileges, 12 O.S. 2509, plainly bars recognition of a common law privilege even if it were supported by such a court rule.

Returning first to the issue of rules promulgated by the Oklahoma Supreme Court, Plaintiff is unable to find any reference in any such rule adopting, incorporating, or authorizing recognition of a common law doctrine or privilege. In the instant case, this Court's Order neither quotes nor cites any such rule either. Instead the Court's Order states the following: "In title 12 O.S. Sec 2, the Supreme Court Rule provides that common law remains in full force unless a statute explicitly provides to the contrary, citing *FDIC v. Hamilton*, 1995 CA Okla 10, 58 F 3d 1523."⁴

² 12 O.S. §2501.

³ See Court's Order of June 17, at 4.

⁴ Court's Order of June 17, at 4 (quoted verbatim).

Plaintiff respectfully requests the Court to clarify the intending meaning of this finding or conclusion of law if the Court intended it to be a citation or reference to a Supreme Court Rule. Currently, this statement's plain language appears to cite a statute, 12 O.S. §2, then refer to the statute as a Supreme Court Rule before giving an incomplete paraphrase of the statute followed by a suggestion that the statute/Supreme Court Rule somehow cites a Tenth Circuit Court of Appeals decision rendered approximately eighty-five years after its adoption. It seems highly improbable that this peculiar meaning was intended by the Court, and such Plaintiff respectfully requests the Court review this statement if its unusual character is due to a scrivener's error or similar issue.

Regardless of the meaning of the above statement, the statute codified as 12 O.S. §2 is both well-known and is potentially relevant to this case. As the statute states in its entirety:

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.⁵

In terms of the instant case, this statute establishes both that common law does remain in force in Oklahoma, though as limited and modified by statutes, and that

⁵ 12 O.S. §2.

statutes that limit or contravene common law are to be construed liberally. Even without the mandated liberal construction, however, 12 O.S. §2501 would still function to preclude the recognition of common law Deliberative Process Privilege unless this Court is able to cite a Supreme Court rule establishing such privilege.

Even assuming for the sake of argument that such a Supreme Court Rule could be found, there is a second statute that applies specifically to government privileges. It unambiguously precludes any recognition of a government privilege unless it is one required by federal law or the Constitution or statutes of Oklahoma.⁶ In 12 O.S. §2509, the Oklahoma Evidence Code provides:

- A. If the law of the United States creates a governmental privilege that the courts of this state must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

- B. *No other governmental privilege is recognized except as created by the Constitution or statutes of this state.*⁷

As argued in Plaintiff's Motion for Summary Judgment and its supporting Brief, unlike 12 O.S. §2501, Section 2509 is more specific and more restrictive as to the privileges that the government can claim. By its plain language, Section 2509 bars any recognition of a governmental privilege found in Oklahoma common law, regardless of what, if anything, any Supreme Court Rules had to say. Only a federal, statutory, or

⁶ See 12 O.S. §2509, and for additional information on this statute, Plaintiff's Brief in Support of Motion for Summary Judgment, at 11.

⁷ 12 O.S. §2509A-B (emphasis added) (subsection C omitted due to lack of any relevance to the instant case).

Constitutionally-based privilege can be claimed by the government under Section 2509's explicit curtailment of government secrecy.

This Court's Order states unequivocally: "The Deliberative Process Privilege is a common law privilege unique to the government."⁸ As such, its recognition and use is wholly and plainly not legal under Section 2509, and would only pass muster under Section 2501 if an actual Supreme Court Rule could be found to mandate recognition. Because Oklahoma law establishes an outright bar to the recognition of a common law Deliberative Process Privilege, Plaintiff respectfully requests the Court reconsider its ruling recognizing such doctrine.

II. The Court's decision appears to be based on, and includes statements of, purported facts that are inconsistent with the actual record in this case.

Whether or not the Governor of Oklahoma may claim a Constitutionally-based Executive Privilege has been, and remains, at the heart of this case. However, the Court's Order appears to dispose of this important Constitutional question without an examination of its merits, instead relying on a finding that the parties have settled the question. Beginning in the final paragraph of the first page of the Court's Order, the Court states: "The parties have agreed that no Constitutional or Statutory authority

⁸ Court's Order of June 17, at 3.

exists as the basis of Defendant's exercise of Executive Privilege."⁹ While Plaintiff argues that no such Constitutional authority exists, Plaintiff has been unable to procure any such agreement from Defendant Fallin. In fact, the Defendant's pleadings both arguing for and responding to motions for summary judgment demonstrate that Defendant Fallin argues consistently that various parts of the Oklahoma Constitution create a Constitutionally-based Executive Privilege.¹⁰

While the result of this Court's finding of a purported agreement is effectively to reject Defendant's Constitutional arguments—a result with which Plaintiff certainly does not disagree—the Court's finding is inaccurate nonetheless. Plaintiff has argued and continues to argue that there is no Constitutional authority for Executive Privilege in Oklahoma, but Plaintiff finds nothing in the record to support the notion that Defendant Fallin is in agreement. To the contrary, throughout the record of this case Defendant Fallin's arguments attempt to justify the withholding of public records otherwise subject to the Oklahoma Open Records Act by relying strongly on purported Constitutional authority.

Plaintiff respectfully requests this Court review the record and rescind the erroneous finding of agreement or set and hold an additional hearing, if needed, to verify whether such agreement has in fact taken place. Should Plaintiff's interpretation of this component of the Court's Order be erroneous as to what the Court intended to

⁹ Court's Order of June 17, at 1-2.

¹⁰ *See for example*, Defendant's Response to Plaintiff's Motion for Summary Judgment, at 5-8.

find or rule, Plaintiff respectfully requests the Court clarify or supplement it so as to remove any potential for further confusion.

The Court's Order contains a second finding of a purported agreement that is inconsistent with the record in this case. In the third paragraph of the third page, the Court's Order states: "All parties agree the documents at issue fall within the definition of the Deliberative Process."¹¹ It then immediately continues by stating that the only remaining issue is thus whether the Deliberative Process Privilege can be recognized in Oklahoma.

With utmost respect to the Court, this purported agreement simply has not taken place, nor could it have. Plaintiff has been and continues to be without sufficient information about the withheld public records to ascertain whether any of them are actually part of the deliberative process.¹² Only when the privilege log ordered by the Court is delivered will Plaintiff have even the barest information needed to determine what each of the withheld documents constitutes. As will be argued below in more detail, even then it is unlikely that Plaintiff or the Court will have sufficient information to answer definitively whether all of the documents are properly part of the deliberative process.

Plaintiff further notes that the Court's Order gives no explicit definition of what is part of the deliberative process for the purposes of the Deliberative Process Privilege.

¹¹ Court's Order of June 17, at 3.

¹² See Plaintiff's Petition, at ¶14 and Exhibit B.

Plaintiff respectfully requests this Court review the record and rescind the erroneous finding of agreement or set and hold an additional hearing, if needed, to make further inquiry. Unless the Court finds Plaintiff to be in error, Plaintiff respectfully requests that the Court further define the scope of the Deliberative Process Privilege that the Court has now found to exist in Oklahoma common law.

III. The Court's order for a "Privilege Log" may not dispose of all public records that are the subject of this litigation and is insufficient to determine whether documents are protected under Deliberative Process Privilege.

Assuming for the sake of argument that the Court declines to reconsider its ruling so as to comport with state law (as urged in Section I), there would remain multiple unresolved issues concerning the Court's application of Deliberative Process Privilege to the instant case.

This case, from its beginning, has concerned public records withheld under three distinct claims of privilege; Executive Privilege, Deliberative Process Privilege, and Attorney-client Privilege. Of the 31 documents being kept secret by Defendant Fallin, the record is silent as to how many of them have been withheld under Executive Privilege and Attorney-Client Privilege.¹³ The Court's Order, despite its apparent rejection of both the Executive Privilege and Attorney-Client Privilege claims, makes no

¹³ See Plaintiff's Petition, at ¶¶10-14 and Exhibit B.

disposition as to records withheld under either claim. This may be due to the Court's finding (which Plaintiff contests above) that the parties made some sort of agreement that all withheld documents in this case were part of the deliberative process. Should that finding of agreement be rescinded, Plaintiff respectfully requests this Court supplement its Order to include not merely a Privilege Log of those documents withheld under the Deliberative Process Privilege, but also an order to turn over documents withheld under rejected claims of other privileges.

In the alternative, should the Court continue to rely on this purported agreement or otherwise find that all documents in the case are part of the deliberative process, Plaintiff respectfully requests the Court supplement its order to include additional information about the documents and an in camera examination by the Court. Both of these are necessary to definitively determine whether the documents are properly subject to Deliberative Process Privilege.

Since the Court's Order does not define the scope of this privilege, the only guidance available is that provided by the Court in its citation of two cases to explain and justify its recognition. Both of these cases upheld withholding of documents under the Deliberative Process Privilege only after in camera examinations of the documents'

contents by the respective courts and information provided to respective plaintiffs that far exceeded that ordered in the instant case.¹⁴

In *Coastal*, decided by the District of Columbia Circuit Court of Appeals and concerning withholding of documents by the United States Department of Energy following a federal Freedom of Information Act request, the Court rejected the government's attempt to provide minimal information to the court (roughly the same information as this Court has ordered provided in the instant case).¹⁵ Furthermore, it required in camera investigation to determine whether the government had met its burden to establish the essential elements of Deliberative Process Privilege, which the court found to require far more than merely that a document is pre-decisional and deliberative.¹⁶ The court found it must also; (1) be reflective of the give-and-take of the consultative process, (2) be a recommendation, draft document, proposal, suggestion, or other subjective document, (3) reflect personal opinions of the writer rather than the policy of the agency, (4) inaccurately reflect or prematurely disclose the views of an agency, (5) be recommendatory in nature or a draft of what will become a final document.¹⁷

In *Gwich'in Steering Committee*, decided by the Alaska Supreme Court in 2000, a similar in camera investigation was undertaken. Just as in *Coastal*, the court found

¹⁴ See *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *Gwich'in Steering Committee v. State of Alaska*, 10 P.3d 572 (Alas. 2000).

¹⁵ *Coastal States Gas Corp.*, supra.

¹⁶ *Id.*, at 866.

¹⁷ *Id.* at 866.

additional requirements for justifying a claim under the Deliberative Process Privilege beyond the mere definition of a document as “pre-decisional” or “deliberative.”¹⁸ The court finds that a communication must reflect a give-and-take of the decision making process and must contain opinions, recommendations, or advice about agency policies.¹⁹

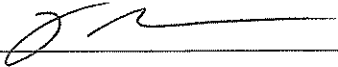
The Privilege Log ordered by the Court in its Order of June 17 does not contain sufficient information to satisfy the standards set out in these cases, and the Court has not, thus far, given any contrary or more deferential set of standards for use here in Oklahoma. As such, Plaintiff respectfully requests that if the Court continues to recognize a common law Deliberative Process Privilege, then the Court clarify or supplement its definition of the Privilege’s scope and requirements.

WHEREFORE, all above premises considered, Plaintiff respectfully requests that this Honorable Court reconsider the components of its Order as argued above and to the extent necessary for the interests of justice, to amend, rescind, and supplement the Order of June 17 to comport with the record of this case and to the laws of the State of Oklahoma.

¹⁸ *Gwich'in Steering Committee*, supra, at 579.

¹⁹ *Id.*

Respectfully Submitted,



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CERTIFICATE OF DELIVERY

The undersigned does hereby certify that on the day of filing, a true and correct copy of the above and foregoing is being delivered to Senior Assistant Attorneys General Neal Leader and Sandra Rinehart at the office of the Attorney General of Oklahoma, via First Class U.S. Mail, postage prepaid.

