

Open Records Act

51 O.S. §24A.1 - §24A.32

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"From ordinary people come extraordinary results"

ORA 101

As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government. ... The purpose of this 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. §24A.2

"From ordinary people come extraordinary results"

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ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

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"From ordinary people come extraordinary results"

A series of horizontal blue and white lines of varying lengths and colors, creating a sense of motion or a modern design element, is located in the bottom right corner of the slide.

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- Public Body: Any City or Town and its commissions, trusteeships, authorities, councils, committees and public trusts. §24A.3(2)
- Public official: Your officers and employees. §24A.3.

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- Record: Does the item relate to the:
 - ✓ Transaction of public business;
 - ✓ Expenditure of public funds; or
 - ✓ Administering of public property.

§24A.3(1)

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- 3 Types of Records:

- Must Produce: "Open" (Default under ORA)
- Must Not Produce: Confidential (not "Open")
- May Produce: Discretionary

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- ORA:
 - 21 exceptions to mandatory production.
 - Incorporates all other privileges and confidentiality provisions into the ORA (if they otherwise apply to you). §24A.5(A).
- Public entity has the burden to establish the applicability of an exception to production.

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- Applies to records that exist when the request is made. *See* §24A.18; 67 O.S. §§ 203(c) & 207.
- Not required to create a record that does not exist.
- Cannot withhold a record that has some confidential information if the information can be redacted. §24A.5(2).

ORA 101

All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours... §24A.5

- §24A.17: Penalty for willful violation of the ORA:
 - Criminal: Misdemeanor (\$500 fine and/or 1 year in jail).
 - Civil Action: Court can order production and award the Plaintiff attorney fees and costs.

Personnel Records & Ross

Ross v. City of Owasso, 2020 OK CIV APP 66

- §24A.7(A): Personnel record “may” be kept confidential in 2 instances:
 1. Records reviewed in making an employment decision.
 2. Records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.
- (A)(2) Can be a subjective standard.
- (A)(1): Objective standard.

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Ross v. City of Owasso, 2020 OK CIV APP 66

- (A)(2) provides examples of types of information that fits the criteria for constituting an invasion of privacy.
- If we withhold a record under (A)(2) outside of the examples, a Court can decide whether we were correct in finding the record fit the statutory criteria. Okla. Public Employees Assoc. v. State, 2011 OK 68, 267 P.3d 838.
- *Did the City apply the statute correctly?*

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Ross v. City of Owasso, 2020 OK CIV APP 66

- ORA challenge is *supposed to be* limited to whether the City applied to ORA correctly.
 - The lone legislative exception relates to Law Enforcement Records, 51 O.S. §24A.8(B), allowing a Court, by statute, to balance the public's interest with the PD's interest in withholding.
- (A)(1) is an objective standard. Court review *should be* limited to whether the record fits (A)(1).
- Ross expands the scope of the review.

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Ross v. City of Owasso, 2020 OK CIV APP 66

• **Facts:**

- City Manager let go after a City-funded report allegedly identified criminal and/or policy violations. Grand Jury found “unethical / questionable” (but not unlawful) conduct.
- Manager’s contract: no severance if fired for “cause”.
- Manager’s separation was via a severance agreement. Questioning the legitimacy of the severance, citizens sought the neutral report via the ORA.
- Request denied under §24A.7(A)(1).

Personnel Records & Ross

Ross v. City of Owasso, 2020 OK CIV APP 66

- **Held:**

- Record “may” be withheld under §24A.7(A). Since City had discretion to release the report a Court can review to determine whether the City abused that discretion.
- Abuse of discretion: Balance the City’s interest in withholding the record with the public’s interest in obtaining the record.
- City abused its discretion in withholding the report.

Personnel Records & Ross

Ross v. City of Owasso, 2020 OK CIV APP 66

- Factors considered:
 - Interest to the community at large or just one person?
 - Objective basis to question the legitimacy of a governments action or simple curiosity or a general desire to broadly monitor the workings of government?
 - Specific issue or general investigative or journalistic interest?

Personnel Records & Ross

Ross v. City of Owasso, 2020 OK CIV APP 66

- Factors considered:
 - Routine day-to-day personnel matter or a decision regarding a high-profile employee?
 - Does the record relate to a decision by the elected officials or one made by an appointed official?

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Ross v. City of Owasso, 2020 OK CIV APP 66

- *The request involved "a high profile employee in an official position... It involves specific questions of why the City Manager, who was accused of misconduct, was granted a substantial severance package, paid for by the taxpayers of Owasso, instead of being fired... it is a 'core' Open Records matter going directly to questions of the legitimacy of the Mayor and City Council's good governance and use of funds, and the citizens' inherent political power to inquire into these matters."*

Personnel Records & Ross

Ross v. City of Owasso, 2020 OK CIV APP 66

- Pre-Ross: ORA challenge limited to determining whether the law allowed the City to withhold the record.
- Post-Ross: Where the withholding is discretionary, a Court can also determine whether the City abused its discretion.
 - Judicial second guessing of legally correct decisions.

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Ross v. City of Owasso, 2020 OK CIV APP 66

- Potential future cases under Ross:
 - High profile employee is not fired after allegations of serious misconduct are made public?
 - High profile employee is fired for cause amid public allegations that the termination was not for cause and public monies must be expended to defend the termination?
 - All “high profile” cases of alleged misconduct?

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Ross v. City of Owasso, 2020 OK CIV APP 66

- Potential future cases under Ross:
 - Personnel documents withheld under §24A.7(A)(2)?
 - Documents withheld under other ORA exemptions that are “may” rather than “shall” withhold?
 - Documents withheld under other non-ORA privileges which are discretionary or can be waived?

Who has the record?

- 2009 OK AG 12:
 - ORA Applies to City employees and Officials. Their records subject to production under the ORA.
 - E.g. text messages and emails.
 - Must meet the statutory criteria of a “Record”.
 - Must the entity force the Official to turn it over to the entity in order to respond to the ORA?

Who has the record?

- 4th Amendment:

Searching *our* files would generally be a reasonable “search” if in response to an ORA request. See City of Ontario v. Quon, 560 U.S. 746 (2010).

Searching an Official’s files for ORA purposes *could* be held found to be an unreasonable search. See U.S. v. Ackerman, 831 F.3d 1292 (10th Cir. 2016) (4th Amendment can be violated even where the person had no privacy interest).

Having the Official search their own files alleviates the concern.

Who has the record?

- §24A.17: Official can violate the ORA separate from the entity. Implies the duty to produce applies to the Official.
- Entity can only produce records in its possession. The record is not in the entity's possession.
- Forward the request to the Official and request production.
- Official should review §24A.9 & §24A.14.

Who has the record?

- Social media accounts operated by public officials can be deemed “official” government pages. *Compare Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) and *Knight 1st Amendment Inst. v. Trump*, 928 F.3d 226 (2nd Cir. 2019) *with Campbell v. Reisch*, _ F.3d _ (8th Cir. 1/27/2021).
- For ORA purposes, the more “official” the page the more likely it will be subject to the ORA.

Abusive Requests

- §24A.5(4):
 - Search fee can be charged for requests 1) that are solely for a commercial purpose or 2) would clearly cause excessive disruption of our essential functions. Media requests are not to be considered to be for a commercial purpose.
 - *"In no case shall a search fee be charged when the release of records is in the public interest, including, but not limited to, release to the news media, scholars, authors and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants."*

Abusive Requests

- §24A.5(6):
 - A public body must provide prompt, reasonable access to its records but may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions.
 - Delay: limited to the time required for preparing the requested documents **and** the avoidance of excessive disruptions. Priority should be given to requests that can be satisfied more quickly.

Abusive Requests

- Media vs. Citizens:
 - Commercial purpose exception exists for media only.
 - “With the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred.” Citizens United v. F.E.C., 558 U.S. 310, 352 (2010).
 - Excessive disruption applies to the public at large, media included.
 - Regardless of who requests, releases in the public interest cannot result in a search fee.

Abusive Requests

- Excessive Disruption vs. Public Interest:
 - Public Interest “is as equally well served by public agencies performing their essential services without burdensome, disruptive records requests as in providing release of information to taxpayers.” McVarish v. New Horizons Cmty. Counseling & Mental Health Servs., Inc., 1995 OK CIV APP 145, 909 P.2d 155.
 - Excessive disruption must be proven by the City. Transportation Info. Servs., Inc. v. State ex rel. Oklahoma Dep't of Corr., 1998 OK 108, 970 P.2d 166.
 - Fees and timeline for compliance are both tools in responding to requests that would disrupt operations.

Abusive Requests

- Err (in writing) on the side of the public:
 - Attempt to clarify vague or overbroad requests.
 - Advise the cost and timeline for compliance. Offer to expand the timeline to avoid some or all of the cost.
 - Offer to let them prioritize among the items they want.
 - Advise of any unique hardships that are in place.
 - Documentation should paint a clear picture (to a Judge): *We did everything we could to get them what they wanted as quickly as possible while keeping the City running.*
 - *We have nothing to hide!*

"From ordinary people come extraordinary results"

Why do you want it?

- 1999 OK AG 55: very limited in your ability to inquire into the motivation behind the request.
 - Search fees apply to requests solely for commercial purposes. You can inquire for this purpose.
 - Put it in writing: Ensures the entity can respond fully and completely.
 - Ross: How do we know the motivation if we can't ask?