

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

JUL 26 2024

137
RICK WARREN
COURT CLERK

THE SUSTAINABLE JOURNALISM)
FOUNDATION, D/B/A NONDOC MEDIA)
and WILLIAM W. SAVAGE III,)
)
Plaintiffs,)
)
vs.)
)
VICKI ZEMP BEHENNA, as DISTRICT)
ATTORNEY FOR OKLAHOMA COUNTY,)
)
Defendant.)

CASE NO. CV-24-_____

CV-2024-2074

**PETITION FOR RELIEF FOR VIOLATIONS
OF THE OKLAHOMA OPEN RECORDS ACT**

COMES NOW the Plaintiffs, The Sustainable Journalism Foundation, d/b/a NonDoc Media and William W. Savage III (collectively "Plaintiffs"), by and through their undersigned counsel, to petition this Court pursuant to the Oklahoma Open Records Act ("ORA"), 51 O.S. §§ 24A.1-24A.32, for (1) a declaration of the rights and responsibilities of Oklahoma County District Attorney Vicki Zemp Behenna ("Defendant") as to the public records sought by Plaintiffs; (2) an order requiring Defendant to immediately conduct an adequate search for records and enjoining Defendant from denying access to specific public records; and (3) a writ of mandamus pursuant to 12 O.S. §§ 1451-1462 directing Defendant to produce the requested public records.

In support of this Petition, the Plaintiffs allege and state as follows:

PARTIES

1. Plaintiff The Sustainable Journalism Foundation d/b/a NonDoc Media ("NonDoc") is a nonprofit media company, operating within and officing in Oklahoma County, which produces

news content for "the public good." NonDoc makes its content freely and openly available on its website (www.nondoc.com) and various social media platforms.

2. Plaintiff William W. Savage III ("Savage"), a resident of Oklahoma County and who is also known in a professional capacity as Tres Savage, is a reporter and Editor in Chief of NonDoc.

3. Defendant Oklahoma County District Attorney Vicki Zemp Behenna is an elected government official tasked with reviewing and prosecuting alleged criminal behavior in Oklahoma County. Defendant is also required to uphold the laws of Oklahoma and has enforcement authority regarding the Oklahoma Open Records Act for public business conducted within Oklahoma County.

4. The Oklahoma Open Records Act ("ORA") was enacted by the Legislature "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.

5. Absent a statutorily prescribed exception in the ORA, "the record must be made available for public inspection." *Citizens Against Taxpayer Abuse, Inc. v. City of Oklahoma City*, 2003 OK 65, ¶12, 73 P.3d 871, 875. The public body urging an exemption (to disclosure) has the burden to establish the applicability of such exemption. *Id.*

STATEMENT OF FACTS

6. Defendant Vicki Zemp Behenna was sworn into elected office as the District Attorney of Oklahoma County on Tuesday, January 3, 2023.

7. Behenna inherited three pending criminal cases filed against a combined seven municipal police officers for fatal shootings that occurred in 2019 and 2020. The manslaughter and murder charges had been filed by former District Attorney David Prater, who retired and did

not seek reelection. The fatal shootings received prominent news media and public attention and factored prominently in the 2022 Oklahoma County district attorney election campaign, during which Behenna (as a candidate) sparred with her opponent over his promise to dismiss the charges if elected.

8. Soon after taking office in 2023, Behenna entered into a contractual agreement with National Justice Consultants, a Santa Monica, California company owned by Clarence Chapman, for purposes of reviewing and providing recommendations and opinions about the three pending police-shooting prosecutions.

9. On Thursday, July 20, 2023, Savage and NonDoc managing editor Michael McNutt met with Brook Arbeitman, Behenna's director of communications, and inquired as to how Behenna was proceeding with the pending cases. Arbeitman acknowledged that Behenna had contracted with a "use-of-force" expert to review the fatal shootings and provide analysis.

A. The contract

10. On July 20, 2023, Savage made a request to Arbeitman under the Oklahoma Open Records Act for a copy of the contract with Chapman and his company. Arbeitman said she would check with an assistant district attorney before releasing the contract.

11. At 7:16 p.m. on Thursday, July 27, 2023, Arbeitman distributed an "embargoed" press release saying Behenna would hold a 3 p.m., Friday, July 28, 2023 press conference at her office. Savage followed up his previous request for the contract by text.

12. At the press conference, Behenna announced she was dismissing all seven charges against officers in all three fatal police-shooting cases.

13. During the press conference, Behenna repeatedly emphasized that her decision to dismiss the charges was significantly based on analysis and/or recommendations provided by

Chapman. For example, when Savage asked Behenna why she reached a conclusion different from that of her predecessor regarding the culpability of Sgt. Clifford Holman in the shooting of Benny Edwards, Behenna responded, “Part of it is in consultation with an expert. I don't think an expert on the use of force had ever been retained in those cases to evaluate the facts and look at it frame by frame, which is what our expert did.”

14. Similarly, in response to another question, Behenna again advised “I mean, we relied heavily on our experts.” Following up, Savage asked, “How much did you pay the expert? What [were] the terms of the contract?” Behenna responded, “I don't know that that's really relevant here, but we can talk about that.”

15. On July 28, 2023, Arbeitman sent Savage an email containing a forwarded message from Assistant District Attorney Aaron Etherington contending the “contract requested falls outside the scope of those we are required to disclose under the (Open Records) Act” and was also protected from disclosure by common law privileges for attorney work product and the deliberative process privilege. (See attached Exhibit “A”).

B. The Report(s)

16. During and after the July 28, 2023 press conference, Arbeitman distributed a four-page press release to the media, including Savage, in print and by email. (See attached Exhibit “B”).

17. The press release included sections discussing each of the three cases. In each section, quoted passages were attributed to the use of force expert Chapman, the owner of National Justice Consultants, with whom the district attorney had contracted. (See attached Exhibit “B”).

18. Behenna’s press release quoted directly from Chapman’s expert opinion report(s) (which she is now refusing to disclose) as justification for her decision to drop charges against

police officer Chance Avery in the death of Christopher Poor, drop charges against police officers, Jared Barton, Corey Adams, Bradley Pemberton, Bethany Sears and Jonathan Skuta in the death of 15-year-old Stavian Rodriguez, and drop charges against police officer Clifford Holman in the death of Bennie Edwards.

19. As announced, Behenna filed motions to dismiss with prejudice all the charges against the police officers, meaning the counts cannot be re-filed, even if additional evidence is discovered.

20. On September 18, 2023, counsel for Savage sent Behenna a letter requesting she reconsider her denial of Savage's request for the contract, stating a strong public interest in favor of releasing the information, which involves the expenditure of tax-payer funds, and concluding: "the ORA expressly mandates that the records requested by Mr. Savage be made available to the public. No cited exemption to the broad and unequivocal reach of the ORA applies to Mr. Savage's request and elaborating the legal principles summarized above." (See attached Exhibit "C").

21. The contract is a public record within the meaning of the ORA, which provides that "every public body and public official has a specific duty to keep and maintain complete records . . . reflecting all financial and business transactions relating" to the "expenditure of any public funds[.]" 51 O.S. § 24A.4; *see also id* § 24A.3(1). Behenna's refusal to disclose this public record is in violation of Oklahoma law.

22. On September 22, 2023, ADA Etherington responded by letter, denying Savage's request for the contract and contending three purported exceptions to ORA's policy of public access applied to allow concealment of the documents: (1) the litigation-file exception, (2) the work-product doctrine, and (3) the deliberative-process privilege. (See attached Exhibit "D").

23. None of these exceptions apply.

24. First, pursuant to Oklahoma statutory law, the litigation-file exception does not apply to records otherwise required by state law to be made available to the public. *Id* § 24A.12. It further provides that records that “would otherwise be available” under the terms of the ORA “shall not be denied because a public body or public official is using or has taken possession of such records for investigatory purposes or has placed the records in a litigation or investigation file.” *Id* § 24A.20. The contract is a record reflecting expenditure of public funds—it has no inherent litigation purpose or investigatory value; Behenna cannot legally shield the contract from discovery by strategic file keeping.

25. Second, the work-product doctrine does not apply to documents prepared in the ordinary course of business; it applies only to documents that would divulge litigation strategy or attorney’s legal impressions. An engagement contract with a purported expert is an ordinary business record; it is not litigation work product.

26. Third, Oklahoma courts have rarely embraced the common-law deliberative-process privilege. Where they have done so, they have applied that privilege exclusively to the office of the governor and to records that are at once deliberative and pre-decisional. The contract at issue is neither and Behenna is not the governor.

27. As such, the contract is governed by the ORA and Behenna’s refusal to produce that record—which squarely concerns the expense of public monies—violates the rights of Oklahomans to be informed of how their elected representatives are managing public resources.

28. On Nov. 15, 2023, Savage requested copies of Chapman’s reports, which were quoted in Behenna’s release explaining her dismissal of the cases. (See attached Exhibit “E”).

29. On Nov. 17, 2023, Etheridge responded with a denial of the request, contending the expert report(s) were confidential investigatory or litigation files exempt from public disclosure

by the ORA, or was subject to an attorney work product privilege, despite the fact the District Attorney had previously referred to the report in her press conference and issued a press release quoting from the report. (See attached Exhibit “F”).

CAUSE OF ACTION

30. Plaintiffs re-assert and incorporate the allegations set forth in paragraphs 1 through 23 as though fully set forth herein.

31. The ORA provides that all records of public bodies and public officials shall be open to any person for inspection, copying or mechanical reproduction. 51 O.S. §24A.5.

32. The records sought by Plaintiffs are public records of a public body and public officials as defined by the ORA. *Id.*, at §24A.3.

33. The Defendant has failed to provide prompt, reasonable access to records responsive to Plaintiffs’ records requests.

34. Any claim by Defendant that said records requested fall within an exemption of the ORA and not subject to disclosure pursuant to 51 O.S. §24A.8 is without merit or basis in fact or law.

35. In the event the Court determines the Defendant had a reasonable basis for withholding the records and an exemption to disclosure was applicable, the Plaintiffs request the Court to find that the public interest in disclosure – in order to facilitate the public’s right to access and review government records so they may efficiently and intelligently exercise their inherent political power – outweighs any justification for Defendant’s denial.

36. Defendant has unlawfully denied Plaintiff’s access to the public records requested in violation of the ORA.

WHEREFORE, the Plaintiffs respectfully pray the Court, pursuant to 51 O.S. §24A.17(B), find that the records requested are public records pursuant to the ORA, that Plaintiffs are entitled to prompt disclosure of the requested records, and order an injunction, pursuant to 51 O.S. §24A.17(B), or issue a writ of mandamus pursuant to 12 O.S. §1451-1462, requiring Defendant to promptly disclose all records requested by the Plaintiffs; and, further, that Plaintiffs be awarded reasonable attorney fees in this action, pursuant to 51 O.S. §24A.17(B)(2), and other relief as allowed by law.

Respectfully submitted,



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and

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809 N.W. 36th St.
OKLAHOMA CITY, OK 73118
Ph. 405-605-6718
Email: blakejohnson@overmanlegal.com

Attorneys for Plaintiffs

From: "Arbeitman, Brook" <Brook.Arbeitman@oklahomacounty.org>
Date: July 28, 2023 at 1:47:33 PM CDT
To: Tres Savage <savage@nondoc.com>
Subject: FW: Media request

Tres,

See below from our head of civil. As I mentioned previously, the experts contact information is included in his CV if you want to go that route.

Brook

-----Original Message-----

From: Etherington, Aaron
Sent: Friday, July 28, 2023 10:42 AM
To: Arbeitman, Brook
Subject: Re: Media request

The reporter is incorrect. The Open Records Act not only makes our litigation files confidential it also limits the records we must produce. The contract requested falls outside the scope of those we are required to disclose under the Act. Moreover, it is protected by common law privileges for attorney work product and the deliberative process privilege.

Aaron Etherington
Assistant District Attorney
Oklahoma County District Attorney's Office
320 Robert S. Kerr, Suite 501
Oklahoma City, OK 73102

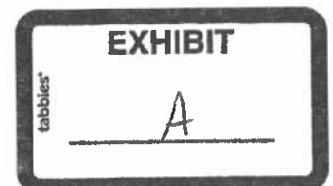
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From: Arbeitman, Brook <Brook.Arbeitman@oklahomacounty.org>
Sent: Friday, July 28, 2023 10:20 AM
To: Etherington, Aaron
Subject: Media request

Aaron,

I have a request from a reporter for a copy of our contract with the use of force expert we retained to review three cases.

He believes it's a public record because it's not work product or a law enforcement investigative record and it's a contract with the state.



Case numbers are:

CF-2020-4505
CF-2021-975
CF-2021-808

Can you advise?

Brook Arbeitman
Director of Communications
Oklahoma County District Attorney's Office

**Sent from my iPhone. Please excuse typos.

OKLAHOMA COUNTY
SEVENTH DISTRICT
STATE OF OKLAHOMA



320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
(405) 713-1600
FAX (405) 235-1567

VICKI ZEMP BEHENNA
DISTRICT ATTORNEY

MYKEL FRY
FIRST ASSISTANT DISTRICT ATTORNEY

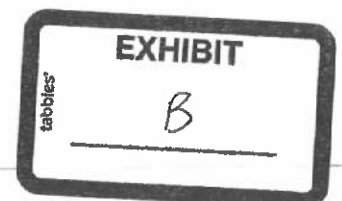
CHARGING DECISIONS MADE IN THREE USE OF FORCE CASES

FOR IMMEDIATE RELEASE
July 28, 2023

CONTACT: Brook Arbeitman
(405) 713-1790
brook.arbeitman@oklahomacounty.org

OKLAHOMA CITY - Oklahoma County District Attorney Vicki Zemp Behenna has made final charging decisions in three use of force investigations involving two different metro police departments.

- Officer Chance Avery was charged with Murder in the Second Degree, or alternatively Manslaughter in the First Degree, for the July 25, 2020, death of Christopher Poor. Avery is an officer with the Village Police Department.
- Officers Jared Barton, Corey Adams, Bradley Pemberton, Bethany Sears and Jonathan Skuta are all facing a charge of Manslaughter in the First Degree related to the November 23, 2020, death of Stavian Rodriquez, 15, in Oklahoma City. Rodriquez was shot and killed outside the Okie Gas and Express Store on South Western Avenue.
- Officer Clifford Holman, with the Oklahoma City Police Department, was charged with Manslaughter in the First Degree, or alternatively Manslaughter in the Second Degree, for the December 11, 2020, death of Bennie Edwards, 60. Edwards was shot after a confrontation with officers outside a small shopping plaza located at 2111 West Hefner Road in Oklahoma City.



The DA's Office retained a use-of-force expert to evaluate each case independently. Clarence Chapman has 28 years of experience with the Los Angeles County Sheriff's Department, where he retired as a Captain, and 10 years with the University of California Los Angeles Police Department where he was the chief of police. As an expert in use-of-force investigations, he has consulted on more than one thousand cases for more than 150 municipal, county, state and federal agencies.

Chapman reviewed case materials from body worn camera video, medical examiner reports, interviews with witnesses, to reports from other agencies on scene to form his opinion in each case.

"When incidents involving officer-involved shootings occur, it is vital to engage in a vigorous and independent exercise of in-depth and unbiased review and analysis," said Clarence Chapman, Police Practices Expert with National Justice Consultants, Inc. "My focus in these cases was to determine the appropriateness of the relevant applicable tactics, training, policies and national standards with regard to the incidents provided for my review."

After reviewing each of the three cases, Chapman submitted reports to DA Behenna. The District Attorney then put together a small committee of seasoned trial lawyers from the DA's office to painstakingly review not only Chapman's opinion on these cases, but also the entire case file.

"I know how highly-charged the topic of law enforcement use-of-force is in the current environment," said Vicki Zemp Behenna, Oklahoma County District Attorney. "It is critical to evaluate each case independently and make a decision based on facts, not emotion. No matter what the ultimate decision is, there is a family that is going to be changed forever. I do not take these decisions lightly and they are not made in a vacuum."

Oklahoma law 21 O.S. §732 (2) and (3) states that an officer is justified in using deadly force when:

1. When making an arrest... the officer reasonably believes both that:

- a. Such force is necessary to keep the arrest from being prevented by... escape; and
 - b. There is probable cause to believe that the person to be arrested has committed a crime involving the infliction or threatened infliction of serious bodily harm, or
2. The officer is in the performance of their legal duty... and reasonably believes the use-of-force is necessary to protect him/herself, or others from the infliction of serious bodily harm.

With those legal parameters in mind, review of Chapman's expert opinion and in consultation with prosecutors, District Attorney Behenna has made the following charging decisions:

OFFICER CHANCE AVERY, THE VILLAGE POLICE DEPARTMENT

Charges Dismissed

Chapman concluded that "a suspect armed with a potentially deadly weapon advancing directly toward a uniformed and armed police officer, while disobeying orders to drop the weapon can be reasonably interpreted as a deadly threat. Officer Avery acted in strict accord with nationally accepted standards of proper procedures and tactics in defense of his life and the lives of others in the face of an imminent and credible deadly threat."

OFFICERS BARTON, ADAMS, PEMBERTON, SEARS AND SKUTA, OKLAHOMA CITY POLICE DEPARTMENT

Charges Dismissed

Officers are trained to continuously assess a suspect's actions and be prepared to shift as needed to the appropriate force needed. In Chapman's opinion, Stavian "created a sufficiency of fear" in the minds of the officers. He was repeatedly told to show his hands and to get on the ground. Instead of complying, Stavian lifted the front of his shirt and pulled a semi-automatic pistol from his waistband and dropped it on the ground. After which Stavian continued ignoring the officers' commands and lowered his left hand to the side of his waistband. "The act of a suspect facing and making eye contact with uniformed armed police officers while disobeying orders and lowering his hand to his waistband area as if retrieving a firearm can be reasonably interpreted as an imminent deadly threat requiring defensive action. The five officers acted lawfully and appropriately in the fact of an imminent and credible deadly threat."

OFFICER CLIFFORD HOLMAN, OKLAHOMA CITY POLICE DEPARTMENT

Charges Dismissed

In Chapman's expert opinion, Edwards posed a significant threat to the officers at the scene. "Contemporary police training and national standards of care instructs that suspects exhibiting obvious symptoms of mental illness can be dangerous and a threat to officer safety." Mr. Edwards was not obeying commands to "put the knife down" and was acting erratically. Additionally, when Mr. Edwards charged at Sgt Duroy with the knife, he became an imminent threat to Sgt. Duroy and committed a felony assault on Sgt Duroy.

Criminal charges are based on probable cause to believe a person has committed a crime. All defendants are presumed innocent unless proven guilty in a court of law.

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C U R R I C U L U M V I T A E

Clarence Robert Chapman

Police Practices Expert
1014 Broadway, Suite 350
Santa Monica, CA 90401
(310) 429-2940 crchapman@earthlink.net

EMPLOYMENT HISTORY

Chief of Police (Retired)	University of California Los Angeles Police Department
<i>Department Size:</i>	245 Sworn and Civilian Personnel
<i>Date of Appointment:</i>	June 1994
<i>Date of Retirement:</i>	December 2004
Captain (Retired)	Los Angeles County Sheriff's Department
<i>Department Size:</i>	12,000 Sworn and Civilian Personnel
<i>Date of Appointment:</i>	May 1966
<i>Date of Retirement:</i>	June 1994

SUMMARY OF EXPERIENCE

To date, retired Chief Chapman has consulted on over one thousand cases involving law enforcement related civil litigation, criminal prosecution and employment practices and has given court and deposition testimony in over 500 cases to date. Chief Chapman has served over 150 clients from municipal, county, State and federal agencies and private enterprises throughout the country and has been certified as an expert witness and testified in State and federal court in the areas of:

- Police Policy, Procedures, Training and Practices
- Officer Involved Shootings – Deadly Force
- Use of Force
- Pursuit/Emergency Driving
- In-Custody / Restraint Deaths
- Active Shooter Policies and Procedures
- Search Warrants
- Canine Operations, Management and Tactics
- Private Sector Security and Loss Prevention
- Racial Discrimination
- Police Employment Practices
- Jail & Custody Practices
- Criminal Interview & Interrogation Practices

During over 40 years in law enforcement, Chief Chapman supervised, managed, and commanded a vast number of police personnel and units covering a wide range of assignments. As a Captain/Station Commander with the Los Angeles County Sheriff's Department, and a California State Chief of Police, Chapman has served as a supervisor, manager, and executive level administrator in the areas of field patrol, criminal investigations, officer involved shooting investigations and policies, procedures, and training in the area of use of force.

Chief Chapman has served as an expert witness in the following States: Alaska, Alabama, Colorado, Illinois, Nevada, New Mexico, New York, Ohio, Oregon, Texas, Arizona, Florida, and Washington State.

CAREER HIGHLIGHTS:

Between 1980 and 1982, Chief Chapman was appointed to the California State Governor's Office as Project Manager for a new and progressive criminal tracking project, known as the California Career Criminal Apprehension Program.

Between 1987 and 1990, while assigned to the Sheriff's Department Detective Division, Narcotic Bureau, Chief Chapman was awarded a \$3 million federal drug enforcement grant to target Los Angeles area street gangs involved in mid-level cocaine enterprises. Under Chief Chapman's command this highly successful and widely publicized law enforcement anti-drug effort, known as the STAR Grant, (Sheriff's Task force Against Rock), incorporated a multi-agency concept joining agents and investigators from the Federal Bureau of Investigation, State Bureau of Narcotics Enforcement and the Los Angeles County District Attorney's Office. During this project, Chief Chapman was sworn as a Deputy United States Federal Marshall.

In January of 1998, Chief Chapman was selected to participate on a task force with the UCLA Anderson School of Management to formulate an executive management curriculum for the Los Angeles Police Department's senior command staff. That effort culminated in the creation of an accredited police management course for all LAPD senior level police administrators.

In June of 1998, Chief Chapman was selected by the Federal Bureau of Investigation to attend the prestigious National Law Enforcement Executive Academy in Quantico, VA.

Chief Chapman is a nationally recognized police practices management consultant and instructor. In 1999, Chief Chapman was selected by the State of California Department of Justice, Commission on Peace Officers Standards and Training (POST) to serve as a staff instructor for the Center of Leadership Development. In this capacity, Chief Chapman instructs the California State Executive Development Management Course.

In January 2000, Chief Chapman was contracted by the City of Los Angeles to assist the mayor's office in developing a systematic approach to facilitate compliance with a federal court consent decree involving LAPD training and citywide employment practices.

In June of 2001, Chief Chapman was appointed as an independent federal monitor by the Federal Court in the district of New Mexico to oversee a class action suit involving civil rights violations by local law enforcement. The areas that Chief Chapman is commissioned to monitor include specified police policies, procedures and practices in the areas of racial profiling, search and seizure and use of force. [Refer: Johnson, et al. vs. City of Hobbs, et al., CIV 99-00348 MV/JHG-ACE]

PUBLICATIONS:

Los Angeles Times Editorial: "Silence Code Doesn't Exist" - December 1992

NATIONAL TELEVISION APPEARANCES:

McNeil / Lehrer News hour: "Street Gangs & the Drug Trade" - April 1988

LECTURES, SPEAKING APPEARANCES & TRAINING ATTENDED:

- Westwood Village Rotary Club: **“Police Operations - Democratic National Convention”** – June 2000
- UCLA Law School: **“Community Crime and Drugs”** - October 2000
- *New Mexico Law Enforcement Training Conference, “Policing 2000: Entering the New Millennium”*: Guest Lecturer on: **Police Use of Force & Racial Profiling** – December 2000
- Los Angeles County Professional Peace Officers Association: Guest Speaker: **“The Media and Law Enforcement”** – March 2001
- Los Angeles Women’s Resource Center, Lecturer: **Hate Crimes & Rape Prevention** – April 2001
- Seminar panelist with Professor James Q. Wilson: **The LAPD and the Community** - UCLA Bradley Center – July 2001
- POST sponsored training seminar, guest lecturer to the San Bernardino Sheriff’s and Chief’s Association on the topic of **Racial Profiling** – January 2002
- Taser Use of Force, risk Management and Legal Strategies, sponsored by Taser International, March 16, 2009, Whitter, California
- Seminar panelist on subject of Taser use and in-custody death related to Excited Delirium syndrome – October 2009
- 40 hours Force Science Institute Training Course, Henderson, Nevada, 2016
- Force Science Instructors Course, Containment and De-Escalation, Los Angeles, California, 2019

EDUCATION:

- Master of Business Administration: UCLA Executive Program, Los Angeles, CA, 1997
- Postgraduate Certificate: (Criminal Justice Ed.), University of Virginia, Quantico, VA. 1992
- Bachelor of Science: (Public Affairs), Pepperdine University, Malibu, CA, 1980
- Postgraduate Studies: (Public Administration), University of Southern California

RECOGNITION:

- **Career Achievement Award** from the National Organization of Black Law Enforcement Executives, 2002
- **Law Enforcement Achiever Tribute Award** from California Governor Gray Davis, 2002

CALIFORNIA POST CERTIFICATES HELD:

- Basic Certificate
- Intermediate Certificate
- Advanced Certificate
- Supervisory Certificate
- Management Certificate
- Executive Certificate

OTHER CERTIFICATIONS ATTAINED:

- *Teaching Credential, State of California Vocational: Police Science, 1982*
- *Police Personnel Management (POST Certified), 1990*
- *Hostage Negotiations, Rio Hondo Community College, 1990*
- *Certificate of Achievement, Criminal Justice Education, (University of Virginia), 1992*
- *Executive Development Program (POST Certified), 1995*
- *Law Enforcement Southwest Command College; Federal Bureau of Investigation, 1996*
- *Law Enforcement Executive Development Program; Federal Bureau of Investigation, 1998*
- *Force Science Institute Training Certificate, 2016*
- *Force Science Instructors Course, Containment and De-Escalation, 2019*
- *Axon Enterprises Taser Defensive Strategies Course, 2023*

AFFILIATIONS:

Graduate, FBI National Academy, United States Department of Justice, Quantico, VA Class 169, June 1992
Staff Instructor, Peace Officer Standards and Training – Executive Development Program
Member, California Peace Officers Association
Member, Los Angeles County Black Peace Officers Association
Member, FBI Law Enforcement Executive Development Association
Member, FBI National Academy Graduates
Member, International Association of Chiefs of Police
Member, National Organization of Black Law Enforcement Executives
Ex-Board Member, Santa Monica Community College District Citizen's Bond Oversight Commission
Associate Member, California State Sheriff's Association
Ex-Commissioner, City of Malibu Public Safety Group
Associate Member, Force Science Research Institute
Subscriber, American for Effective Law Enforcement
Past Member, International Union of Police Associations
Past Member; Los Angeles County Management Council
Past Member, National Sheriff's Association
Past Member, Los Angeles County Chiefs of Police Association
Past Member, University of California Association of Black Administrators
Past Member, International Association of College Law Enforcement Administrators
Past Member, Los Angeles County Sheriff's Executive & Command Staff Support & Advisory Group
Past Member, Board of Directors – Peace Officer Association of Los Angeles County



September 18, 2023

VIA USPS and e-mail

Vicki Behenna
District Attorney
Aaron Etherington
Assistant District Attorney
Oklahoma County District Attorney's Office
320 Robert S. Kerr, Suite 501
Oklahoma City, OK 73102
Vicki.Behenna@oklahomacounty.org
Aaron.Etherington@oklahomacounty.org

Re: Reconsideration of Open Records Act Request by Tres Savage

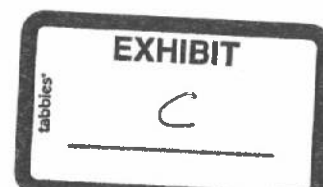
Ms. Behenna and Ms. Etherington:

This firm represents Tres Savage in connection with his recent request for public records maintained by your office and made available for public inspection by the Oklahoma Open Records Act (the "ORA"). *See* 12 O.S. §§ 24A.1 *et seq.* In July, Mr. Savage made an ORA request to your office for any retention/engagement contract(s) with the use-of-force expert(s) retained in connection with Case Nos. CF-2020-4505, CF-2021-975, and CF-2021-808. We respectfully request you reconsider your office's refusal to produce those records.

As you are aware, Mr. Savage is a prominent journalist and the editor in chief of NonDoc Media, an awarded not-for-profit publication that provides dedicated civics coverage and promotes transparency in local and state government. Mr. Savage's request for the records in question—regarding payment of government funds to a private vendor—is in service of his reporting on a matter of undeniable public interest.¹

To that end, the ORA declares "every public body and public official has a specific duty to keep and maintain complete records of the receipt and expenditure of any public

¹ *See City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, ¶ 29, 250 P.3d 305, 317 (recognizing public scrutiny as "one measure of [officials'] good faith in making decisions involving the expenditure of public funds").



funds reflecting all financial and business transactions relating thereto[.]” 12 O.S. § 24A.4.² Applying the plain language of the statute, authorities in Oklahoma commonly conclude the ORA requires agencies to make available for inspection all records concerning the expense of public funds.³

We understand your office’s denial of Mr. Savage’s request to be based on your assertion that the pertinent records are exempt from disclosure pursuant to (a) the ORA’s “litigation-file” exception, (b) the work-product doctrine, and (c) the deliberative-process privilege. In determining whether a particular record is subject to the ORA’s broad mandates, courts typically “focus on the totality of the circumstances” surrounding the record’s “creation, maintenance, and use[.]”⁴ We believe the records targeted by Mr. Savage’s request are plainly encompassed by the ORA and no exception applies.

A. *Litigation-File Exception*

To be sure, the ORA provides that “[e]xcept as otherwise provided by state or local law,” a district attorney’s office “may keep its litigation files and investigatory reports confidential.” 51 O.S. § 24A.12 (emphasis added). Crucially, however, records that “would otherwise be available” under the terms of the ORA “shall not be denied because a public body or public official is using or has taken possession of such records for investigatory purposes or has placed the records in a litigation or investigation file.” *Id.* at § 24A.20. Oklahoma courts recognize this limitation on the discretion of district attorneys to prohibit access to public records through unilateral designations of confidentiality or strategic record-keeping practices.⁵

² See also 51 O.S. § 24A.3(1) (defining records covered by the ORA to include those “created by, received by, [or] under the authority of” of a public body “in connection with the transaction of public business [or] the expenditure of public funds[.]”)

³ E.g., Okla. Att’y Gen. Op. No. 08-19 (July 23, 2008); Okla. Att’y Gen. Op. No. 95-97 (Mar. 13, 1996).

⁴ See *Int’l Union of Police Associations v. City of Lawton*, 2009 OK CIV APP 85, ¶ 16, 227 P.3d 164, 168 (quoting *Bureau of Nat. Affs., Inc. v. U.S. Dep’t of Just.*, 742 F.2d 1484, 1492-93 (D.C. Cir. 1984)).

⁵ E.g., *State ex rel. Oklahoma State Bd. of Med. Licensure & Supervision v. Rivero*, 2021 OK 31, ¶ 66, 489 P.3d 36, 60; *Oklahoma Ass’n of Broadcasters, Inc. v. City of Norman, Norman Police Dep’t*, 2016 OK 119, ¶ 4 n.1, 390 P.3d 689, 698 n.1 (Edmonson, J., concurring); *OSU-AJ Homestead Med. Clinic, PIC v. The Oklahoma Health Auth.*, 2018 OK CIV APP 30, ¶ 6, 416 P.3d 1082, 1085; see also *Saxon v. Macy*, 1990 OK 60, ¶ 6, 795 P.2d 101, 102 (observing that, following the pertinent amendment to the ORA, district attorneys are unlikely to withhold ordinarily public records on the basis they have been designated “litigation files”).

Accordingly, “an investigatory purpose by a public body for a particular document is not sufficient, by itself, to create confidentiality for that document.”⁶ Rather, reading the provisions of the ORA—or analogous statutes—in harmony, authorities regularly order officials to produce records like those requested by Mr. Savage.⁷ The requested records concern your office’s use of public funds; the Legislature has mandated public access to those records, and they may not be exempted from that mandate by an administrative decision to store them in a particular location.

B. Work-Product Doctrine

As you know, the work-product doctrine applies only to materials “prepared in anticipation of litigation”—where, however, the “document was prepared in the ordinary course of business,” the doctrine is inapplicable.⁸ Principally, of course, the “doctrine is intended only to guard against divulging the attorney’s strategies and legal impressions.”⁹ As such, “it does not protect facts concerning the creation of work product” or “preclude inquiry into the mere fact of an investigation.”¹⁰

The retention agreements targeted by Mr. Savage’s request are not protected by the work-product doctrine. The request does not seek your expert’s investigatory reports or any similar materials. It is limited only to records reflecting the retention of experts and the terms of their engagement and compensation. That is, Ms. Savage’s request targets records prepared in the *ordinary course of business* and reflecting your office’s expenditures of public funds. Again, courts considering similar circumstances regularly order the production of documents akin to those at issue here.¹¹

⁶ *Rivero*, 2021 OK 31, ¶ 66, 489 P.3d at 60.

⁷ *E.g.*, *Lindley v. Life Invs. Ins. Co. of Am.*, 267 F.R.D. 382, 403 (N.D. Okla. 2010) (“copies of the retention agreements”); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) (“did little more than reveal the relationship between the parties, the purpose for which Law Firm had been engaged, and the steps which the Firm intended to take in discharging its obligation”); *see also Nichols v. Jackson*, 2002 OK 65, ¶ 1, 55 P.3d 1044, 1047 (“list of expenses associated with overhead and the purchase of equipment and general references to budget expenses for travel and expert witness fees”).

⁸ *Hall v. Goodwin*, 1989 OK 88, ¶ 12, 775 P.2d 291, 295.

⁹ *Resol. Tr. Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)

¹⁰ *Id.* (citing *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 89 (W.D.Okla.1980)).

¹¹ *E.g.*, *Lindley*, 267 F.R.D. at 403 (“copies of the retention agreements” not protected); *Nichols*, 2002 OK 65, ¶ 1, 55 P.3d at 1047 (“the general right of the public to know recognized by the Open Records Act” encompasses “records relating to fees and expenditures” for expert witnesses); *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997) (“A general description of the work performed by the attorney is not protected”); *United States v. Olano*, 62 F.3d 1180,

C. Deliberative-Process Privilege

Finally, the deliberative-process privilege is inapplicable to Mr. Savage's request. Oklahoma courts have rarely acknowledged any such privilege and—when they have done so—they have applied it exclusively to records maintained by the office of the governor.¹² The limited scope of the deliberative-process privilege corresponds to its basis in the Oklahoma Constitution's guarantee of the separation of powers and those responsibilities uniquely assigned to the governor's office.¹³ Our research reveals no Oklahoma authority applying the privilege in any instance to records maintained by a district attorney.

Moreover, “[t]o qualify for protection under the [deliberative-process] privilege, the party seeking to invoke the privilege bears the burden of proving that the document at issue is both predecisional and deliberative.”¹⁴ Surely, this is an impossible burden with respect to the records requested by Mr. Savage.¹⁵ Again, those records reflect only the terms of agreements made with prospective experts; they do not include “proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”¹⁶ Because the retention agreement in question “does not set forth any suggestions, proposals, or options for consideration as part of a process by which

1205 (9th Cir. 1995) (“general descriptions of the work that he performed” not protected); *Meredith*, 572 F.2d at 603 (no protection for document that “did little more than reveal the relationship between the parties, the purpose for which Law Firm had been engaged, and the steps which the Firm intended to take in discharging its obligation”); *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 215 (N.D. Ill. 1972) (“the inquiry is directed solely at the retainer agreement, which is not itself a confidential communication”); *Colton v. United States*, 306 F.2d 633, 639-40 (2d Cir. 1962) (doctrine does not protect existence of relationship, terms of engagement, compensation); *United States v. Pape*, 144 F.2d 778, 782 (2d Cir. 1944) (“The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client. The privilege is limited to confidential communications, and a retainer is not a confidential communication[.]”).

¹² *Vandelay Ent., LLC v. Fallin*, 2014 OK 109, ¶ 9 & n.4, 343 P.3d 1273 (recognizing the privilege as “component of executive privilege”).

¹³ *See id.* at ¶¶ 13–15, 29, 343 P.3d at 1277–79.

¹⁴ *Cherokee Nation v. Salazar*, 986 F. Supp. 2d 1239, 1245 (N.D. Okla. 2013).

¹⁵ *Id.* at 1247 (application depends on a disputed document's “contents and its context” as “the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process”) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C.Cir.1980)).

¹⁶ *See id.* (identifying the contents of “deliberative” documents and also recognizing that “[f]actual materials do not qualify as deliberative unless their disclosure would so expose the deliberative process within an agency that it must be deemed exempted”).

governmental decisions and policies are formulated,” it is not a deliberative document to which the privilege applies.¹⁷

In conclusion, the ORA expressly mandates that the records requested by Mr. Savage be made available to the public. No cited exception to the broad and unequivocal reach of the ORA applies to Mr. Savage’s request. While we are sensitive to the unique intricacies involved in prosecutorial records, the Legislature has resolved any resulting dilemma in favor of the public’s right to be informed as to the use of taxpayer money.¹⁸ We therefore urge that you reconsider your decision to deny Mr. Savage’s request.

If we have misconstrued your office’s position on this matter, we invite you to clarify the same. To the extent your office believes the documents at issue are protected from disclosure for reasons unknown to us, we invite you to explicate the basis of your denial so that we may intelligently analyze your position. Otherwise, we ask that you make the requested document(s) available to Mr. Savage on or before the close of business on September 22, 2023. If we do not receive any response in the intervening period, we will proceed on the understanding that your office is withholding the records at issue and explore relief for violation of the ORA. Mr. Savage reserves all rights and remedies available to him under Oklahoma law.

I can be reached by phone or email to discuss this matter. Thank you for your attention and for all you do for Oklahoma County.

Sincerely,

J. Blake Johnson
for the Firm

¹⁷ *Id* at 1248 (quoting *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

¹⁸ Incidentally, your office has supplied no support for its implied position that the record in question is “in need of protection,” as the related “proceedings . . . are complete” and “there will be no interference with any ongoing investigation.” See *Seabolt v. City of Muskogee*, No. CIV-07-255-JHP, 2008 WL 2977865, at *2 (E.D. Okla. July 30, 2008); see also *Doubleday v. Ruh*, 149 F.R.D. 601, 606 (E.D. Cal. 1993) (“[A] public prosecutor—having completed his investigation and having announced . . . that no further action would be taken by him—is [not] entitled to rely upon the work product doctrine . . . The district attorney is not an ‘attorney’ who represents a ‘client’ as such.”); *Kelly v. City of San Jose*, 114 F.R.D. 653, 662 (N.D. Cal. 1987) (“[L]aw enforcement usually will have a much greater interest in preserving [] confidentiality . . . in ongoing criminal investigations than in keeping secret the factual information provided by percipient witnesses to events that are long since past and about which there will be no prosecution[.]”).

OKLAHOMA COUNTY
SEVENTH DISTRICT
STATE OF OKLAHOMA



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VICKI ZEMP BEHENNA
DISTRICT ATTORNEY

MYKEL FRY
FIRST ASSISTANT DISTRICT ATTORNEY

September 22, 2023

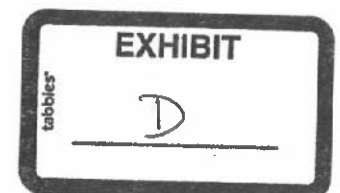
J. Blake Johnson
Overman Legal Group
809 NW 36th Street
Oklahoma City, OK 73118

RE: Reconsideration of Open Records Act Request by Tres Savage

Dear Mr. Johnson:

We are in receipt of your letter dated September 18, 2023, requesting our office to reconsider Mr. Savage's request for a copy of the retention/engagement contract(s) with the use of force expert retained in connection with Case Nos. CF-2020-4505, CF-2021-975, and CF-2021-808. However, we stand by our denial of the request.

As you are aware, the purpose of the Oklahoma Open Records Act, 51 O.S. § 24A.1, *et seq.* ("the 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." *Citizens Against Taxpayer Abuse, Inc. v. City of Okla. City*, 2003 OK 65, ¶ 12, 79 P.3d 871, 875 citing 51 O.S. § 24A.2. The Act, however, is not intended to remove from the public the privilege of confidentiality to which they are collectively entitled when represented by an attorney as would an individual citizen enjoy when represented by counsel hired to protect their individual legal interests. 51 O.S. § 24A.12. To this end the Act provides protections to the District Attorney as both the attorney of the people and as a law enforcement agency.



As the attorney of the people, the District Attorney is entitled to the same privileges of confidentiality that inures for the benefit of other counsel. A consulting expert witness retained to assist the District Attorney in understanding the complexities of a case and providing guidance in preparing for the merits of the litigation does not serve the Act's purpose and is not discoverable under Oklahoma law. See *Hefron v. District Court Oklahoma County*, 2003 OK 75, ¶ 24, 77 P.3d 1069, 1079-80 (discussing the primary purpose behind 12 O.S. § 3226 and expert witnesses). In this regard, the request for the expert contract falls outside of the scope of the Act. On this point, Section 24A.5(1)(a) makes it clear that the Act does not apply to records specifically required by law to be kept confidential." This includes records protected by a state evidentiary privilege such as the attorney-client privilege and the work product doctrine. 51 O.S. § 24A.5(1)(a); see also *Meritor, Inc. v. State ex. rel. Bd of Regents of the University of Okla.*, 2019 OK CIV APP 64, ¶ 1, 451 P.3d 914, 916 (adopting the holding from the U.S. Supreme Court that matters which are "normally or routinely privileged" come within the Act's evidentiary privilege exemption, and this includes records from a non-testifying expert.).


Under Oklahoma law, documents between an attorney and a consulting expert witness are protected by litigation and work product privileges. See 12 O.S. § 3226(B)(4)(c) ("A party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial ..."); see also 12 O.S. § 3226(B)(3)(a) ("a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent"). Even in the context of a criminal prosecution, the Court of Criminal Appeals has recognized a consulting expert's involvement in a case does not give rise to discoverable evidence that must be disclosed by the State to the defense. *Musonda v. State*, 2019 OK CR 1, ¶ 7, 435 P.3d 694, 696 (finding no error in the trial court's denial of the defendant's discovery request for notes, reports, or information involving the State's medical consulting expert). This is precisely the situation surrounding the use of force expert retained in the three felony cases referenced above. If opposing counsel could not obtain the agreement through discovery, *a fortiori*, it may not be obtained through the conduit of an Open Records Act request. To conclude that the ruse of an open records request might allow opposing counsel to obtain what they could not through discovery would weaken the privilege into non-existence.

In truth, a consulting expert is an agent of the attorney, assisting them in making informed decisions and rendering legal advice. It is well established that an attorney is not required to disclose a consulting agreement with an expert witness, even a testifying expert, and the mere fact the District Attorney is a state officer does not negate this privilege. Indeed, the scope of the contractual engagement with a consulting expert as well as the responsibilities and duties defined therein may reveal the thought processes of counsel which are at the core of the litigation and work product privileges. What's more, these same circumstances implicate the deliberative process privilege of the District Attorney as an executive branch official. *Vandelay Entertainment, LLC, d/b/a, The Lost Ogle, v. Fallins*, 2014 OK 109, 343 P.3d 1273 (2014). In fact, the decision-making process of prosecutors has long been zealously guarded by the common law in order to allow them the independence of judgment needed to honestly, fairly, and faithfully carry out their duties free from harassment and interference. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

No legitimate argument can be made that the District Attorney, as the attorney of the people, is not entitled to invoke litigation, work product, prosecutorial and deliberative process privileges – all of which necessarily shield disclosure of the consulting expert agreement requested by the media. But even apart from the protections afforded to the District Attorney as the people's attorney, the Open Records Act extends additional protections to the office as a law enforcement agency. 51 O.S. § 24A.3. As recognized by the Attorney General, Section 24A.8 of the Act limits those records which must be provided to the public by a law enforcement agency. 2012 OK AG 22. "Law enforcement records are not public records except as specified in the Open Records Act." 1999 OK AG 58, ¶ 12. Unquestionably, the consulting expert agreement is not one which is specified to be open to the public and does not otherwise fall within the scope of Section 24A.4.

For all of these reasons, the request for disclosure of the expert consulting agreement is respectfully denied.

Sincerely,

A handwritten signature in cursive script, appearing to read "Aaron Etherington".

Aaron Etherington
Assistant District Attorney

Attention: Vicki Behenna & Aaron Etherington
Oklahoma County District Attorney's Office
320 Robert S. Kerr Ave., 5th Floor.
Oklahoma City, OK, 73102
Wednesday, Nov. 15, 2023

To Mrs. Behenna and Ms. Etherington,

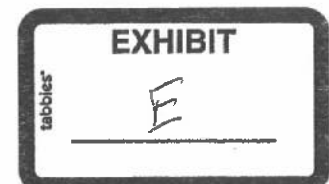
My name is William W. Savage III (Tres), editor in chief of NonDoc.com. We are a news organization in Oklahoma, and I am hereby requesting the following public records under the Oklahoma Open Records Act:

- A copy of each report from Clarence Chapman and National Justice Consultants provided to the Oklahoma County District Attorney's Office in 2023, specifically including the three reports referenced and quoted in a press release distributed by your office Friday, July 28, regarding the dismissal of charges against seven police officers related to three separate fatal shooting events.

If possible, I request digital copies of this information. Please contact me at (405) 808-0308 with any questions regarding this request. You may also reach me by e-mail at Savage@nondoc.com. Any estimate you can provide as to the timeframe for completion would be greatly appreciated. Thank you very much for your time and effort.

Sincerely,

William W. Savage III



OKLAHOMA COUNTY
SEVENTH DISTRICT
STATE OF OKLAHOMA



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(405) 713-1600
FAX (405) 235-1567

VICKI ZEMP BEHENNA
DISTRICT ATTORNEY

MYKEL FRY
FIRST ASSISTANT DISTRICT ATTORNEY

November 17, 2023

William Savage III
c/o NonDoc.com
savage@nondoc.com

Re: *Open Records Request for District Attorney Litigation File*


Dear Mr. Savage:

I am in receipt of your email send on November 15, 2023, in which you request items contained in the District Attorney's litigation files. Specifically, you have requested the reports of the consulting use of force expert, Clarence Chapman and National Justice Consultants, relied upon by the District Attorney in making prosecutorial decisions in Oklahoma County Case Nos. CF-2020-4505, CF-2021-975, and CF-2021-808.

Section 24A.12 of the Open Records Act expressly provides that investigatory reports and litigation files of the District Attorney's Office are confidential. Section 24A.8 of the Act further limits those records which a law enforcement agency, such as the District Attorney's Office, must make available. Access to records falling within the narrow scope of Section 24A.8 may, nonetheless, be denied, as Sections 24A.5(1) and 24A.20 of Act authorize the District Attorney's Office to keep its records confidential when the same are either available from other public bodies or otherwise protected as privileged by state and/or federal law.

Your request for documents seeks records that are outside the scope of Section 24A.8 of the Open Records Act. Moreover, the records are protected as confidential as attorney work product. For these reasons, your request for records is respectfully denied.

Sincerely,


Aaron Etherington
Assistant District Attorney

