



NOT FOR OFFICIAL PUBLICATION  
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

JUL 31 2024

JOHN D. HADDEN  
CLERK

TYLER SCOTT PAULSEN, )  
)  
Plaintiff/Appellant, )  
)  
vs. )  
)  
WAGONER COUNTY SHERIFF'S )  
OFFICE; WAGONER COUNTY E911; )  
CHRIS ELLIOTT and JUDY ELLIOTT; )  
)  
Defendants/Appellees. )

Case No. 121,575

APPEAL FROM THE DISTRICT COURT OF  
WAGONER COUNTY, OKLAHOMA

HONORABLE DOUGLAS KIRKLEY, TRIAL JUDGE

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR  
FURTHER PROCEEDINGS**

Brendan M. McHugh  
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For Plaintiff/Appellant

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DISTRICT 27  
DISTRICT ATTORNEY'S OFFICE  
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ASSISTANT DISTRICT  
ATTORNEY  
Wagoner, Oklahoma

For Defendants/Appellees

OPINION BY STACIE L. HIXON, JUDGE:

Tyler Paulsen appeals summary judgment granted in favor of Defendants Wagoner County Sheriff's Office (Sheriff's Office), Chris Elliot (Sheriff), Wagoner County E911 (E911) and its director, Judy Elliot (Director Elliot) on his request for declaratory judgment and injunction compelling production of documents under the Open Records Act (ORA). Paulsen contended Defendants failed to produce all documents responsive to his requests, related to a warrant issued in Wagoner County and his arrest thereon in McIntosh County. We affirm the trial court's grant of summary judgment in favor of Sheriff and Sheriff's Office. We also find no viable claim against E911 and Director Elliot for failure to produce documents in this action which were produced during a previous, dismissed suit, and partial summary judgment on this basis is proper. However, we find E911 and Director Elliot failed to present admissible evidence establishing they were entitled to summary judgment on Paulsen's claims. Additionally, Paulsen demonstrated a genuine dispute of material fact as to whether E911 and Director Elliot produced all available documents responsive to Paulsen's request. Therefore, we reverse that portion of the trial court's August 2, 2023 Order granting summary judgment to E911 and Director Elliot, and remand for further proceedings consistent with our Opinion.

## **BACKGROUND**

This is the second appeal from actions by Paulsen to obtain records from these Defendants related to his arrest by Eufaula police on a warrant issued in Wagoner County in July 2018. Paulsen seeks records and communications related to the warrant and his arrest, including requests by Wagoner County to McIntosh or Mayes County to hold Paulsen on the Wagoner County warrant.<sup>1</sup> Paulsen asserts he has not received all documents responsive to that request, particularly in relation to any hold placed in Mayes County or employee communications regarding his arrest.

In 2019, Paulsen presented requests to Defendants under the ORA to produce documents or recordings related to calls from or to E911 regarding the Wagoner County warrant, copies of hold sheets<sup>2</sup> created for a certain period regarding the Wagoner County warrant, and copies of all written communications sent or received regarding the Wagoner County warrant. Sheriff advised it had no records to produce. E911 produced two audio recordings and document(s) on

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<sup>1</sup> Though not entirely clear, Paulsen seems to contend that E911 dispatcher Aaron Hanning, his brother Wagoner County Commissioner James Hanning, and/or other employees or public officials in Eufaula or Mayes counties contrived to have him arrested to prevent him from appearing at a hearing in Mayes County and seeks records pertaining to those alleged events.

<sup>2</sup> The hold sheet appears to be a document created for or by the county issuing the warrant and transmitted to another county with the warrant to authorize the receiving county to hold the detainee for the issuing county. Based on information and testimony submitted by Paulsen, it appears this document is created and/or maintained by E911, and which E911 is charged with transmitting to other counties.

May 28, 2019. Paulsen filed suit a few days later, alleging Defendants wrongfully withheld at least one audio recording relevant to the request, which Paulsen had obtained from another source. During that suit, Defendants produced that audio recording. Paulsen's case was eventually set for status conference and dismissed without prejudice when he failed to appear. Another division of this Court affirmed that decision on August 25, 2022.

Paulsen filed the underlying action on December 1, 2022. He alleged that Defendants had previously failed to produce the recording referenced above, and that it was likely Defendants had also failed to produce other responsive documents. Paulsen again sought declaratory relief that he was entitled to further documents under the ORA and an injunction requiring immediate production of additional documents.

Defendants moved for summary judgment, arguing they had produced all documents responsive to Paulsen's request prior to dismissal of the previous action, and that Paulsen's assertion that further records exist was speculative. In support, Sheriff and Chris Elliot produced an affidavit advising they had no responsive documents. E911 and Director Elliot supplied an unsworn and incomplete affidavit, asserting they had searched their computer and audio systems.

In response, Paulsen presented deposition testimony of dispatcher Aaron Hanning (Dispatcher Hanning) that he had seen a hold sheet and/or entry in E911's "hold book," reflecting Wagoner County's request to Mayes County to hold Paulsen, which was never produced. Paulsen also asserted that Dispatcher Hanning's cell phone records reflected he was texting with other E911 employees on the evening of Paulsen's arrest, which were never produced. He contended, therefore, that a question of fact remained as to whether all documents responsive to his request had been produced. Paulsen also presented evidence he claimed demonstrated that Defendants failed to preserve these materials and sought such a determination from the court.

Defendants filed no reply and did not respond to these arguments. After a hearing, for which we have no record, the trial court granted Defendants' Motion for Summary Judgment.

Paulsen appeals.

### **STANDARD OF REVIEW**

"Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions." *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1052. "Therefore, as the decision involves purely

legal determinations the appellate standard of review of a trial court's grant of summary judgment is *de novo*." *Id.* The Court will "examine the pleadings and evidentiary materials to determine what facts are material to plaintiff's cause of action, and to determine whether the evidentiary materials introduced indicate whether there is a substantial controversy as to one material fact and that this fact is in the movant's favor." *Ross by and through Ross v. City of Shawnee*, 1984 OK 43, ¶ 7, 683 P.2d 535. All inferences and conclusions to be drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id.*

### **ANALYSIS**

Paulsen asserts the trial court erred by granting summary judgment because he contends: (1) production of records after filing of suit does not render his claims moot; (2) fact issues remained regarding Defendants' alleged spoliation of evidence and entitlement to relief; (3) failure to produce text messages between individual employees violates the ORA; and (4) fact issues exist as to whether a search was done for all responsive documents.

#### **A. Sheriff's Office and Sheriff**

As a preliminary matter, we note that the entirety of Paulsen's arguments regarding Defendants' late production of the recording, as well as alleged failure to produce additional documents, concern E911. Paulsen did not identify anything Sheriff's Office or Sheriff failed to produce and presented nothing which would

tend to suggest documents exist that either has failed to produce.<sup>3</sup> In particular, as addressed below, though Paulsen argues certain documents exist which were not produced, he produced no testimony or evidence that any of these documents were created by or would be in the custody of Sheriff or Sheriff's office. The testimony he relied upon in opposition to summary judgment concerns E911 and its Dispatcher Hanning and fails to raise a dispute of fact as to whether Sheriff possesses any responsive documents that were not produced. We therefore affirm the trial court's grant of summary judgment to Sheriff's Office and Sheriff in its entirety.

**B. E911 and Director Elliot**

**1. Previously-produced audio recordings**

During Paulsen's previous suit, E911 produced an audio recording it contended was missed in its pre-suit production. Paulsen argues a claim for failure to produce this recording remains viable in this second suit. We disagree.

Oklahoma law authorizes a person denied access to records of a public body or public official to bring a civil suit for declaratory and/or injunctive relief "but such civil suit shall be limited to records requested and denied prior to filing of the civil suit." 51 O.S.2021, § 24A.17(B)(1). Paulsen's action is limited to those

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<sup>3</sup> Paulsen sometimes uses the term "Wagoner County" interchangeably, for Sheriff or E911. However, the record reflects separate ORA requests to each entity, as well as separate responses.

materials he requested but was denied before filing *this* action. Though another division of this Court has recognized that production during an action does not moot a claim under the ORA, that case is not directly on point. *See Lawson v. Curnutt*, 2010 OK CIV APP 78, 239 P.3d 192. Paulsen's earlier suit was dismissed for his failure to appear. By the time this action was filed, Paulsen had received the recording. To the extent this action was based on the failure to produce that recording, Paulsen's action is not viable.

## **2. Other documents**

Paulsen contends E911 is obligated to provide records related to his arrest or warrant issued by Wagoner County pursuant to the ORA, and that a dispute of fact remained whether E911 produced all records responsive to his request.

The ORA facilitates 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.2021, § 24A.2; *Ross v. City of Owasso*, 2020 OK CIV APP 66, ¶ 9, 481 P.3d 278. "Because of the strong public policy allowing public access to governmental records, we must construe the Act's provisions to allow access unless an exception clearly applies, and the burden is on the public agency seeking to deny access to show a record should not be made available." *Oklahoma Ass'n of Broadcasters, Inc. v. City of Norman, Norman Police Dep't*, 2016 OK 119, ¶ 15, 390 P.3d 689; *Citizens Against Taxpayer Abuse, Inc. v. City of Okla.*

City, 2003 OK 65, ¶ 12, 73 P.3d 871. “Unless a record falls within a statutorily-prescribed exemption in the Act, the record *must* be made available for public inspection. The public body urging an exemption has the burden to establish the applicability of such exemption.” *Ross*, 2020 OK CIV APP 66, at ¶ 9 (citing *Citizens Against Taxpayer Abuse, Inc.*, 2003 OK 65, at ¶ 12).

Paulsen sought the following for the periods of July 23, 2018 to July 30, 2018:

1. Complete and accurate records of any/all: A) call logs; B) call details; C) call transcripts; and/or D) dispatch and/or 911 audio recordings regarding communications sent/received by the Wagoner County Sheriff’s Department/Wagoner County Dispatch and/or E911 from any person concerning the July 23, 2018 Application to Accelerate Deferred Judgment and/or Order for Acceleration Hearing & for Warrant of Arrest filed in Wagoner County Case No. CF-2016-359 (*State of Oklahoma v. Tyler Scott Paulsen*) and/or the July 25, 2018 arrest of Tyler Scott Paulsen in Eufaula, OK (for “calls,” this request includes dispatch lines as well as administrative lines);
2. Complete and accurate copy(ies) of the hold sheet(s) created on or about July 23, 2018 - July 25, 2018 for the arrest of Tyler Scott Paulsen concerning the July 23, 2018 Application to Accelerate Deferred Judgment and/or Order for Acceleration Hearing & for Warrant of Arrest filed in Wagoner County Case No. CF-2016-359 (*State of Oklahoma v. Tyler Scott Paulsen*); and/or
3. Complete and accurate copies of any and all written communications sent/received concerning the July 23, 2018 Application to Accelerate Deferred Judgment and/or Order for Acceleration Hearing & for Warrant of Arrest filed in Wagoner County Case No. CF-2016-359 (*State of Oklahoma v. Tyler Scott Paulsen*) and/or the July 25, 2018 arrest of Tyler Scott Paulsen (“written communications” includes emails, letters, and/or faxes).

Defendants did not challenge or dispute Paulsen's assertion that he was entitled to obtain these materials as law enforcement documents pursuant to 51 O.S.Supp.2022, § 24A.8. The issue is whether Defendants fully produced everything responsive to the foregoing requests before Paulsen filed the underlying action.

**a. Mayes County hold**

Paulsen appears to seek documentation that Mayes County either contacted E911 and inquired whether Wagoner County wished for Paulsen to be held on Wagoner's warrant, or that E911 contacted Mayes County and requested Paulsen be held. Paulsen asserts that E911 has not produced a warrant or hold presented to Wagoner County from Mayes County; any fax cover sheet from Wagoner County to Mayes County;<sup>4</sup> documents from Wagoner County's "hold book;" recordings of any phone calls between Mayes County and Wagoner County; or calls from E911 Dispatcher Hanning to Mayes County. Paulsen contends that if Wagoner County placed a hold in Mayes County, some or all of these documents should exist.

In opposition to summary judgment, Paulsen cited testimony of Hanning claiming he knew Wagoner County had placed a hold on Paulsen in Mayes County. Dispatcher Hanning explained that if Wagoner County requested a hold,

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<sup>4</sup> It is not entirely clear what this fax cover sheet pertains to, but potentially to the Wagoner County warrant Paulsen believes may have been transmitted to Mayes County.

E911 would fill out a “hold sheet” with information regarding the request and would make an entry in a “hold book” maintained by E911. Further, E911 would fax a copy of the warrant to Mayes County. Dispatcher Hanning testified he had no recollection if he talked to Mayes County and had no knowledge of any calls between E911 and Mayes County regarding that request, to the extent it occurred. Dispatcher Hanning also testified that he had no firsthand knowledge that Wagoner County placed a hold on Paulsen in Mayes County, but also qualified, “other than [he] knew it was in the [hold] book.”<sup>5</sup>

In short, Dispatcher Hanning has no personal knowledge of how and when a hold was purportedly placed by Wagoner County in Mayes County, to the extent one exists. However, he specifically testified that he saw it noted in Wagoner County’s hold book, though he did not know the source. Per Dispatcher Hanning’s testimony, a notation in the hold book would indicate a hold sheet was created and placed there. It would also potentially imply phone calls between Wagoner and Mayes County, as well as a fax of the warrant from Wagoner to Mayes County. If

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<sup>5</sup> Paulsen asserts in his Response that Dispatcher Hanning admitted Mayes County had called him previously regarding Paulsen and that Dispatcher Hanning called Mayes County the night Paulsen was arrested. The cited testimony indicates that Mayes County had called Dispatcher Hanning about Paulsen in 2017, a year prior to the arrest, and does not state that Dispatcher Hanning called Mayes County in 2018. Meanwhile, Dispatcher Hanning denied any personal knowledge of a warrant in Mayes County or how any hold was placed in Wagoner County for that warrant, other than claiming he saw it in the hold book.

they exist, these materials would be responsive to Paulsen's request. We consider whether this is sufficient to raise a question of fact on Paulsen's claim.

E911 submitted the affidavit of Michelle Collins attempting to verify that she searched for records responsive to the request by searching the "Computer Automated Digital System (CAD SYSTEM)," identified as a database maintained by E911, and that she searched the recording system that records phone calls and radio traffic at E911. Collins' affidavit, however, is incomplete. It contains no signature line, and no verification that it is submitted under oath or acceptable substitute. It appears to be missing key pages. Nothing of record indicates that this omission was ever corrected. On the record presented, Collins' partial affidavit is not acceptable evidentiary material to support the Motion for Summary Judgment of E911 or Director Elliot.<sup>6</sup> For this reason alone, summary judgment was improper.

Additionally, even if we could consider the partial affidavit, it merely states that E911 searched its computer systems and its recorded calls and produced electronic data or recordings that were available. Collins' affidavit does not mention whether she searched for the hold sheet, the hold book, facsimile communications, or whether these would be expected to be contained within

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<sup>6</sup> We accept as true those facts Paulsen did not dispute from the affidavit, i.e., that E911 produced "several items" not identified in the affidavit and the additional missed recording.

E911's computer system search, though specifically requested. Dispatcher Hanning's testimony specifically referenced a handwritten notation of a hold, and that the hold sheet would be placed in the hold book therewith. We do not weigh credibility of testimony on summary judgment and must accept Dispatcher Hanning's testimony as true for our purposes. For this reason, we find Paulsen has established a dispute of fact as to whether E911 is in possession of and searched for any "hold sheet," as well as any facsimile transmission of the Wagoner County warrant to Mayes County, and thus whether E911 has fully responded to Paulsen's request.<sup>7</sup>

**b. Text messaging or communications on personal devices**

Paulsen also contends that E911 and/or Director Elliot failed to produce text communications between Dispatcher Hanning and other E911 employees regarding his arrest, and that E911 failed to preserve these communications. Defendants did not reply to Paulsen's Response and largely did not address his allegation that messages on employees' personal devices are subject to production under the ORA.

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<sup>7</sup> Paulsen also contends that E911 has a policy of destroying hold sheets shortly after the arrest, based on Dispatcher Hanning's testimony. However, nothing in the record suggests Dispatcher Hanning is the records custodian for E911 or has personal knowledge the hold sheet here was destroyed. E911 itself has made no such representation. Whether such material has been destroyed and whether its destruction violates Oklahoma law is not ripe, and we do not address it further.

Under the ORA, a record is defined as documents “created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies or their representatives in connection with the transaction of public business the expenditure of public funds or the administering of public property.” 51 O.S.2021, § 24A.3.<sup>8</sup> The language of the statute does not differentiate between communications on a public system or an employee’s private device. Though we find no Oklahoma Supreme Court authority on point, we are persuaded by a prior opinion of the Oklahoma Attorney General that such communications are subject to the ORA if they otherwise meet the definition of a record and are required to be produced under the ORA. *See Question submitted by: Susan C. McVey Director, Oklahoma Dept. of Libraries, 2009 OK AG 12.* As noted therein, to conclude otherwise “would allow public officials and employees to circumvent the open records laws simply by using privately owned personal electronic communication devices to conduct public business.” *Id.* at ¶ 1. Thus, generally speaking, we agree with Paulsen that the fact that employees sent text messages on their private devices does not automatically shield them from the ORA if they are used to transact public business and otherwise meet the definition of a record under the ORA which must be produced.

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<sup>8</sup> Title 51 O.S.Supp.2014, § 24A.3 was in effect at the time of Paulsen’s request and has since been amended, but this language remains the same.

We also agree that Paulsen has raised a dispute of fact as to whether such communications exist or have been produced, precluding summary judgment. Specifically, E911 produced one text message from Director Elliot, prior to the filing of this action.<sup>9</sup> The affidavit of Paulsen's counsel recounts that he heard a voice on one of the audio recordings directing an E911 employee to text Director Elliot, and later sought and obtained that message from E911. E911 counsel's email indicated that she had checked with Director Elliot and *Commissioner* Hanning and had no other messages.<sup>10</sup>

Thus, E911 was aware that at least one of its employees communicated by private cell phone regarding matters presumably responsive to Paulsen's ORA request. Yet, E911's partial affidavit indicates only a search of E911's recordings and computer system. The affidavit, even if considered, does not indicate E911 searched elsewhere for communications about Paulsen's arrest or confirm that it has ascertained no such communications exist.<sup>11</sup> We offer no bright line rule as to

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<sup>9</sup>We assume for our purposes that Elliot employed a private cell phone, as opposed to a work-issued phone. Paulsen seems to assume this fact, and E911 does not directly address it. Particularly, Defendants' Motion for Summary Judgment does not mention Elliot's text message at all, even while arguing E911 is not the custodian of other employees' text messages. Meanwhile, though Elliot provided an affidavit on summary judgment, it states simply that it referred the search to Collins.

<sup>10</sup> It is unclear why E911 consulted Commissioner Hanning, as opposed to Dispatcher Hanning.

<sup>11</sup> Defendants' Motion for Summary Judgment states that E911 has no additional work-related texts from private cell phones of certain named employees. That statement is not supported by affidavit and is disregarded.

how or when an entity should inquire as to its employees' private communications, and to which employees they should inquire. However, in this circumstance, we find Paulsen has at least raised a question of fact as to whether E911 and/or Director Elliot searched for and produced all responsive documents.<sup>12</sup> We find the trial court erred by granting summary judgment to E911 and Director Elliot.

### **CONCLUSION**

For the foregoing reasons, we affirm summary judgment in favor of Sheriff and Sheriff's Office and reverse the trial court's grant of summary judgment in favor of E911 and Director Elliot and remand for further proceedings consistent with this Opinion. Because we have reversed judgment, we also reverse the trial court's denial of Paulsen's request for an attorney's fee and costs as premature.

### **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

HUBER, P.J., and BLACKWELL, J., concur.

July 31, 2024

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<sup>12</sup> Paulsen also argued evidence suggested E911 failed to produce text messages about his arrest between E911 employees Cherokee Capps, Delaney Thorp and Andrew Blake Sheppard. In support, Paulsen cites Hanning's cell phone bill, which shows text messages on the date of Paulsen's arrest to three numbers. A handwritten note on the bill by source unknown suggests these numbers belong to the three employees. The evidence submitted is insufficient to establish the numbers at issue belonged to these individuals in the first place. Even if we were to consider it, Paulsen did not supply any message content, or any evidence that would suggest these employees conducted state business on their private cell phone. He supplied no evidence to raise his assertions about these three employees' messages, or that these employees were communicating about state business, above speculation. For this reason, we do not address Paulsen's assertion that the trial court should have held that Defendants violated the ORA by failing to preserve these employees' text messages which may no longer be available.