



ORIGINAL

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THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION IV

SEP 12 2024

JOHN D. HADDEN
CLERK

NICHOLLES BROOKE,
Plaintiff/Appellant,

vs.

Case No. 121,604

KEITH REED, RN, MPH, CPH, in his
Official Capacity as Oklahoma State
Department of Health Commissioner,

Defendant/Appellee.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, DISTRICT JUDGE

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REVERSED AND REMANDED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

¶1 This case directly presents the question of whether the Open Records Act, 51 O.S. § 24A.1 et seq. (ORA), requires the government to supply records requested under the act in native, digital file format, if possible. We hold that it does. The trial court's judgment, premised on a contrary interpretation of the

law, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

BACKGROUND

¶2 On March 23, 2020, plaintiff and appellant, Mr. Nicholles Brooke, submitted an open records request to the Oklahoma State Department of Health (OSDH). Specifically, he requested to “[i]nspect or receive digital copies of all correspondence with attachments and other public records regarding the COVID-19 pandemic sent to Governor Stitt, or anyone working in the Governor’s office, by the State Epidemiologist or others in the Department of Health.” The request was further limited to seven specific search terms found in correspondence from January 1, 2020, to March 23, 2020. Brooke stated that he preferred to receive the documents via email but would be willing to inspect them in person as well.

¶3 That same day, OSDH acknowledged receipt of Brooke’s email. On March 31, 2020, Brooke sent a follow up email to OSDH to inquire about the status of his request. Again, on the same day, OSDH replied that they were in the process of collecting the requested information and would make it available at the earliest opportunity.

¶4 On April 8, 2020, only sixteen days after his initial request, Brooke filed a petition in district court requesting that the court temporarily and permanently enjoin OSDH from “continuing to deny” his access to specific public records in violation of the ORA, requesting a declaration of the rights and responsibilities of OSDH as to the public records, and seeking a writ of mandamus pursuant to

12 O.S. § 1451, directing OSDH to produce the requested public records as required by law. ODSH responded with a motion to dismiss arguing that it had not denied Brooke's request and was still collecting the requested documents. Further, ODSH had apparently supplied some records around this time. Indeed, on August 5, 2020, Brooke received an initial batch of 228 documents, and there were additional batches of documents produced on August 8, 2020, August 27, 2020, September 8, 2020, and February 2, 2021. However, Brooke did not believe that any of these documents were responsive to his request, as none of them were correspondence to the governor's office, as far as he could tell.

¶5 Brooke also complained that every record produced by OSDH was in PDF¹ format, which stripped each record of metadata,² which he claimed was essential to organizing, searching, and understanding the records.³ He also alleged that more than half the PDF copies of emails in the first document production were

¹ "The Portable Document Format (PDF) was created by Adobe Systems, introduced at the Windows and OS/2 Conference in January 1993 and remained a proprietary format until it was released as an open standard in 2008." *History of PDF*, <https://datatracker.ietf.org/doc/html/rfc8118> (last accessed August 29, 2024).

² "Metadata" is defined as "secondary data that organize, manage, and facilitate the use and understanding of primary data." *Metadata*, Black's Law Dictionary (11th ed. 2019). See also *Merriam-Webster.com Dictionary*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/metadata> (last accessed August 29, 2024) (defining metadata as "data that provides information about other data.>").

³ According to Brooke, email messages—the records specifically requested in this case—have two parts: the message body and the header fields. The header fields contain metadata about the emailed message. For example, header fields include information regarding the sender's address, the recipient's address, the subject of the message, the time the message was received, and other advanced metadata that "can be used to identify related messages (to put threaded conversations back together) as well as information about the computer used to send the message." Doc. 2, *Petitioner's Brief in Support*, pg.7.

missing critical information about who sent the message, the recipient of the message, and when the message was sent. OSDH responded to Brooke's motion, alleging that they had not yet denied him access to any records; that the broad nature of his request was causing excessive disruption to OSDH's normal activities; and that the ORA does not require production of records in any specific format, and hence, PDF copies of the emails constituted proper production.

¶6 On May 12, 2021, the parties participated in a bench trial. There were only two witnesses: Mr. Brooke and Joshua Anderson, the assistant general counsel of OSDH. The witnesses testified at length about the thousands of documents that had been produced by OSDH at that point, all of which were PDF facsimiles. Brooke argued, and still maintains, that he is entitled to the documents in their native PST format,⁴ as opposed to the PDF copies he received. Notably, at the very end of the hearing, Brooke asked: "I just wanted to point out that I believe they testified that they have never delivered any electronic records at all. And can we stipulate that you're not going to turn around and start delivering electronic records between now and when we close?" Counsel for OSDH responded, "I think we're pretty clear that we are not going to produce native file format emails." Nonetheless, on August 17, 2021, the court entered a minute

⁴ The native file format for the records in this case is a personal storage table (PST) file format built by Microsoft to store copies of messages, calendar events, and other items within their software platforms. Doc 13, *Defendant's Third Motion for Summary Judgment*, Exhibit 6, *Affidavit of Samantha Hatch*, pg. 3. Such files "can only be opened in MS Outlook and the items contained therein may be manipulated within that software. It is considered a dynamic file storage format." *Id.*

order requiring the parties to confer on production of electronic records, and on February 17, 2022, OSDH sent Mr. Brooke some files in their native file format.

¶7 In October 2021, OSDH filed three separate motions for summary judgment, arguing that Mr. Brooke was never denied the records he requested; that it was not required to produce files in their native format; and that the open records requested in this case caused an excessive disruption to OSDH's activities. Mr. Brooke subsequently filed a brief arguing that the motions for summary judgment were untimely. It appears there were various delays in the case, and a notice of disposition was filed on March 6, 2023. The parties met on May 1, 2023, and set a hearing for August 3, 2023. At the August 3 hearing, the court heard OSDH's motions for summary judgment and Mr. Brooke's related argument that the motions were untimely.

¶8 Ultimately, the court granted OSDH's motion for summary judgment that the native format of the records was not required to be produced under the ORA. It further granted summary judgment that OSDH had "substantially complied" with all its duties under the ORA. It is from these rulings Mr. Brooke now appeals.⁵

⁵ This Court scheduled this matter for oral argument, to be held March 7, 2024. On that date, a medical event occurred the courtroom that foreclosed the possibility of proceeding with argument. The parties were invited to request either to reschedule argument or seek supplemental briefing. Neither party sought additional argument but both suggested briefing. Upon review, the Court determines that neither argument nor supplemental briefing is necessary to decide the purely legal question this case presents.

STANDARD OF REVIEW

¶9 A trial court's decision on summary judgment is purely legal: whether a party is entitled to judgment as a matter of law because there are no material disputed facts. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Therefore, our standard of review is *de novo*. *Id.* Even if the material facts are undisputed, a motion for summary judgment must be denied if a reasonable person could reach a different inference or conclusion from the undisputed facts. *Buckner v. Gen. Motors Corp.*, 1988 OK 73, ¶ 30, 760 P.2d 803, 812. We draw all inferences in favor of the party opposing the motion. *Davis v. Leitner*, 1989 OK 146, ¶ 9, 782 P.2d 924, 926.

ANALYSIS

¶10 The ORA provides that, “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours” 51 O.S. § 24A.5. The ORA defines a “record” as “all documents including, but not limited to, any ... data files created by or used with computer software” *Id.* § 24A.3.⁶ The question presented here is whether the ORA requires those bodies subject to it to produce electronic records in their native file format when requested to do so, presuming that an agency is technologically capable of such production and such production is not disallowed by some other provision of the act.

⁶ We note that the ORA was amended in April 2024; however, the language cited above was not modified. See Oklahoma Open Records Act, 2024 Okla. Sess. Law Serv. Ch. 116 (H.B. 3779) (West).

¶11 Although this is a question of first impression in Oklahoma, several other states have addressed a similar issue under their open records acts. The Arizona Supreme Court held in *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009) that electronic versions of a record, including any embedded metadata, are subject to disclosure under public records law. In *Lake*, David Lake, a Phoenix police officer, submitted a public records request to the city of Phoenix, seeking notes kept by his supervisor documenting Lake's work performance. *Id.* at 1005. The city denied the request and contended that metadata was not a public record under prior case law. *Id.* Despite the city's contention, the Arizona Supreme Court found that the "metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page." *Id.* at 1007-08. The Court ultimately held that the electronic version of the supervisor's notes on a police officer's work performance, including embedded metadata inherent in the document, was subject to disclosure under the public records law. *Id.* at 1008.

¶12 Additionally, in *Roe v. Phillips Cnty. Hosp.*, 522 P.3d 277 (Kan. 2023), plaintiff Roe, sought copies of hospital records or electronic records in their native format. *Id.* at 278. The hospital refused to produce the requested electronic records in their native format but expressed a willingness to provide copies of the electronic records in hard copy format. *Id.* at 279. The Kansas Supreme Court ultimately held that the hospital was required to produce electronic copies of the requested records. *Id.* at 282. In reaching its decision,

the Court cited a Kansas statute, which stated: “Any person may make abstracts or obtain copies of any public record to which such person has access under this act.” *Id.* at 281. There was no question that the hospital possessed the requested electronic records and could produce them in electronic format; therefore, it found that the parties only dispute centered on what the Kansas open records act meant by “copies.” *Id.* at 280. The Court ultimately found that a copy would be an “accurate reproduction of the original electronic records.” *Id.* at 282.

¶13 The Court noted that Kansas’s act defined a “public record” as “any recorded information, *regardless of form, characteristics or location*, which is made, maintained or kept by or is in the possession of any public agency.” *Id.* at 281. The Court held that due to the language of the act, it was clear that an “agency cannot split a public record into its constituent parts: all recorded information within a record *is* the record, and thus must be disclosed unless specifically exempted by KORA.” *Id.* Thus, the Court found that the act obliged the agency to faithfully duplicate the public record in *all* its respects, “regardless of form, characteristics or location.” *Id.* (quoting K.S.A. 2020 Supp. 45-217 (g)(1)).

¶14 Although the ORA does not use precisely the same definition of a public record as the Kansas act uses, the language is similar and appears to have the same meaning. Our act provides that a “[r]ecord” means “all documents ... including data files created by or used with computer software ... regardless of physical form or characteristic.” 51 O.S. § 24A.3. We find the Kansas and Arizona opinions to be persuasive and join those states in holding that requestors of open

records are entitled to production of a record in its native file format. In Oklahoma, as in Kansas, “all recorded information within a record is the record.” *Roe*, 522 P.3d at 281.

¶15 In support of its argument that it is not required to produce the documents in their native file formats OSDH primarily relies on federal cases under the federal Freedom of Information Act (FOIA). Although Oklahoma courts have considered FOIA cases in situations where FOIA has “virtually identical language” to the ORA,⁷ that is not the case here. FOIA requires that a public body must “provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B); 26 C.F.R. § 601.702(c)(2).⁸ We find no equivalent passage in the

⁷ See *Oklahoma Pub. Employees Ass’n v. State ex rel. Oklahoma Office of Pers. Mgmt.*, 2011 OK 68, ¶ 26, 267 P.3d 838, 848, analyzing United States Supreme Court cases and other federal cases because FOIA contained “almost identical language” to the ORA provision which provided that the release of certain files “would constitute a clearly unwarranted invasion of personal privacy” and may not be released for public scrutiny.

⁸ The two FOIA cases cited by the defendants are: *Citizens for Resp. & Ethics in Washington v. U.S. Dept of Educ.*, 905 F. Supp 2d 161, 171 (D.D.C. 2012) and *Facebook, Inc. & Subsidiaries v. Internal Revenue Serv.*, 16-CV-05884-LB, 2017 WL 2630086, at *5 (N.D. Cal. June 19, 2017). In *Citizens*, the plaintiff, Citizens for Responsibility and Ethics in Washington (“CREW”), filed a request with the U.S. Department of Education (“DoEd”) seeking records of communications between DoEd officials and specified individuals or entities. *Id.* The DoEd produced records of emails in paper format. The court held that CREW was not entitled to electronic records but raised several different theories without being clear which theory it relied on. *Citizens* also relied on the fact that, although plaintiff had requested a *search* for records “regardless of format, medium, or physical characters, and including electronic records and information,” plaintiff did not request *production in electronic format*, and hence the Department of Education “had no obligation to produce the documents in any particular format.” *Id.* at 171-72 (emphasis supplied). As stated below, FOIA specifically provides that the record must be provided in the format requested; however, the ORA does not contain such language. *Citizens* also appears to hold that the email records CREW sought were not “readily reproducible” in electronic format and were therefore exempt from production under 5 U.S.C. § 552(a)(3)(B). The “readily reproducible” language of § 552 also does not appear in the ORA.

ORA, however. Further, even if we were to read this FOIA provision into the ORA and hold that Mr. Brooke was required to request native format production, we would hold that Mr. Brooke's request for the records in "electronic format" was sufficient.

¶16 OSDH also relies on *Wagner v. Office of Sheriff of Custer Cnty.*, 2021 OK CIV APP 20, 492 P.3d 1240, to support its denial of native format records. However, the case contains no such support. The only issue presented in *Wagner* was whether a public body is required under the act to provide records via email. *See id.* ¶ 13. The Court held it was not. *Id.* The Court held that, although the ORA did not prohibit a government body from producing the documents via email, it did not require it. *Id.* The case had nothing to do with the production of electronic records and went out of its way to say so. *See id.* ¶ 12 ("Most of the cases the [plaintiff] cites concern the definition of 'record' under the Act, *or some other issue not presented here.*" (emphasis supplied)). *Wagner* gives no support for the proposition that a public body has discretion to provide or deliver records in a form that materially alters or removes the content of the original record.

¶17 Based on the plain language of the ORA, as well as persuasive interpretations of similar statutes from other state courts, we hold that the ORA requires agencies to produce electronically stored records in a way in which the full content of the original record, including metadata, are included in the

The other case cited by defendants, *Facebook*, does not expand on *Citizens*, however, and relies upon the same 5 U.S.C. §552(a)(3)(B) argument that Facebook had not requested production in native format. 16-CV-05884-LB, 2017 WL 2630086, at *5 (N.D. Cal. June 19, 2017).

production. While we find that the ORA does not provide a specific means for providing inspection, copying, or electronically reproducing any given record, we hold that the record must be produced, or made available for copying, in its entirety. Where production of copies of records omits essential information from the record, such as occurred in this case,⁹ the agency has not complied with the act.

CONCLUSION

¶18 We find no language in the ORA that supports a complete refusal to produce a record in the format it was made or stored, unless some specific statutory provision otherwise prevents such disclosure. We acknowledge that disclosure under the ORA is subject to statutory limitations, including limitations on the disclosure of sensitive personal information and that there may be individual records in OSDH's possession that would not be subject to disclosure without redaction. Additionally, the record in this case indicates that

⁹ As relevant in this particular case, Mr. Brooke notes more than half of the emails produced in the first document production were missing critical information regarding the sender, the recipient, and what time or date the email was sent. Only thirty-one out of seventy-one emails produced clearly identified the sender, recipients, and the date and time that the email was sent. Mr. Brooke also used an excel spreadsheet produced by OSDH to prove that a PDF is substantially lacking some information contained in a record stored electronically in PST format. *Id.* One of the initial batches of document production by OSDH included a hospital bed census report, originally stored as a spreadsheet. The spreadsheet included a list of hospitals and their bed counts. In the data table, each row represented a hospital facility, and each column contained a data point about that facility (number of beds, available staff, etc.). In the PDF export given to Brooke, he notes that the columns related to each row are printed on six different non-consecutive pages. Additionally, he points out that some of the spreadsheet columns are truncated, prohibiting him from being able to read the entire name of various facilities. Further, had there been any formulas used in the spreadsheet, Brooke would not have been able to see them. These examples make it clear that records produced in PDF format are not, in fact, the entirety of the record. They are missing essential data that we hold is part of the record itself. It must, therefore, be produced.

OSDH might not currently have the technological means to follow other requirements of the act while producing the record in its native file format.¹⁰ These issues, and more, constitute material questions of fact that must be explored on remand. However, our holding—that the ORA requires the production of native digital files when those files constitute “record[s]” subject to the act—necessitates reversal. Accordingly, we reverse the court’s judgment in favor of OSDH and remand for further proceedings consistent with this opinion.

¶19 REVERSED AND REMANDED.

HUBER, P.J., and HIXON, J., concur.

September 12, 2024

¹⁰ However, we also find the Wisconsin’s Court of Appeals case *Stone v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2007 WI App 223, ¶ 18, 305 Wis. 2d 679, 690, 741 N.W.2d 774, 779, helpful on this issue. The court held that an open records disclosure need not be in any specific format, but that the disclosed record must, in terms of material information, be an “identical copy.” The court states:

A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. More specifically, a copy that is not meaningfully different from an original for purposes of responding to a specific open records request is an “identical copy,” as we use that term in this decision.

Id. As *Stone* notes, “[i]f a ‘copy’ differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record.” *Id.* We note, as the court did in *Stone*, that if producing a particular record in its native file format is not feasible or possible then OSDH is still required to produce an “identical copy” of the record. Which, by example of the excel spreadsheet produced by OSDH, means producing more than the PDF printout of the sheet over multiple pages. The format should reflect the cells in their entirety, their relationship to one another, any underlying formulas, and other data contained within the file that is not reproduced in a PDF printout. Similarly, an email record containing sensitive information would still need to be produced, though redacted, with its full headers.