NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

OKLAHOMA ASSOCIATION OF BROADCASTERS, INC.,	)	
Plaintiff/Appellant,	)	
vs.	)	Case No. 113,973
CITY OF NORMAN, NORMAN POLICE DEPARTMENT, DISTRICT ATTORNEY OFFICE FOR THE TWENTY FIRST JUDICIAL DISTRICT,	)	
Defendants/Appellees.	)	

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE THAD BALKMAN, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

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OPINION BY DEBORAH B. BARNES, JUDGE:

Plaintiff/Appellant Oklahoma Association of Broadcasters, Inc. (OAB) appeals from a "Journal Entry" (Order) of the district court granting a motion to dismiss made by Defendants/Appellees City of Norman, Norman Police Department (collectively, NPD), District Attorney Office for the Twenty First Judicial District (District Attorney) (collectively, Defendants) dismissing OAB's petition for declaratory, injunctive and mandamus relief under the Open Records Act, 51 O.S. 2011 §§ 24A.1-24A.30 (ORA). This appeal proceeds under the accelerated procedure for "final orders in cases in which motions to dismiss for failure to state a claim" are filed pursuant to Oklahoma Supreme Court Rule

1.36(a)(2), 12 O.S. Supp. 2013, ch. 15, app. 1.[1] We reverse the Order of dismissal and remand the cause for further proceedings.

BACKGROUND

In its petition, filed November 3, 2014, OAB alleged that on July 25, 2014, University of Oklahoma student Joe Mixon (Mixon) was involved in a physical altercation with a female university student at a local restaurant that was recorded on the restaurant's surveillance video. NPD was called to the restaurant and police officers investigated the matter. On August 15, 2014, an NPD police officer filed an affidavit of probable cause in which he asked for an arrest warrant for Mixon. In the affidavit, the police officer stated he was called to the restaurant, reviewed the reports of other police officers who earlier arrived at the scene and interviewed witnesses who identified Mixon as the person who struck the female student, and "viewed/obtained the surveillance video." The police officer's affidavit states the surveillance video showed Mixon in a verbal altercation both outside and inside the restaurant, and that Mixon

> lunged at [the female student] in an aggressive manner, leading with his head and with his right fist clinched by his side. The [female student] reacted by slapping [Mixon], with an open right hand, near his left ear. [Mixon] then struck her on the left side of her face with his closed right fist, knocking her into a table top and then to the ground where she laid motionless. [Mixon] then left the[] scene.

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[1] OAB's motion to the Oklahoma Supreme Court to retain the appeal was denied.

The same day the police officer filed his affidavit, the District Attorney filed a criminal information alleging Mixon "unlawfully, willfully, knowingly and wrongfully committed the" misdemeanor crime of "Acts Resulting in Gross Injury." The information referenced the NPD Law Enforcement Incident Number that corresponds with the affidavit of probable cause. Three days later, on Monday, August 18, 2015, Mixon was arraigned in Case No. CM-2014-1774.

OAB further alleged that on or around August 18, several of its member television station news departments and other media entities asked NPD for a copy of the surveillance video pursuant to the ORA, a request NPD declined. Instead, NPD agreed to allow the requestors to view the surveillance video at the Norman Police Department. On September 4, 2014, approximately forty individual members of news agencies were permitted to view the surveillance video but were not permitted to record the surveillance video nor were they provided copies of it.

On October 30, 2014, Mixon, pursuant to an agreement with the District Attorney, entered an Alford plea to the misdemeanor charge and, as a result of his plea, his case was "Disposed of and Deferred." Also on October 30, 2014, OAB submitted its ORA request to each of the Defendants requesting "a copy" of the surveillance video. Its member television station KWTV News 9 (News 9) also renewed its earlier ORA request to Defendants. That same day, OAB received an email response to its request in which the District Attorney stated, in part, "This

office no longer has that record [the surveillance video] in its custody and control, as it has been given to the victim."[2] OAB also alleged that News 9 received responses to its renewed ORA request. According to the affidavit of News 9's managing editor, it received the same response from the District Attorney as did OAB but additionally received a response from NPD Captain Tom Easley in which he stated, "We have copies[.]" In a phone conversation with Norman City Attorney Rick Knighton, the managing editor averred he was told the NPD delivered a copy of the surveillance video to the city attorney's office after News 9 requested a copy be preserved and that copy was now in the city attorney's "litigation file." The managing editor further averred that as of November 3, 2014, none of the Defendants has produced or agreed to produce the surveillance video.

OAB asked for judgment against each of the Defendants declaring OAB's right to access the surveillance video and finding the Defendants in violation of the ORA, enjoining the Defendants from disposing of or altering the surveillance video prior to producing it to OAB, and issuing, in the alternative, a writ of mandamus commanding the Defendants to produce the surveillance video or to appear and show cause as to the reason for their failure to produce the surveillance video.

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[2] Tab 1, Exhibit F.

The District Attorney filed an answer in which, among other things, it denied "that any of the requested records are in its possession," and denied that Mixon's charges, as alleged by OAB, "were the result of the incident shown and recorded in the" surveillance video.[3] The District Attorney denied OAB was entitled to any relief. It further raised the affirmative defense of mootness because, it alleged, the criminal court concluded its proceedings before November 1, 2014, the Defendants permitted the media to view "the record" and thus complied with the ORA, and the District Attorney "did not possess a copy of the [surveillance] video at issue on or after November 1, 2014[.]"[4]

NPD did not answer but filed a motion to dismiss.[5] NPD claims OAB is not entitled to declaratory or injunctive relief because: the surveillance video had been made available to the public for viewing as required by the pertinent ORA provision in effect at the time the requests were made;[6] NPD exercised the discretion granted to it to return the "property" to the rightful owner pursuant to 22

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[3] Tab 3, ¶¶ 5, 9.

[4] The District Attorney raised other affirmative defenses not pertinent to the issues on appeal.

[5] During the hearing on the motion to dismiss, the District Attorney stated that although its "fact situation is slightly different" from NPD's, it joins in the motion to dismiss. Tab 9, Tr. at p. 50.

[6] Tile 51 O.S. 2011 § 24A.8(A) provides: "Law enforcement agencies shall make available for public inspection, if kept," certain records, whereas the 2014 amendment, effective November 1, 2014, states, in part, "Law enforcement agencies shall make available for public inspection *and copying*, if kept," certain documents. (Emphasis added.)

O.S. 2011 § 1321(B);[7] and OAB is not entitled to a copy of the surveillance video because it is now in the city attorney's office in anticipation of litigation.[8] It also argues mandamus was not available to OAB because OAB's allegations show the surveillance video had been made available for public viewing, and OAB "has plead[ed] itself out of court" because one of the five usual elements for mandamus could not be met.[9] It also argues that because the NPD had discretion to return the surveillance video to its owner, another of the five usual elements for mandamus

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[7] Title 22 O.S. § 1321 provides, in part, as follows:

> A. It is the intent of the Legislature that any stolen or embezzled money or other property held in custody of a municipality, county or the state in any criminal investigation, action or proceeding be returned to the proper person or its lawful owner without unnecessary delay.
>
> B. If the property coming into the custody of a municipal, county or state peace officer is not alleged to have been stolen or embezzled, the peace officer may return the property to the owner upon satisfactory proof of ownership. The notice and hearing provisions of this section shall not be required for return of the property specified in this section if there is no dispute concerning the ownership of the property. Within fifteen (15) days of the time the owner of the property is known, the peace officer shall notify the owner of the property that the property is in the custody of the peace officer. The property shall be returned to the owner upon request.

[8] Referencing § 24A.20, NPD asserts a municipal attorney is permitted to keep its litigation files confidential and claimed the second sentence of that section did not apply "because the record sought by [OAB] was not 'otherwise available for public inspection and copying' on October 30, 2014 – i.e., the date [OAB] submitted its [ORA] request."

[9] Tab 2, at p. 8. NPD quoted from *Chandler (U.S.A.), Inc. v. Tyree*, 2004 OK 16, 87 P.3d 598, in which the Oklahoma Supreme Court stated:

> A typical case for mandamus has five elements: (1) The party seeking the writ has no plain and adequate remedy in the ordinary course of the law, (2) The party seeking the writ possesses a clear legal right to the relief sought, (3) The respondent (defendant) has a plain legal duty regarding the relief sought, (4) The respondent has refused to perform that duty, and (5) The respondent's duty does not involve the exercise of discretion.

Id. ¶ 24 (footnote omitted). Although not referenced by NPD, there the Supreme Court also stated: "However a writ of mandamus may be used to correct an official's arbitrary abuse of discretion." *Id.* (citation omitted).

cannot be met by OAB. Consequently, NPD requests OAB's petition be dismissed.

In its response, OAB argues, among other matters, that while some of OAB's membership were given access to the surveillance video, the present lawsuit was filed on its behalf and it has been denied, and continues to be denied access though it made a separate request on October 30, 2014. It also argues that Defendants admit they still have possession of the surveillance video, thus admitting the record exists.[10] OAB also argues that under either the 2011 or 2014 version of § 24A.8(A), it is entitled not just to inspection of the record, but to a copy of the record, and further contends that because the record is still in Defendants' possession and it has been denied any access to it, OAB is entitled to inspection and copying under the 2014 version of § 24A.8(A). As to NPD's assertion that it was required to return the record to the restaurant, OAB argues that it is not § 1321, but rather 22 O.S. 2011 § 1327[11] that controls because the surveillance video was never stolen or embezzled but rather was used as evidence

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[10] Tab 4, at p. 5.

[11] Section 1327 provides, in part, as follows:

> A. All exhibits which have been introduced, filed, *or held in custody of the state in any criminal action* or proceeding may be disposed of as provided for in this section.
>
> B. *The court may*, on application of the party entitled thereto, or an agent designated in writing by the owner, *order all such exhibits*, other than documentary exhibits, as may be *released from the custody of* the court or *the state*, without prejudice to the state, delivered to such party at any time after the final determination of the action or proceedings[.]

(Emphasis added.)

in a criminal investigation and a potential exhibit in the subsequent criminal trial. Finally, OAB argues it has met all five elements of the test set forth in *Chandler* for mandamus relief.

In reply, NPD argues that § 24A.8(A) is not applicable to OAB's request for access because Mixon was never arrested but instead voluntarily surrendered himself to the court. Thus, under either the 2011 or 2014 amendment to § 24A.8(A)(2),[12] the Defendants argue they are not required to make the surveillance video available for inspection or copying and, therefore, OAB's petition should be dismissed because it is not entitled to declaratory, injunctive or mandamus relief. NPD also again asserts the property was required to be returned to the restaurant under § 1321(B) because the surveillance video came into the custody of a municipal peace officer and it has not been alleged to be stolen or embezzled. Because the ownership was known, they argue, the property may be returned without delay.

A hearing was held on the motion during which the trial judge and the attorneys for OAB viewed the surveillance video. At the conclusion of the parties' arguments, the trial court announced its ruling granting Defendants' motion to dismiss. On April 30, 2015, the court entered its Order. The court found the

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[12] Section 24A.8(A)(2) requires the following records, among others, to be made available, if kept: "Facts concerning the arrest, including the cause of arrest and the name of the arresting officer[.]"

surveillance video did not "depict" an arrest or facts concerning an arrest because no arrest occurred; thus, the trial court found the provisions of § 24A.8(A) did not apply and the Defendants were not required to make the surveillance video available for inspection or copying. The court further found that, in any event, the surveillance video had been made available for inspection pursuant to the 2011 version of § 24A.8(A), and further found the surveillance video "was property that was rightfully returned to its owner by Defendants." Consequently, the court determined that OAB was not entitled to declaratory or injunctive relief. Additionally, the court found OAB was not entitled to mandamus because OAB had no "clear legal right to relief" pursuant to § 24A.8(A) and Defendants satisfied any duty owed because they provided members of the public, including OAB, the opportunity to inspect the record. The trial court also specifically ordered the surveillance video, "which is now part of the Court record," preserved pending any further action by OAB. OAB appeals.

STANDARD OF REVIEW

The Oklahoma Supreme Court has stated that only under the following standards may dismissal of an action be upheld:

> Generally, motions to dismiss are viewed with disfavor. This court reviews the dismissal *de novo* considering the legal sufficiency of the petition and taking all allegations in the plaintiff's petition as true. The function of a motion to dismiss is to test the law of the claims, not the facts supporting them. No dismissal for failure to state a claim upon which relief may be granted should be allowed unless it

> appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle relief. Plaintiffs need neither identify a specific theory of recovery nor set out the correct remedy or relief to which they may be entitled. If any set of facts can be established which is consistent with the allegations, a motion to dismiss should be denied. Dismissal is appropriate only for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable theory. Where not all claims appear to be frivolous on their face or without merit, dismissals for failure to state a claim upon which relief may be granted are premature. The movant bears the substantial burden of demonstrating any insufficiency.

Gens v. Casady School, 2008 OK 5, ¶ 8, 177 P.3d 565 (footnotes omitted) (emphasis omitted).

The dismissal also concerns questions of statutory construction. The "interpretation of statutory law presents a question of law and statutes are construed to determine legislative intent in light of the general policy and purpose that underlie them." *Troxell v. Okla. Dep't of Human Servs.*, 2013 OK 100, ¶ 4, 318 P.3d 206 (citation omitted). Further, "[a] decision concerning which statutes apply to a given set of facts is one of law." *Vaughan v. Graves*, 2012 OK 113, ¶ 9, 291 P.3d 623 (citation omitted). Questions of law are reviewed *de novo*. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081.

ANALYSIS

Among the issues OAB asserts on appeal is whether the surveillance video, that captured a criminal act and was the basis for a probable cause affidavit for an arrest warrant, shows the facts of an arrest or cause for an arrest referenced in 51

O.S. 2011 § 24A.8(A), and whether "arrest" includes a defendant's voluntary submission to the custody of a court after an affidavit of probable cause has been filed and an information has been filed.

A. Applicability of 51 O.S. 2011 § 24A.8(A)

Pursuant to 51 O.S. 2011 § 24A.3, the surveillance video is a "record" because it is a "video record . . . received by . . . or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with transaction of public business . . . ."[13] "Law enforcement agency" is further defined under § 24A.3(5), to mean "any public body charged with enforcing state or local criminal laws and initiating criminal prosecutions, including, but not limited to, police departments . . . ." Thus, the fact that the surveillance video was prepared or owned by a private party does not preclude it from being a record for purposes of the Act. The surveillance video was taken by a Norman police officer as part of his investigation and used by the police officer to file a probable cause affidavit requesting an arrest warrant for Mixon.[14] Further,

[13] Defendants agree the surveillance video "clearly fits within the definition of record under [§] 24A.3." Tab 9, Tr. at p. 42.

[14] Tab 1, Exhibit A.

OAB alleged that the surveillance video was used by the District Attorney in the criminal prosecution of Mixon.[15]

The Defendants argue, however, that while the surveillance video may be a record, the Department is not required to allow inspection (never mind copying of the surveillance video) because it is not a record of "[f]acts concerning the arrest, including the cause of arrest" pursuant to § 24A.8(A)(2). While OAB concedes the surveillance video does not depict Mixon's arrest – he left the scene before any police officer arrived – OAB argues it shows the facts that were the cause of his arrest as set forth in the police officer's probable cause affidavit. Defendants assert Mixon was never arrested but voluntarily appeared before the district court. The trial court agreed and granted the motion to dismiss because the video does not "depict an arrest or the cause of an arrest."

We note the statute does not use the word "depict,"[16] nor is there any other indication from the plain language of the statute that the requested record itself must show the actual arrest before the law enforcement agency is obligated to provide access to the record pursuant to § 24A.8(A). The record, however, must be of facts concerning "the arrest," including facts concerning the cause of "the

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[15] Although the District Attorney alleges it did not rely on or use the surveillance video in its investigation or prosecution of Mixon that matter is a question of fact not properly determined on a motion to dismiss. "The function of a motion to dismiss is to test the law of the claims, not the facts supporting them." *Gens*, ¶ 8.

[16] Depict is defined as "to form a likeness of by drawing or painting . . . ." Webster's Third New International Dictionary of the English Language Unabridged 605 (3rd ed. 2002).

arrest." Thus, the statute clearly requires an "arrest" before the provisions of § 24A.8(A)(2) apply.

OAB asserts there is a question about whether an arrest occurred at the time Mixon appeared in the criminal case. OAB argues a legal question is presented as to whether "arrest" as used in § 24A.8(A) includes a situation where "(i) a criminal information is filed, (ii) an individual appears in court with his legal counsel, (iii) the court orders the defendant to remain in custody of counsel and/or bondsman, pending posting of bond, (iv) the defendant is ordered to be processed by the county sheriff's department, and (v) defendant is released after posting bond[.]"[17] Thus, OAB argues that when Mixon placed himself in the court's custody, an "arrest" occurred. We disagree.

Nothing in § 24A.8 demonstrates the Legislature's intent to deviate from the definition of arrest set forth 22 O.S. 2011 § 186 and its interpretation by the courts. Section 186 provides: "Arrest is *the taking* of a person *into custody*, that he may be held to answer for a public offense." (Emphasis added.) In *Castellano v. State*, 1978 OK CR 107, 585 P.2d 361, the Oklahoma Court of Criminal Appeals defined arrest as the

> taking, seizing, or detaining the person of another either by touching, or by any act which indicates an intention to take him into custody and subject the person arrested to the actual control and will of the person making the arrest, or any deprivation of the liberty of one

[17] Petition-in-error, Exhibit C.

> person by another or any detention of him, for however short a time, *without his consent, and against his will*, whether it was by actual violence, threats, or otherwise[.]

Id. ¶ 6 (emphasis added) (citation omitted). Further, § 187 sets forth the persons who have authority to arrest: "An arrest may be either: 1. By a peace officer, under warrant[;] 2. By a peace officer without a warrant; or, 3. By a private person."

In the situation OAB describes, there has been no taking of the person into custody – the person appeared himself to answer for the alleged public offense with which he was charged in the information. No peace officer, with or without warrant, effected the taking of Mixon though he was processed by the sheriff's department upon order of the court.[18] It is police-citizen encounters that are addressed in § 24A.8(A). Although Mixon was not free to leave after he submitted himself to the district court and thus was in custody, it was the court, not law enforcement that placed him in custody. Consequently, we conclude Mixon's appearance in the criminal case, though that appearance put him in custody, is not tantamount to an arrest, and the trial court did not err in this regard.[19] Therefore,

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[18] Title 22 O.S. 2011 § 190 provides: "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." The submission made by Mixon was to the court not "to the custody of the officer."

[19] During the hearing, OAB appeared to also argue there was a factual question concerning whether an arrest was made; that is, whether an arrest warrant actually issued and was executed. Tab 9, Tr. at pp. 29-32. Defendants argue the trial court can take judicial notice of its own docket and the docket in the criminal case was devoid of any reference to issuance of an arrest warrant and to Mixon's arrest. No copy of that docket is in the appellate record, however. On the other hand, in its petition-in-error, OAB seems to have abandoned that factual argument

we conclude the Defendants did not have any obligation under § 24A.8(A) to provide access to the surveillance video.[20]

B. Applicability of 51 O.S. 2011 § 24A.8(B)

The inquiry into whether Defendants must make the surveillance video available for inspection and copying, however, is not concluded. Section 24A.8(B) provides as follows:

> *Except for the records listed in subsection A* of this section and those made open by other state or local laws, law enforcement agencies may deny access to law enforcement records *except* where a court finds that the public interest or the interest of an individual outweighs the reason for denial.

(Emphasis added.)[21] Therefore, if none of the records listed in § 24A.8(A) constitutes the public record at issue, a law enforcement agency may deny access to that public record "except" where a court "finds" the public interest outweighs

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instead arguing for the more expansive definition of what constitutes an arrest above discussed. Yet, the record of the hearing raises some question about whether the arrest warrant was issued – *e.g.*, Tab 9, Tr. at p. 6 (Defendants' argued "None of the individuals that were depicted in that video were arrested *at that time*; neither the victim nor [Mixon]." (Emphasis added.)). Other arguments by Defendants, however, assert no actual arrest occurred. Tab 9, Tr. at pp. 6-7. If such a factual question were at issue, that factual question would provide a reason for reversal of the Order of dismissal. *Gens*, ¶ 8.

[20] Because we have concluded no arrest occurred that would trigger the access mandate of § 24A.8(A), we do not address the issue of whether "inspection" in the 2011 version of the statute means only inspection or inspection and copying, as stated in the 2014 amendment.

[21] The 2015 version of this subsection provides:
> Except for the records listed in subsection A of this section and those made open by other state or local laws, law enforcement agencies may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial. The provisions of this section shall not operate to deny access to law enforcement records if such records have been previously made available to the public as provided in the Oklahoma Open Records Act or as otherwise provided by law.

the reason for denial. Consequently, while no arrest may have been made in the present case and, thus, § 24A.8(A) may impose no obligation on Defendants to provide access to the surveillance video, whether § 24A.8(B) may require such access has yet to be determined.

"Dismissal is appropriate only for lack of any cognizable legal theory to support the claim . . . ." *Gens*, 2008 OK 5, ¶ 8 (footnote omitted). While OAB's petition did not specifically allege its entitlement to access to the surveillance video pursuant to § 24A.8(B),"[p]laintiffs need neither identify a specific theory of recovery nor set out the correct remedy or relief to which they may be entitled." *Gens*, ¶ 8. A hearing was conducted in the present case, but it was confined to the issues of whether § 24A.8(A)(2) applied and whether the Defendants had discretion to return the surveillance video to the owner of the video and whether they should be enjoined from divesting themselves of the surveillance video. Neither in the briefs below, nor during the hearing is § 24A.8(B) mentioned,[22] nor

[22] In fact, the only mention of § 24A.8(B) appears in Defendants' Exhibit A appended to its response to the petition-in-error. Defendants assert that on September 4, 2014, NPD "exercised its discretion under [§ 24A.8(B)] in favor of making the property sought by [OAB] available for public inspection." Section 24A.8(B), however, does not repose "discretion" in the law enforcement agency. By its plain language, § 24A.8(B) applies to circumstances where the law enforcement agency has denied access to records other than those set forth in § 24A.8(A). It is the court that will make a finding under § 24A.8(B) whether the public's interests outweigh the reason for denial.

We further note that while § 24A.12 provides that "the office of the district attorney of any county of the state, and the office of the municipal attorney of any municipality may keep its litigation files and investigatory reports confidential," the appellate record contains no information that the District Attorney or the municipal attorney made the surveillance video "confidential." Moreover, the video was made available to the public for inspection from

is there any finding in the Order determining whether the public's interest in the surveillance video outweighs the reason for denying (whatever reason that may be) access to it.

We do note that from the arguments made during the hearing, it appears as if some arguments by counsel may have addressed public policy issues that might go to the weighing of interests contemplated by § 24A.8(B). For example, Defendants concede the denial of access to the surveillance video was made after Mixon pleaded guilty. They recognize the video depicted someone who could be considered a person of "some public appeal or public sway or is a public official."[23] They further argue, however, the video belonged to a private person, to someone who might profit from the sale of his property, as have other such private owners of videos depicting possible criminal activity by people who might hold some celebrity or public notoriety. "And does that not potentially give rise to a takings claim if the Government is taking your valuable property for a limited purpose. And a limited purpose in this case was a criminal prosecution."[24] The Defendants argue that while the government seizes records, after the records are no

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September 2, 2014, through October 30, 2014, when Mixon entered his plea. See also the August 19, 2014 order issued by the trial judge in the criminal case in which the court makes clear it did not order the surveillance video to be held as a confidential record or otherwise place it under seal. Tab 1, Exhibit D.

[23] Tab 9, Tr. at p. 43.

[24] Tab 9, Tr. at p. 44.

longer needed, they are returned "to the owner under some process."[25] Defendants conclude, if someone wants access to that record, that person or entity can negotiate with the owner of the record for such access.[26]

In response, OAB argues that even if other media have purchased video from private owners, if in those cases such videos were in the possession of a public body, then the public body would have had to have had a reason to possess the record, and the media could have asked for access.[27] OAB also argues, in effect, that the public interest in that record should not be determined by the difference in situation between a defendant against whom a warrant is issued and a defendant who voluntarily surrenders himself to a court three days after a probable cause affidavit for an arrest warrant and an information charging the defendant with an offense were filed.[28] It argues, the fact that a record might be purchased from a private owner does not change the nature of the record nor the public's right to its access.

While the foregoing arguments *may* go to § 24A.8(B), they have not been completely presented to nor considered by the trial court. For example, while Defendants argue private property should be returned by law enforcement agencies

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[25] Tab 9, Tr. at p. 45.

[26] Tab 9, Tr. at p. 46.

[27] Tab 9, Tr. at p. 47.

[28] Tab 9, Tr. at p. 49.

"under some process" after the public record is no longer needed, no evidence or legal authority was produced that demonstrates "the process" required return of the surveillance video to the owner on the same day Mixon pled guilty to the offense. Nor factually does the record show the surveillance video was returned to the owner on that date. The record shows that in a letter dated October 30, 2014 (delivered via email), the District Attorney stated it no longer had the surveillance video because it had "been given to the victim," not the owner,[29] and on that date, at "3:01:48 PM" NPD had copies in its possession.[30] Moreover, Defendants' response on appeal states: "On October 30, 2014, NPD was advised that the property sought by [OAB] was no longer needed for prosecution. NPD attempted to return the property to its owner; however, prior to completing delivery, a local television station asked NPD to maintain a copy in anticipation of legal action. The [Norman municipal attorney] complied with the local television station's request." Thus, by Defendants' own account, it is unclear whether delivery of the surveillance video to the owner was made or when it was made. Consequently, return of the surveillance video to the restaurant does not appear, from this record, to have been the reason for denial of access to it.

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[29] Tab 1, Exhibit 5.

[30] Tab 1, Exhibit 6.

Further, nothing in the asserted public policy of the ORA states as its purpose the protection of the financial gain of a person who is the owner of a record that is used as part of a criminal investigation and prosecution. Defendants' assertion that any member of the public can "negotiate" with the owner and gain access to the record, in fact, presents a circumstance that seriously undermines the public's interest in records used by police and prosecutors in the conduct of their governmental responsibilities.[31] While § 24A.2 states privacy and confidentiality issues will not bar the public's right to "be fully informed about their government," the section also states the ORA shall not "establish any procedures for protecting *any person* from release of information contained in public records."[32] Thus, protecting the financial gain of an owner of a public record does not appear to be the purpose of the ORA. Further, § 24A.2 provides: "Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access." *See*

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[31] The Defendants' argument that some person may purchase the public record from the private owner necessarily means only "someone" – not the public – may gain exclusive access to the information upon which the police and prosecutor relied, at least in part, in investigating and prosecuting a defendant. While that someone may be media or other person who may make the information available to a wider audience, that someone may also be an individual who seeks to keep that information private and deny it to the public. What records the police use to file probable cause affidavits for an arrest warrant and what records district attorneys use in prosecuting defendants charged with an offense or in entering plea bargains with defendants so charged, are significant to an electorate's knowledge about how these powerful governmental bodies operate.

[32] *Id.* (emphasis added).

City of Lawton v. Moore, 1993 OK 168, ¶ 6, 868 P.2d 690 ("Given this strong public policy it is not surprising that the Act . . . grants no right to notice and hearing, or any other procedural protection, with respect to records covered by the Act's terms.").

Consequently, while an owner's right to his property that has been seized and used by law enforcement may not be indefinitely denied under certain circumstances, nothing in the record on appeal reveals that the trial court was presented with any reason why the surveillance video had to be returned to the restaurant on the day Mixon pleaded guilty,[33] or indeed what the reason was for denial in the first place, and why that reason outweighs the public's interest to access that record. *See, e.g., Progressive Independence, Inc. v. Okla. State Dep't of Health*, 2007 OK CIV APP 127, ¶ 4, 174 P.3d 1005 ("In ruling on a request for disclosure, the public body and the reviewing court must consider that, pursuant to the intent of the Act, disclosure of information is to be favored over a finding of exemption.") (citing *Tulsa Tribune Company v. Okla. Horse Racing Comm'n*, 1986 OK 24, 735 P.2d 548, noted as superseded by statute on other grounds in

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[33] The trial court appears to have accepted Defendants' argument that 22 O.S. 2011 § 1321(B) permitted Defendants to return the surveillance video to the restaurant. However, that section does not mandate a time by which "property" must be returned and does not specifically address the circumstance of the timing of the return when that "property" is a record. It is § 1321(A), not subsection (B), that requires return of stolen or embezzled money to the lawful owner "without unnecessary delay." The surveillance video is not "stolen or embezzled money."

Moore, ¶ 6, and *Okla. Pub. Emp. Ass'n v. State ex rel. Okla. Office of Personnel Mgmt.*, 2011 OK 68, ¶ 4 n.5, 267 P.3d 838).

We therefore conclude the trial court erred in dismissing OAB's petition for declaratory and injunctive relief and the matter must be returned to the trial court to further determine whether OAB's interest – the public's interest – in access to the record outweighs Defendants' reason(s) for denial of that access.

This conclusion is not altered by the availability of the surveillance video for public "inspection" from September 4, 2014, through October 30, 2014 (though, apparently, not all of the day on October 30, 2014).[34] If the record is not one of the records set forth in § 24A.8(A), then the nature of the access is not governed by that subsection – that is, whether only inspection, or inspection and copying was required for requests for access made prior to November 1, 2014. The potentially limiting language of "inspection" is found in the 2011 version of § 24A.8(A), but not in the other provisions of the ORA concerning the nature of the access to "records" in the possession of public bodies.[35] As above discussed, § 24A.8(B)

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[34] *See* n.30 and accompanying text, *supra*.

[35] *See, e.g.*, § 24A.5 ("All records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours . . . ."). Further, § 24A.20 provides:

> Access to records which, under the Oklahoma Open Records Act, would otherwise be available for public inspection and copying, 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. However, a law enforcement agency may deny access to a

concerns the public's interest in "other" records in the possession of law enforcement agencies, i.e., public bodies. Nothing in § 24A.8(B) states that "access" to those other records – if the public's interest is found to outweigh the reason for denial of access – is limited to only inspection. Given the express purpose of the Act is to "ensure and facilitate the public's right of access to and review of government records," § 24A.2, and given – with the exception of confidential records and other records specifically exempted by the Act,[36] – that "[a]ll records of public bodies . . . shall be open to any person for inspection, copying, or mechanical reproduction[,]" § 24A.5, we conclude the Legislature's use of the word "access" evinces a clear intent that public access to records made available pursuant to § 24A.8(B) is not confined to inspection only.[37] Consequently, if OAB's interests outweigh the reasons Defendants may assert for denial of access, then OAB's rights include a copy of that record.

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copy of such a record in an investigative file if the record or a true and complete copy thereof is available for public inspection and copying at another public body. (Emphasis added.)

[36] Title 51 § 24A.2, §§ 24A.9-24A.16(a), and §§ 24A.22-24A.24.

[37] This conclusion also finds support in the 2014 amendment to § 24A.8(A). The amendment makes clear that law enforcement agencies shall not only allow inspection of certain records, but that it shall allow copying of those records, thus bringing that provision in line with § 24A.2, among others. And while § 24A.8(B) was also amended in 2015, the amendment only makes more clear the legislative intent to ensure and facilitate public access. The 2015 amendment adds the following sentence to § 24A.8(B): "The provisions of this section shall not operate to deny access to law enforcement records if such records have been previously made available to the public as provided in the Oklahoma Open Records Act or as otherwise provided by law."

We, therefore, conclude OAB's petition for declaratory and injunctive relief asserts a cognizable legal theory that precludes dismissal. Consequently, the trial court erred in granting the motion to dismiss OAB's petition.

C. Court Record

Additionally, OAB raises as an issue on appeal whether dismissal was improper because the surveillance video was viewed by the trial court during the hearing and was relied upon by the trial court in granting dismissal, and the trial court specifically adjudged it to be a court record.[38] OAB argues that where the record is part of the court record under 12 O.S. 2011 § 22,[39] it is subject to disclosure under 51 O.S. 2011 § 24A.3(1).[40] The Oklahoma Attorney General has held that the offices of court clerks are "public bodies" as defined in the ORA and that a court clerk is a public official as defined by the ORA. 2014 OK AG 1, ¶ 5.

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[38] Defendants assert in their response to the petition-in-error that this issue cannot be considered on appeal because it was not raised below, citing *Office of State Chief Med. Exam'r ex rel. Pruitt v. Reeves*, 2012 OK CR 10, ¶ 10, 280 P.3d 357. That case is unpersuasive, however, because it does not concern an appeal from a court's order dismissing a petition for failure to state a claim. Moreover, "[p]laintiffs need neither identify a specific theory of recovery nor set out the correct remedy or relief to which they may be entitled" to withstand a motion to dismiss. *Gens*, ¶ 8.

[39] Section 22 provides: "The clerk of the district court shall keep an appearance docket, a trial docket, a journal and such other records as may be ordered by the court or required by law."

[40] As above set forth, § 24A.3(1) defines record to include, "video record or other material regardless of physical form or characteristic, . . . coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business . . . [.]" While judges, among others, are not public bodies within the Act, "public body" includes any court supported in whole or in part by public funds; public office means the physical location where public bodies conduct business or keep records; and public official means any official or employee of any public body. § 23A.3(2)-(4).

Consequently, pursuant to the provisions of § 24A.2(1), the surveillance video is a record because it is a "video record . . . received by . . . 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 trial court did not place the surveillance video under seal, 51 O.S. 2011 § 24A.30, nor, as previously discussed, has the record been found to be covered by privilege or otherwise deemed confidential. Defendants argue the surveillance record is now confidential because the municipal attorney made it part of its litigation file in this case and made it confidential. Even assuming the municipal attorney made its litigation file confidential pursuant to § 24A.12, we find instructive and persuasive the Attorney General's Opinion, 1999 OK AG 58, in which the discretion of the district attorney to make a litigation file confidential is discussed. There it was explained:

> It is within the discretion of the [district attorney's] office involved. If a document from a district attorney's litigation file is later filed with the court clerk, and there is not otherwise a privilege of confidentiality on the document, it must be made available for public inspection and copying by the court clerk. In other words, the fact that a district attorney may keep litigation files confidential does not extend to other files in which the document is kept . . . .

Id. ¶ 8 (citing § 24A.20). "No general privilege of confidentiality exists for an office of a court clerk." 1999 OK AG 58, ¶ 9.

In the present case, the surveillance video is part of the court file in the possession of the court clerk and, as such, is accessible to OAB – or any other member of the public – for inspection and copying. Nothing in the record on appeal, however, reveals OAB has requested the surveillance video from the Cleveland County Court Clerk and has been denied that access. Thus, a petition for declaratory, injunctive and mandamus relief as against the court clerk is, at this time, premature.

CONCLUSION

Based on the record and applicable facts, we conclude the trial court erred in dismissing OAB's petition for injunctive and declaratory relief because it has alleged a cognizable legal theory for access to the surveillance video pursuant to 51 O.S. 2011 § 24A.8(B) and the trial court made no determination that the reasons for denial of access (whatever they may be) outweigh the public's interest to access the surveillance video, a public record. Accordingly, we reverse the Order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THORNBRUGH, P.J., and RAPP, J., concur.

February 22, 2016