June 17, 2019

The Honorable J. Kevin Stitt
Governor of the State of Oklahoma
2300 N. Lincoln Blvd. No. 212
Oklahoma City, OK 73105

Dear Governor Stitt:

Freedom of Information-Oklahoma ("FOI-OK") is a nonprofit organization with a mission to promote open and transparent government in Oklahoma. The board of directors of FOI-OK were therefore surprised and discouraged to learn that your Office does not consider the Criminal Justice Reentry, Supervision, Treatment and Opportunity Reform ("RESTORE") Task Force ("the Task Force") created by Executive Order 2019-22 ("EO 19-22") to be a public body under the Open Meetings Act ("OMA") or the Open Records Act ("ORA").

In part, the board's disappointment with this decision stems from the encouraging steps you've taken on transparency and open government since campaigning for governor, and well into your service.

The board's concern about this decision is also rooted in our determination that the Task Force is, in fact, a public body under both the OMA and ORA, and that no Attorney General opinion stands to the contrary, nor can any claim of executive or deliberative process privilege exempt the Task Force from the constitutional oversight functions served by OMA and ORA compliance.

For one, "task forces" are specifically named as public bodies in both OMA (25 O.S. § 304 (1)) and ORA (51 O.S. § 24A.3 (2)). Indeed, the only officers or entities specifically excluded from the definition of public body under the ORA are officers or entities of the judicial and legislative branches. The exclusion of any executive branch officer or entity from this exemption highlights the singular nature of executive authority, and underlines the need for public oversight of executive power.

Both the OMA and ORA define a public body as an entity "supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property[.]" EO 19-22 directs the Office of Management and Enterprise Services ("OMES") to "provide staff and administrative support for the Task Force[,]" and provides the Task Force with authority to "make recommendations regarding policies, programs and proposed legislation that will" (among other things)

“enhance and establish diversion programs, including alternative sentencing, supervision, and treatment options[,]” “reduce recidivism through expanded and enhanced post incarceration supervision[,]” and “[r]educe Oklahoma’s incarceration rate and associated costs[.]”

In other words, not only is the Task Force supported by public funds through OMES, but it’s also “entrusted with administering or operating” public property -- specifically, the State’s Department of Corrections (“DOC”) -- since any recommendation by the Task Force regarding diversion, sentencing, or post-incarceration supervision would necessarily involve the administration or operations of DOC.

Since DOC is within the executive branch -- and indeed, since the Governor’s direct authority over DOC was significantly enhanced this year by the enactment of HB 2480 --this Task Force could make proposals directly to the Governor for changing DOC policies or programs, and DOC’s governing board could enact those policies by a vote of five members appointed directly by the Governor, all serving at his pleasure. Given the unprecedented new powers our Governor enjoys over DOC, the need for public oversight over executive decision-making in this area is greater, not less.

At the same time, the Opinion of the Attorney General reported at 2002 OK AG 5 (“the 2002 AG Opinion”) is not to the contrary. The 2002 AG Opinion related to a “Governor’s Security Preparedness Executive Panel” (“the Panel”) convened a month after the September 11th terrorist attacks, and empowered to “embark on a thorough evaluation of all state safety and security measures” and charged with “further developing, coordinating and implementing a comprehensive state strategy to protect the citizens of Oklahoma from the threat of terrorist attacks.” Specifically, the Panel was empowered to coordinate intelligence-gathering and develop plans to protect vulnerable state assets and achieve rapid response to future attacks.

Like the Task Force, this Panel held authority to make recommendations to the Governor, and not take affirmative actions. However, the Panel was specifically not provided with any staffing or administrative support, unlike the Task Force, which is. The Panel’s work also addressed technical questions of emergency- or disaster-preparedness, not major public policy matters regarding an issue like criminal justice reform, one of the fundamental questions facing Oklahoma today. Finally, the Panel did not hold the same proximity to administrative decision-making as the Task Force does, under the changes in DOC governance discussed earlier.

In addition, this Task Force is likewise distinguishable from the Task Force created by Governor Fallin under Executive Order 2016-24, which was not supported by public funds through OMES, but rather through the Governor’s Office itself, a distinction with high significance to the separation-of-powers principles underlying the constitutional relationship between public oversight and executive privilege.

Finally, and along those same lines, the work of this Task Force cannot and should not be claimed to fall within either the executive or deliberative process privileges described by the Oklahoma Supreme Court in *Vandelay Entertainment , LLC v. Fallin* (2014 OK 109). For one, *Vandelay Entertainment, LLC* only found privilege to exist regarding advice solicited or received by the Governor from “senior executive

branch officials." Given the mixed nature of the Task Force, which includes representation by officials from all three branches of government, as well as local governments, the defense bar, and other subject matter experts, *Vandelay Entertainment, LLC* would not apply.

Secondly, though, and more importantly, if the Governor holds the power to create a deliberative body fully shielded in secrecy from its inception by a blanket claim of privilege so broad as to preempt entirely the clear mandate of both OMA and ORA, then the Governor can essentially create private spaces where public policy-making can occur regarding core state functions without any external oversight whatsoever. This would profoundly change the nature of Oklahoma constitutional government, making it both less open, and less transparent.

Given the seriousness of this matter, FOI Oklahoma requests that you reconsider your pervious decision or at least meet with us as soon as possible to discuss this further. There is high public interest in the subject, and your decision to exclude the Task Force from the transparency requirements of OMA and ORA represents a clear injury to the journalistic interests of the state's media companies. Our board is confident plaintiffs would make a strong case against this decision in the courts, but we are also confident your heart is in the right place, and that you want to do what's best for Oklahoma.

We think this requires the Governor's Office to reconsider this decision, open all Task Force meetings to the public in the future, and provide detailed minutes of what transpired in the first meeting. As Governor, you have consistently talked about the need for government transparency. This decision to hold closed-door Task Force meetings runs counter to your own record of support for transparency in government. We urge you to open the Task Force's meetings to the public, and we encourage you to continue standing strong for transparency at all levels, beginning with this Task Force's proceedings.

Thank you for your consideration.

Sincerely, and on behalf of the entire FOI Oklahoma board,

Joe Hight
President, Board of Directors

Andy Moore
Executive Director
FOI Oklahoma