

Openness in Government: The Open Meeting and Open Records Acts

Presented by:

THOMAS R. SCHNEIDER, Deputy General Counsel

Modified in Fall 2024



Purpose of the Open Meeting and Records Acts



***Transparency in Government
Government under the Microscope***

OUR SHARED GOALS

- ✓ Present the information in an organized manner rather than just section by section.
- ✓ Create a user-friendly, go-to resource.
- ✓ Empower YOU to make the best decision.



IMPORTANT DISCLAIMERS

1. *Neither this presentation nor any answers we provide to your questions should be construed as legal advice. This is informational and educational.*



IMPORTANT DISCLAIMERS

2. **SURPRISE!** I'm a lawyer. This presentation is communicating best practices aimed to prevent you from having any allegations of violations made against your public body or office and to keep you out of court. These best practices prepare the best defense for your public body or office.



The Open Meeting Act (OMA)

*25 O.S. Supp. 2024,
§§ 301–314*

Yellow Book (2024)

Page 1



WHAT HAS CHANGED?

- 2024 OK AG 12;
- House Bill 3780, 2024 Okla. Sess. Laws ch. 246, §§ 1–2 (amending section 307.1 and **NEW** section 311.1);
- House Bill 1382, 2024 Okla. Sess. Laws ch. 237, § 3 (amending Section 304);
- Senate Bill 1716, 2024 Okla. Sess. Laws ch. 44, § 1 (amending Section 307);
- Senate Bill 1933, 2024 Okla. Sess. Laws ch. 180, § 3 (amending Section 307); and
- House Bill 3937, 2024 Okla. Sess. Laws ch. 60, § 1 (amending Section 311);



OVERVIEW

- When does the OMA apply?
- To whom or what does it apply?
- What must be done to comply?
- Why should I comply?



PUBLIC PURPOSE OF OMA

- Encouraging citizens to know more about public bodies, governmental processes, and governmental problems (advance notice, agenda, and minutes).
- Creating space for citizens to come and watch government in action as the public body tackles the issues of the day (open meetings to the public at convenient times and places).

25 O.S. 2021, § 302, Yellow Book 1.



WHEN THE OMA APPLIES?

When a ***majority*** of a ***public body's*** members come together to ***conduct public business.***

25 O.S. 2021, § 304(2), Yellow Book 3.



PUBLIC BODY DEFINED

25 O.S. 2021, § 304(1), Yellow Book 2.

Municipal governing bodies

Boards of county commissioners

Boards of public and higher education

All boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, and public trusts

Any committee or subcommittee of a public body

ELEMENTS OF PUBLIC BODY ANALYSIS

Supported by
public funds
(full or partial)

Entrusted with
spending
public funds

Administration
of public
property

Actual or de-facto
decision-making
authority*

EXEMPT PUBLIC ENTITIES

The Judiciary

State Legislature and legislators

Administrative staff of public bodies

Other entities, incl. Racing Stewards, Council on Judicial Complaints

Multi-disciplinary teams provided for under Title 10A of the Oklahoma Statutes for sole purpose of considering recommendations of team and deciding placement of a child

Board of Directors of federally-qualified health center

Committees that are purely fact finding, informational, recommendatory, or advisory with no decision-making authority. *Andrews v. Indep. Sch. Dist. No. 29 of Cleveland Cnty.*, 1987 OK 40, 737 P.2d 929.*

Private organizations that contract to provide goods or services to the public on behalf of a governmental agency and receive payment as reimbursement. 2002 OK AG 37.

Post adjudication review boards authorized in title 10 of the Oklahoma Statutes.

BETWEEN THE CRACKS

- There are some public bodies that are anomalous:
 - Appear to fall under public body analysis; or
 - A part of another branch, thus falling under exemption, but specific statute requires compliance with Open Meeting Act.
- **MUST FOLLOW THE ACT**
- If public body members do not comply, they open themselves up to liability.
- **REMEMBER:** If an entity has specific authority requiring it to follow the OMA, it must follow it.



ENTITY RECEIVING PUBLIC FUNDS

2020 OK AG 2

- Relevant to our presentation today, the Senator asked whether the OSSAA was subject to the OMA or ORA?
- OAG concluded that OSSAA was not subject to the OMA because of two reasons—
 - No evidence that OSSAA was supported by public funds. Defined support as “to pay the costs of; maintain,”
 - Based on this definition, our office has distinguished between—
 - Entity receiving public funds pursuant to legislative enactment or other government authorization for a public purpose, or
 - Entity simply paid in exchange for providing identifiable goods and services
- OSSAA didn’t fit well on either side of this spectrum. Thus, the Office concluded that it more consistently in the latter.



MEETING DEFINED

*Conduct of business of a public body by a majority of its members being personally together or, as authorized by Section 307.1 of this title, together pursuant to a videoconference. **Meeting shall not include informal gatherings of a majority of the members of a public body when no business of the public body is discussed.***



INFORMAL GATHERINGS

- Conferences
- Receptions
- Church Services
- Community Events
- Funerals

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION
Research Park, Oklahoma City

AGENDA SPECIAL MEETING

Thursday, November 7, 2019 – 9:30 a.m.
655 Research Parkway,
Presbyterian Health Foundation Conference Center,
Oklahoma City
Chairman Joseph L. Parker, Jr., Presiding

1. Reception for State Regents, State System Regents, Presidents and other guests prior to the State Regents Meeting.



MAJORITY vs. QUORUM

- OMA default for quorum is a majority.
- Specific act or rule may determine that less than a majority of the public body is authorized to transact business on behalf of the public body. In any event, rely on the specific statute or rule over § 304(2) when determining if a meeting must comply with the OMA. [Unpublished Opinion 93-587](#).
- **EXAMPLE:** X members shall be authorized to transact business for the **[Public body]**.
- Ex-officio members can (and should) be included in your count if not expressly excluded. See [2009 OK AG 26](#).
- Your quorum **DOES NOT** decrease in light of a vacancy. See [1982 OK AG 165](#).



TEXTS, EMAILS, AND SOCIAL MEDIA

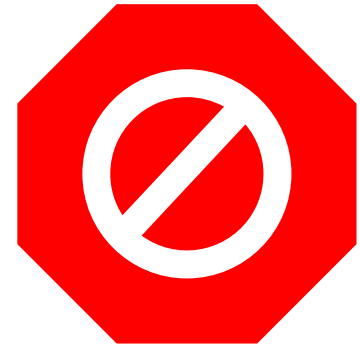
Dorothy sends an email to her fellow board members about an upcoming agenda item.

Sophia has an opinion and smashes reply all.

Confused, Rose also replies all to ask a question.

Having past experience, Blanche decides to chime in and replies all.

A meeting has occurred, and the OMA is violated.



POST-MEETING LUNCH OR COFFEE



BEST PRACTICE: A majority of a public body's members should not attend lunch together.

Public body composed of Joey, Rachel, Phoebe, Chandler, Monica, and Ross has a properly noticed meeting in accordance with the Open Meeting Act.

The meeting adjourns at lunchtime. Rachel brought her signature trifle for everyone. Famished and scared of the trifle, Joey, Ross, Chandler, and Monica want to get burgers or grab something at the coffee shop.



'CONDUCTING PUBLIC BUSINESS'

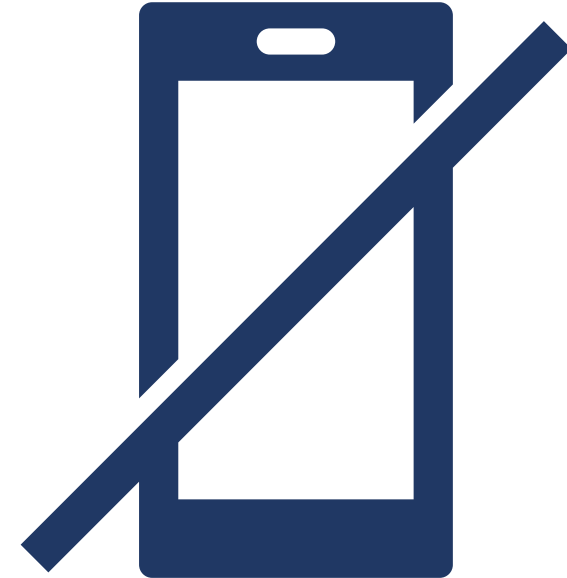
- Construed the ordinary meaning of “conducting public business” in harmony with the Act’s purpose.
- Includes the **entire** decision-making process, including presentation of information, deliberation, decision, or formal action.

[In re Appeal of Order Declaring Annexation Dated June 28, 1978, 1981 OK CIV APP 57, 637 P.2d 1270; 1982 OK AG 212.](#)



CIRCUMVENTING THE ACT

- Public body cannot use informal gatherings or electronic or telephonic communications among a majority of the members to decide any action or vote on any matter.
- Convenient **≠** Legal.



MEETINGS OF LESS THAN A QUORUM

2020 OK AG 4

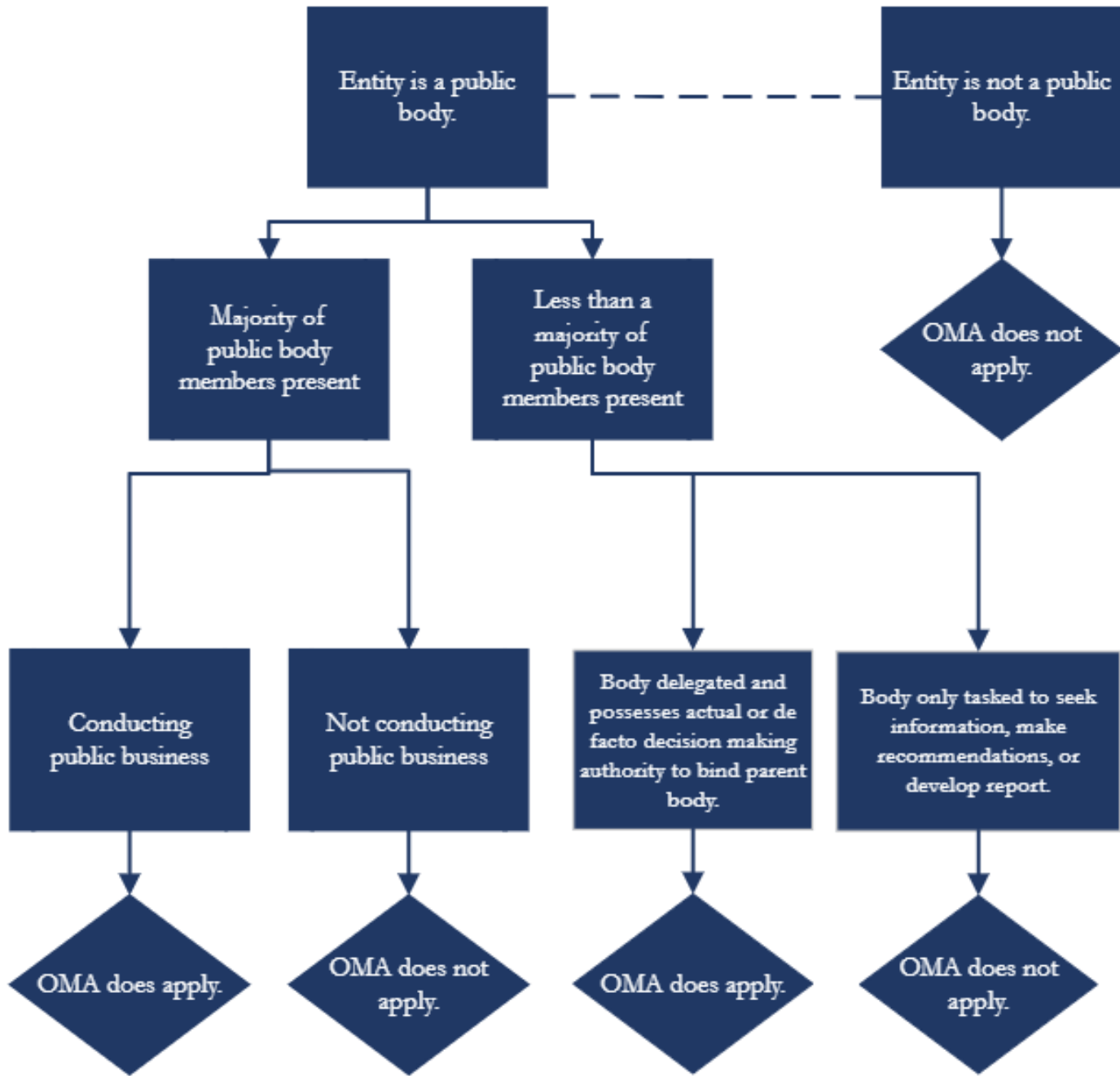
- Rep. Walke asked whether a minority of a public body members can meet outside of a public meeting consistent with the OMA.
- The short answer is that it depends.
- If the public body is doing so to willfully and purposefully circumvent the Act, a court might say that such a meeting, even among a minority, is a violation.
- **DO NOT—**
 - *Conduct polling, or*
 - *Hold discussions with the desired aim of reaching a consensus prior to a meeting.*
- Allowed to hold informational briefings where information is provided and received.
- **REMEMBER:** The purpose of the OMA is to facilitate public knowledge and awareness of governmental problems and processes.



TAKEAWAYS

- Supported by public funds, entrusted to expend public funds, administering public property, or possess actual or de-facto decision-making authority for another public body? Then, public body is subject to the OMA.
- Electronic communications between public body members is discouraged. *Act expressly prohibits public body members from using electronic communications to circumvent OMA requirements.*
- Be cautious at meetings with less than a majority and avoid polling or consensus building. Use this time for information delivery.
- Entirety of decision-making process is subject to the OMA.
- The definition of public body is inclusive.





OMA FLOWCHART



MEETINGS



TYPES OF MEETINGS



REGULARLY
SCHEDULED
MEETINGS



SPECIAL
MEETINGS



EMERGENCY
MEETINGS



CONTINUED OR
RECONVENED
MEETINGS



CORE REQUIREMENTS



Provide Advance Notice



Post Agenda



ADVANCE NOTICE TO WHOM?

- State public bodies and governing boards of higher education: **Secretary of State.**
- County public bodies, boards of education, and public bodies under the auspices of a governing board of higher education: **County Clerk** of the county in which the body is principally located.
- Municipal public bodies: **Municipal Clerk.**



TIMES AND PLACES OF MEETINGS

- **SPECIFIED** times and places,
- **CONVENIENT** to the public,
- **OPEN** to the public, and
- Must provide advance notice (agenda).



Rogers v. Excise Bd. of Greer Cnty.

[1984 OK 95, 701 P.2d 754](#)

- Excise Bd. scheduled meeting to be held on a legal holiday.
- The meeting location was held in a **locked** courthouse.
- The court held that this was a willful violation of the OMA. The Excise Board demonstrated a blatant or deliberate disregard by those who know or should know, if not a willful and purposeful violation of the OMA.



TIMES AND PLACES

- Can you have your meeting on Black Friday?
Probably not.
- Can you have your meeting between Christmas Day and New Year's Eve?
Legally, yes. Practically, not a good idea.



REGULARLY SCHEDULED MEETINGS



- Advance Notice
 - All meetings for the upcoming calendar year must be sent to the appropriate record-keeping clerk by December 15 of the current year.
 - Time, date, and place.
- Posting the Agenda
 - 24 hours prior to the time of the meeting in *prominent public view* at location of meeting or the principal office of public body, **AND**
 - May also upload to public body's website.*
 - Excludes Saturdays, Sundays, and public (legal) holidays.
- New business allowed to the extent that it meets the following:
If it is known about or could have reasonably been foreseen prior to the time of posting the notice and agenda for the meeting, then it is not new business. See 25 O.S. 2021, § 311(A)(10).



REGULARLY SCHEDULED MEETINGS (cont'd)

- Changing the date, time, or place?
 - Notice must be given to the appropriate recordkeeping clerk no less than ten (10) days prior to the implementation of any such change.
- What does this mean?
 - A public body cannot change the time, date, or place of a regularly scheduled meeting if the meeting is set less than ten (10) days away.

A public body **may move up** a regularly scheduled meeting, but the meeting cannot be scheduled less than ten (10) days from the date that notice of the change is published.

BEST PRACTICE: Set a special meeting if the issue(s) is/are urgent and cancel the regularly scheduled meeting.



SPECIAL MEETINGS



- Advance Notice
 - 48 hours prior to time of meeting.
 - Time, date, and place.
 - Must also send notice to those who have requested to receive notice of meeting.
- Posting the Agenda
 - 24 hours prior to the time of the meeting in *prominent public view* at location of meeting or the principal office of public body, or
 - Public Body **may elect** the agendas for special meetings to its website.
 - Excludes Saturdays, Sundays, and public (legal) holidays.
- New business **NOT** permitted.

25 O.S. 2021, § 303(4) & 311(A)(12), Yellow Book 3 & 16–17.



EMERGENCY MEETINGS



- Must first meet the definition of ‘emergency’, which is a “situation involving injury to persons or injury and damage to public or personal property or immediate financial loss **when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss.**”
- Advance Notice
 - As much advance notice as is reasonable and possible under the circumstances existing, and
 - In person, telephonic, or electronic.
- Posting the Agenda
 - As much advance notice as is reasonable and possible under the circumstances existing.
- Must include nature of emergency and reasons for declaring such emergency meeting in written minutes for an emergency meeting.

25 O.S. §§ 304(5) and 311(A)(13), Yellow Book 4 & 17.



CONTINUED OR RECONVENED MEETINGS



- Give notice of such action that the original meeting, including—
 - Date,
 - Time, and
 - Place of continued meeting.
- Only matters appearing on the agenda for the meeting continued may be discussed on continuance or reconvening meeting.
- **BEST practice**: Post notice on website and with recordkeeping clerk. Also, post updated agenda with remaining items of business.



MINUTES & RECORDING

- Must be written and taken by a designated person.
- Minutes are an **official summary** of the proceedings—
 - Must show who is present and absent, matters considered, and actions taken ([2012 OK AG 24](#));
 - Shall be open for inspection, and
 - Shall reflect the manner and time of notice required under the OMA.
- Minutes must be taken in executive session. [Berry v. Bd. of Governors of Registered Dentists, 1980 OK 45, 611 P.2d 628.](#)
- State law does not require minutes to be approved.
- Recording the proceedings—

Members of the public can record the meeting; however, they are not entitled to interfere with the conduct of the public meeting.



PUBLIC COMMENTS

- Public bodies are **not required** to allow an opportunity for the public to comment on matters or issues being considered by the public body, but it may allow for such comments.
- Public bodies ***may limit*** public comment to items set forth on the agenda, or it may allow for open comment.
- If a public body decides to include public comment in its meetings, the public body should consider adopting a policy, such as setting a time limit for each person providing public comments, setting a cut-off for when persons must sign up to participate in the public comments, and potentially limiting the comments to agenda items.



PUBLIC COMMENTS (cont'd)

- An agenda item titled “Visitors Comments” or “Public Comments” is sufficient to meet the requirements under the OMA.
- **CAUTION**: Items for discussion on the agenda should not be discussed by the public body at this time. This is the public body’s opportunity to listen.

2022 OK AG 26; 1998 OK AG 45.



TAKING ACTION

- Votes of each member of a public body: must be publicly cast and recorded.
- May only take action on agenda items that indicate or provide for action to be taken.
- If the vote is either not publicly cast or not recorded, the action taken is invalid. [*Oldham v. Drummond Bd. of Educ.*, 1975 OK 147, 542 P.2d 1309.](#)



VIDEOCONFERENCE & TELECONFERENCE

1. Not less than a quorum must be present at site of meeting.
2. All public body members must be audible and visible to one another.
3. Executive sessions are **NOT** allowed.
4. Notice and agenda must include the **locations** of the meeting; the videoconference sites (*i.e.*, location, address, and telephone number); and identity of members and from where they will appear.
5. Members of public bodies may only participate from the district or subdivision from which they are elected, appointed, or sworn to represent.
6. Materials shared must be immediately available “in the same form and manner” as shared with the public body.
7. Public must be allowed to participate and speak as allowed by rule or policy set by the public body at the videoconference site as permitted at the site of the meeting.
8. Each site and room must be open and accessible to the public.



TAKEAWAYS

- Emergency meetings should be rare.
- New business is defined. It is not an opportunity for a public body to discuss an issue that was known about prior to the agenda being posted.
- Votes must be publicly cast and recorded.
- Minutes must be taken—even in executive session.
- When in doubt, a public body can cancel the regular meeting and schedule a special meeting.



EXECUTIVE SESSIONS



TWO IMPORTANT QUESTIONS

1. Can I do it?

Does it meet one of the bases, or is there some other legal authority?

2. How do I do it legally?

a. Have I posted it on the agenda?

b. Have I cited to the specific basis for executive session?

c. Have I provided context as to what the public body will be discussing?

d. Has a majority of the public body present voted to enter executive session?



BEFORE, DURING, AND AFTER

- A majority of the public body members present must vote in the affirmative to enter into executive session. 25 O.S. 2021, § 307(E)(2).
- Executive sessions are not authorized when a public body meets via videoconference. 25 O.S. 2021, § 307.1.
- Public vote to enter executive session.
- Cannot vote or poll in executive session.
- Public vote to exit out of executive session.

BEST PRACTICE: After exiting executive session, announce the following, “No votes were taken in executive session, and no items not listed on the agenda for discussion in executive session were discussed.”



EIGHT MOST COMMON BASES

Allowed ***only under certain circumstances and only those circumstances allowed under statute***, such as —

- Discussing employment, hiring, appointment, promotion, demotion, disciplining, resignation, or termination [§ 307(B)(1)];
- Discuss negotiations concerning employees and representatives of employee groups [§ 307(B)(2)];
- Discuss purchase or appraisal of real property [§ 307(B)(3)];
- Confidential communications between public body and attorney, the disclosure of which would impair the public body's ability to proceed in the public interest [§ 307(B)(4)];

25 O.S. 2021, § 307(B), Yellow Book 5-10 (all bases*).



EIGHT MOST COMMON BASES (cont'd)

- To hear evidence and discuss expulsion or suspension of a student when requested by the student involved or student's parent, attorney or legal guardian [§ 307(B)(5)];
- Discuss matters involving a specific handicapped child [§ 307(B)(6)];
- Discussing matter in which information is subject to confidentiality requirements under state or federal law [§ 307(B)(7)]; or
- Deliberations in an individual proceeding pursuant to the Administrative Procedures Act [§ 307(B)(8)].



NEW SECTION 307 BASES

- Section 307(B)(12)
 - Reviewing and discussing mental health documents related to a licensee under investigation or review by a professional licensing board
 - Can only hold executive session to review or discuss mental health documents **directly relating** to the licensee or to receive testimony from **relevant** witnesses necessary for the board to make a determination in the matter.
 - Documents reviewed are privileged and confidential.
- Section 307(C)(16) Sexual Assault Forensic Evidence Board

When discussing individual cases.



CONSTRUING SECTION 307

- Cannot talk about a job opening in executive session.
[2006 OK AG 17.](#)
- Cannot discuss hiring independent contractors.
[2005 OK AG 29.](#)
- Must identify the unique position or person if holding executive session under §307(B)(1). [1997 OK AG 61.](#)
- “Pending” under § 307(B)(4) includes an *anticipated or potential* claim, litigation, investigation, or action.
[2005 OK AG 29.](#)
So what? — You’re safe to rely on a litigation evidence hold or demand letter.



REAL ESTATE TRANSACTIONS

Only certain people allowed in executive session when the purchase or appraisal of real estate property is discussed. These people are—

- Public body members,
- Attorney for the public body, and
- Immediate staff of the public body.

Cannot invite landowners, real estate salesperson, broker, developer, or any other person who may profit directly or indirectly from proposed transaction being considered.

- **Exception**—these individuals are operating pursuant to an agreement to represent the public body.
- It boils down to 1 question—*Are these people duty-bound under professional standards, code of ethics, etc., to represent the public body's best interests?*
 - Yes – They may come in.
 - No – They cannot come in.



SAMPLE AGENDA LANGUAGE # 1

[§ 307(B)(1)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(1), to discuss the **[hiring, termination, performance, or employment]** of **[Name of employee/Unique position]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION pursuant to 25 O.S. 2021, § 307(B)(1).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.



SAMPLE AGENDA LANGUAGE # 2

[§ 307(B)(1)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(1), to conduct interviews of **[Candidate A, Candidate B, Candidate C, etc.]** for the position of **[Unique position]**, and to discuss the hiring or appointment, including setting annual compensation, of any of the above-mentioned candidates,

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION pursuant to 25 O.S. 2021, § 307(B)(1).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.



SAMPLE AGENDA LANGUAGE

[§ 307(B)(4)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(4), to discuss the **[case (incl. case number), litigation, claim, investigation]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(4).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.

Opinion of counsel: On the advice of counsel, disclosure of communications related to the above-referenced **[case, litigation, claim, investigation]** will seriously impair the ability of [Name of public body] to process **[case, litigation, claim, investigation]** in the public interest.



SAMPLE AGENDA LANGUAGE

[§ 307(B)(7)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(7), to discuss **[matter]** where disclosure of information would violate confidentiality requirements of state or federal law, specifically **[Citation to state or federal law]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(7).
- c. Vote to exit Executive Session.



SAMPLE AGENDA LANGUAGE

[§ 307(B)(8)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(8), to engage in deliberations or engage in intermediate decision in an individual proceeding pursuant to Article II of the Administrative Procedures Act concerning **[Case, Case No.]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(8).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.



TAKEAWAYS

- Vote to enter into and vote to exit executive session.
- Double-check, triple-check, and even quadruple-check your executive session agenda.
 - Can I do it?
 - How do I do it legally?
- “Must I? Can I? Should I?” – there may be some instances where executive session is absolutely required to preserve confidentiality. But just because something is marked for executive session does not mean that a public body has to discuss the matter in executive session. So, it is recommended that you use “Proposed Executive Session.”



AGENDAS



WORDING THE AGENDA

- “Shall identify all items of business to be transacted by a public body at a meeting.”
- Must include any proposed executive session
- If executive session is proposed, public body must:
 - Contain sufficient information for public to know what the public body is going to discuss.
 - Identify items of business and purposes of executive session, and
 - State which provision under § 307 applies.



WORDING THE AGENDA (cont'd)

- Must be worded in plain language, directly stating the purpose of the meeting.
- Language used should be—
 - Simple,
 - Direct, and
 - Comprehensible to a person of ordinary education and intelligence.

[Andrews v. Indep. Sch. Dist. No. 29 of Cleveland Cnty.](#), 1987 OK 40, 737 P.2d 929; [Haworth Bd. of Educ. Of Indep. Sch. Dist. No. 1-6, McCurtain Cnty. v. Havens](#), 1981 OK CIV APP 56, 637 P.2d 902.



WORKING THROUGH THE AGENDA

- Nothing in the Act requires you to follow the agenda item by item.
- Nothing in the Act requires you to take up all items on the agenda.
- But the Act does prohibit you from taking action not noticed on the agenda.

Example: The [public body] may take up items in any order it deems necessary and convenient.



AGENDA EXAMPLE #1

Wilson v. City of Tecumseh, [2008 OK CIV APP 84, 194 P.3d 140](#)

- Public body provides sufficient notice to the recordkeeping clerk.
- Then, public body publishes the following agenda item for a proposed executive session:
- Proposed Executive Session pursuant to 25 O.S. §307(B)(1) to discuss the employment, hiring, and resignation of [Employee].
- Public body enters into executive session, discusses the above matter, votes to exit executive session, and then votes to award a bonus (equivalent of 6 months in salary) to the Employee.
- Is there a problem here?



AGENDA EXAMPLE #2

Haworth Bd. of Educ. of Indep. Sch. Dist. No. 1-6, McCurtain Cnty. v. Havens,
[1981 OK CIV APP 56, 637 P.2d 902](#)

- Public body provides sufficient notice to the recordkeeping clerk.
- Then, public body publishes an agenda with the following language:
- Proposed Executive Session pursuant to 25 O.S. §307(B)(1) to discuss appointment of board member. Discussion of hiring administrator. Hiring principal. A second notice and agenda listed the items to be considered as:
 - Appoint new board member.
 - Interview a new administrator.
 - Hire principals.
- Public body enters into executive session, discusses the matters listed above, exits executive session, and then votes to hire and set a salary for a superintendent.
- Is there a problem here?



F.O.P., Bratcher/Miner Mem'l Lodge, Lodge No. 122 v. City of Norman

[2021 OK 20, 489 P.3d 20](#)

- Norman City Council meets to take action on their operating budget on June 16, 2020.
- Agenda states that the Council can (1) adopt or (2) reject the budget.
- Agenda refers to FYE 2021 Budget Amendments 6-12-2020. Amendments are attached with the notice and agenda at the time of posting.
- City Council took up and adopted three **NEW, never-before-seen** amendments, reallocating funds away from Norman PD.
- Fraternal Order of Police sued, alleging a violation.



F.O.P., Bratcher/Miner Mem'l Lodge, Lodge No. 122 v. City of Norman (cont'd)

- The trial court found against the City of Norman, concluding that the City had violated the OMA and granted summary judgment.
- City of Norman appealed to the Supreme Court.
- The Oklahoma Supreme Court retained the appeal.
- OSC affirmed the trial court, finding that the City of Norman violated the OMA.
- Agenda was written to only allow adoption or rejection of the budget, not amendment.
- Court further held the agenda to be deceptively vague and likely to mislead, thus making it a willful violation of the OMA.



BEST PRACTICES AFTER *F.O.P. v. NORMAN*

- Do not limit the agenda to just adoption or rejection; it is best to include “possible action.” On the agenda, you might consider listing what “possible action” means.
- Indicate or cite your supporting documents or attachments on the actual agenda.
- If sufficient time allows, list all amendments one by one under the item of business. If done this way, you may want to include language allowing members of the public body to make amendments during the meeting. State law or municipal charter or ordinance may require otherwise.
- **Remember:** the expression one thing excludes others.



POSSIBLE ACTION

“Possible action” includes, but is not limited to, approval, authorization, adoption, rejection, denial, amendment, taking no action, or tabling the item for disposition at a later date or time.



Hirschfeld v. Oklahoma Turnpike Auth.

[2023 OK 59](#)

- In December 2021, Turnpike Authority Executive Director announced that OTA was seeking to develop the “most robust long-range plan in its history.”
- In January 2022, the Authority held votes on the approval or disapproval of a resolution authorizing a line of credit to provide interim financing of “***certain turnpike projects***” and to “authoriz[e] the Director to submit an application to the Council on Bond Oversight for provisional and final approval of the interim financing of certain turnpike projects.” **No turnpikes or projects were identified.**
- At this same meeting, the Authority also voted on a program management contract for engineering.



Hirschfeld v. Oklahoma Turnpike Auth. (cont'd)

- In February 2022, the Authority voted to approve or disapprove professional design contracts “for [the] **ACCESS Bond Program.**” The Authority also voted on a right-of-way management contract for “various turnpikes.” Finally at the February meeting, the Authority voted on utility management contract(s) for ACCESS Bond Program and Capital Program on “**various turnpikes.**” **No turnpikes or projects were identified.**
- Finally, during the director’s report at the February 2022 meeting, Gov. Stitt announces the ACCESS Program. OTA launches the ACCESS Program website with ***proposed*** routes. **This is the first time that the public is informed what ACCESS Oklahoma is.** Information about the projects was also the lead story in major media publications and with Oklahoma broadcast news.



Hirschfeld v. Oklahoma Turnpike Auth. (cont'd)

- Landowners & residents affected by the South Extension filed suit in Cleveland County.
- District Judge Timothy Olsen ruled that OTA violated the OMA willfully and granted summary judgment to the landowners and residents.
- On appeal, judgment was reversed and remanded with instructions to grant summary judgment in favor of OTA.



Hirschfeld v. Oklahoma Turnpike Auth. (cont'd)

- Sufficient notice was given in the agenda items for the action proposed. Issuance of the bonds and proposed route were not up for possible action until June 2022.
- Because no action was taken with regard to ACCESS Oklahoma, the OMA did not require more notice about the announcement.
- Court went a step further and found that because it had exclusive jurisdiction to review and validate the bonds, it also had sole authority to review the OMA claims.



Best practices following *Hirschfeld*

- **NEVER** use phrases like “certain turnpike projects.” They’re vague and possibly deceptively so.
- **ALWAYS** address any “major” public announcements on an agenda separately and use language that is sufficiently informative rather than under “Director’s Report.”
- **ALWAYS** label non-finalized plans or proposed projects as a “DRAFT” or “PROPOSED.”



TAKEAWAYS

- Be specific and avoid vague or unfamiliar/undefined language.
- Identity any presentations or announcements in the agenda.
- Allow the public body opportunity to amend during the meeting and avoid creating a binary choice: approval or rejection.
- If a topic or proposed action is not listed or otherwise provided for in the agenda, the public body cannot discuss it or take any action.
- Agenda language must be simple¹, direct², and comprehensible to a person of ordinary intelligence and education³.



LEGISLATORS AND EXECUTIVE SESSIONS

Members of the Legislature as a member of a legislative committee “shall be permitted” to “attend”:

- (1) **any** executive session
- (2) authorized by the Open Meeting Act
- (3) of **any state** agency, board, or commission
- (4) Whenever the committee has *jurisdiction over the public body’s actions*



LEGALITY OF SECTION 310

2024 OK 12

- Section 310 is constitutional. It acts as check to executive power.
- Committee jurisdiction requirement does not concern the substance of any one specific executive session or the public body's actions related to that particular matter. Instead, the focus is on whether the committee has general oversight over the state public body.
- Withdrew 1978 OK AG 144.
- Legislators should be presumed to act in good faith when asserting their right to attend executive session.
- To the extent attorney-client privilege exists, a public body can undertake necessary actions to prevent the legislator from disclosing such communications.
- Public body may exclude legislator if the legislator is suing or has publicly entertained the idea of suing the public body.



WHY SHOULD I COMPLY?



VIOLATIONS OF THE ACT

CIVIL IMPLICATIONS

- Actions taken in willful violation are **invalid**.
- Minutes of executive session will be made public when OMA is violated.
- **Any person** can bring civil action. Successful party is entitled to reasonable attorney fees.

CRIMINAL PENALTIES

- Any willful violation, if convicted, is a **misdemeanor**, and is punishable by:
 - Fine up to \$500,
 - One (1) year in the county jail, or
 - Both.

Remember *F.O.P. v. City of Norman*?

- Following its decision in April 2021, the Oklahoma Supreme Court granted FOP's motion for appeal-related attorney fees.
- In a July 2021 journal entry order, the City of Norman and FOP agreed to just less than \$40,000.00 in attorney fees subject to a post-judgment interest rate of 5.25%.
- Total paid: **\$44,307.07.**

Source:

<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=Appellate&number=11929>

&

<https://www.oscn.net/dockets/GetCaseInformation.aspx?ct=Cleveland&number=CJ-2020-661> (last visited Sept. 24, 2024).



STATE OF OKLAHOMA V. GOUCHER

CF-2022-48 (Custer County)

- Former county official indicted by the Multicounty Grand Jury with willful violation of the Open Meeting Act.
- Official pled guilty to charges on September 25, 2023, in exchange for a three-year deferred sentence but also serving 45 days in county jail and restitution in the amount of \$10,000.00. Defendant was not entitled to any extra credit.
- The court also conditioned the defendant's sentence by prohibiting him being employed by "a government entity."

Source:

<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=custer&number=CF-2022-00048&cmid=8563836> (last visited Sept. 24, 2024).



WILLFULNESS

“Willfulness does not require a showing of bad faith, malice, or wantonness, but rather, encompasses *conscious, purposeful violations of law¹ or blatant or deliberate disregard of the law²* by those who know, or should know . . . Notice of meetings of public bodies which are **deceptively vague¹** or *likely to **mislead²*** constitute a willful violation.”

[Rogers v. Excise Bd. of Greer Cnty.](#),
1984 OK 95, 701 P.2d 754.



Bailey v. State ex rel. Bd. of Tests for Alcohol and Drug Influence

[2022 OK 50, 510 P.3d 845](#)

- Employee of public body emailed back and forth with Secretary of State's Office concerning rules and an upcoming meeting. When sending out the advance notice of the meeting, he thought that he added the Secretary of State's Office to the email, but he didn't. The board proceeded to meet. Agenda was posted in accordance with the OMA, and the board revoked several driver's licenses.
- **Summary:** Litigant challenging action taken by public body must show evidence of willfulness. Forgetting to send notice does not constitute willfulness to violate the Act.



Statutory Construction of the OMA

- Liberally construed to “further [Act’s] goals and in favor of public.” [Matter of Order Declaring Annexation Dated June 28, 1978, Issued by Frazier, 1981 OK CIV APP 57, 637 P.2d 1270.](#)
- Strict compliance; cannot get away with “substantial compliance.” See [State v. Patton, 1992 OK CR 57, 837 P.2d 483.](#)



“CORRECTING” AN INVALID ACTION

- ❑ Post advance notice,
- ❑ Post agenda timely with accurately worded agenda item, and
- ❑ Take item up, re-vote, and record the decision.



SECRETARY OF STATE'S OFFICE

- **Open Meetings Website:**

<https://openmeetings.ok.gov/ords/r/oma/omadev/dashboard>

Meeting search, Daily Calendar, Subscriptions, Public Body Search, Agendas (optional), and Minutes (optional).

- **Email meeting notices to:** meetingnotices@sos.ok.gov.



SECRETARY OF STATE'S OFFICE



Meeting Search

Keyword, name, partial or misspelled word search for upcoming meetings.
Use Archive for past meetings.



Daily Calendar

View upcoming meetings that can be sorted by month, week or day in a list.



Archived Meetings

Access historical open meeting notices, including agency agendas, meeting minutes or video, if included by agency.



Subscriptions

Subscribe to be notified by email and/or text message when your chosen public bodies post open meeting notices and documents.



Public Body Search

An alternative search helping you find a specific public body or State agency.
Tolerant of most misspellings



Public Body Listing

Peruse or search all public bodies and agencies that choose to or must adhere to the Open Meetings Act.
Allows one to see entire list of participating public bodies or search the list.



The Open Records Act (ORA)

*51 O.S. Supp. 2024,
§§ 24A.1–24A.34*

*Yellow Book
Page 69*



OVERVIEW

- Public policy and purpose of the ORA.
- What is a record?
- What is public body and official?
- Confidentiality of records.
- Production of records and fees.
- Penalties for violating the Open Records Act.



WHAT HAS CHANGED?

- Senate Bill 1574, 2024 Okla. Sess. Laws ch. 358, § 1 (amending section 24A.3);
- House Bill 3779, 2024 Okla. Sess. Laws ch. 116, §§ 2–3 (amending sections 24A.3 and 24A.17);
- Senate Bill 1787, 2024 Okla. Sess. Laws ch. 86 (amending section 24A.16); and
- Senate Bill 1716, 2024 Okla. Sess. Laws ch. 44, § 2 (**NEW** section 24A.34)



PUBLIC POLICY OF THE ACT

Oklahoma citizens have an “inherent right to know and be fully informed about their government.”



PURPOSE OF THE ACT

“[T]o ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.”



RECORDS



EXCLUSIONS v. EXEMPTIONS AND EXCEPTIONS (The Three Es)

- **“Exclusion”** means that a particular document (“record”) is excluded from the definition of record. By virtue of the exclusion, the document is not subject to the ORA. See **section 24A.3**.
- **“Exemption”** means that a record is a governmental record but are kept confidential by applicable law. See **section 24A.5**.
- **“Exception”** generally means that a public body may keep a record confidential. In other words, it can be “excepted” from production.



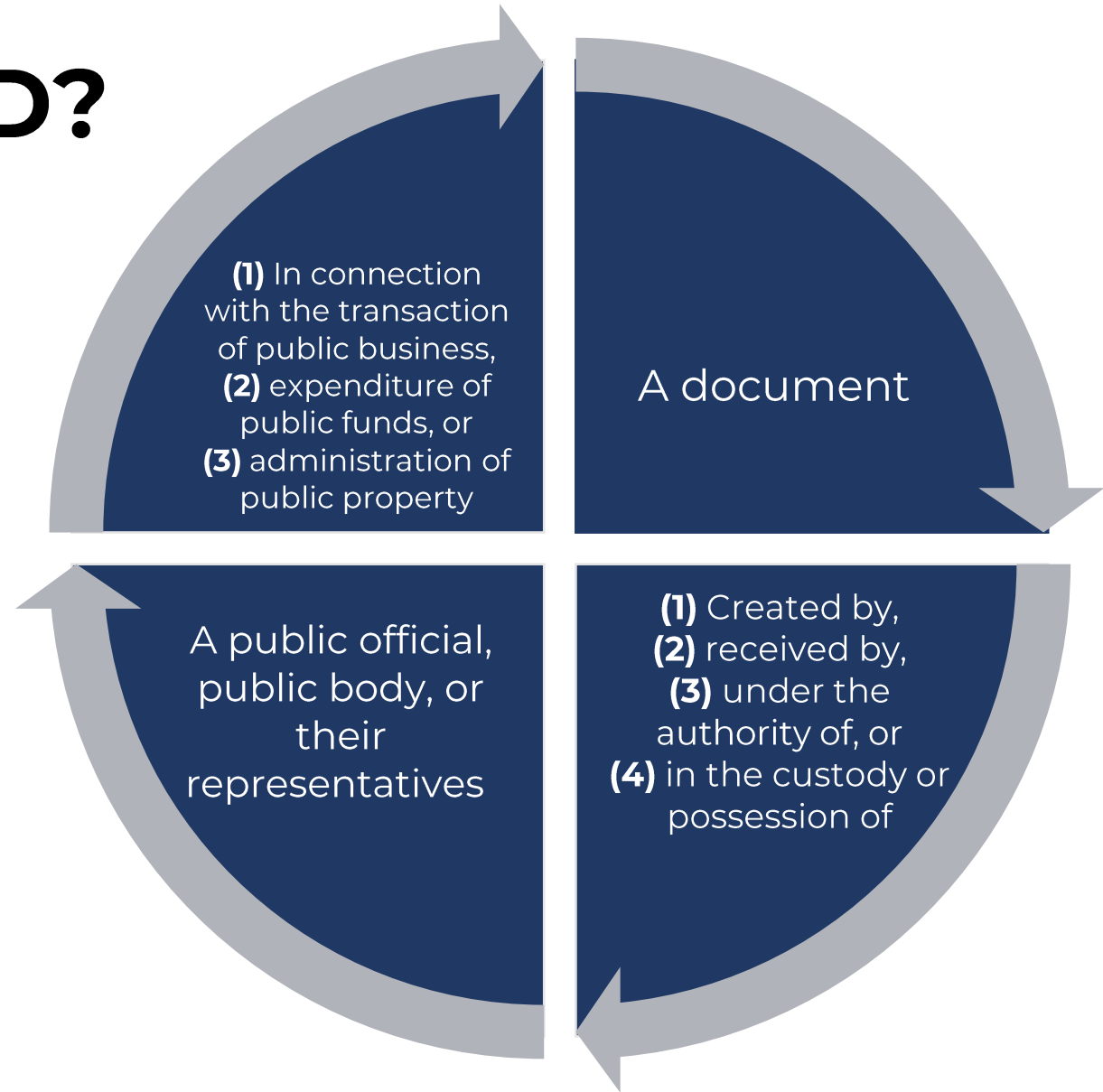
ORA LINGO

- **“Responsive”** means that the record falls within the parameters of an Open Records Act request.
- **“Producible”** means that the record is responsive, open, and is not subject to any exclusions, exemptions, or exceptions.
- **“Confidential”** means that a record is not subject to disclosure or is not required to disclosure in an Open Records Act request.
- **“Privileged”** means that a record is not subject to disclosure in an Open Records Act request, discovery, or by subpoena.



WHAT IS A RECORD?

- The Act defines a “record” broadly; it must only meet these four features.
- **REMEMBER:** “including, but not limited to”



WHAT IS A DOCUMENT?

Books

Papers

Photographs

Microfilm

Certain data files

Computer tape

Disks

Records

Sound or film recordings

Video recordings

Emails

Text messages



ELECTRONIC COMMUNICATIONS

Most electronic communications will not be subject to any privilege or confidentiality and are, broadly speaking, producible.



It doesn't matter where an electronic communication is on a private or public device if it is a producible public record.

It's a hard balance between efficiency and protecting information from unwanted disclosure.



PUBLIC BODIES AND OFFICIALS

Public bodies: any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust, municipality, or school district, etc.

Public body **does not** include, judges, justices, Council on Judicial Complaints, the Legislature, or legislators.

Public official:
Official or employee
of public body



WHAT IS A **NOT** A RECORD?

Computer Software

Nongovernmental personal effects



When a record meets these broad definitions, it is open.

A record may, nonetheless, be shielded from disclosure if a specific exemption or exception applies.



EXEMPTIONS & EXCEPTIONS



EXEMPTIONS TO THE OPEN RECORDS ACT

51 O.S. Supp. 2024, § 24A.5(1)(a–o)

Attorney-client privilege, work product, identify of informer	Executive Sessions authorized under the Open Meetings Act	Personal driver's license information	Board of Medicolegal Investigation Information
Testing materials for state licensure exams	Other state & federal statutes, <i>i.e.</i> FERPA, Juvenile Records	PII of an individual claiming a lottery prize	Personal financial information, credit reports, or other financial data
GPS records re: electronic toll collection systems and A/V recordings of certain activities	DD-Form 214 filed with a county clerk, including any form filed before July 1, 2002	OTRD State Park Guest PII	Certain DPS records
Information to obtain licensure from a state licensing body	Investigation records obtained by OSDH concerning long-term care administration	Documents and other records obtained by OAG and OID regarding pharmacy choice investigations	

STATE EVIDENTIARY PRIVILEGE: ATTORNEY-CLIENT PRIVILEGE

The Attorney-Client Privilege generally protects communications made in confidence between privileged persons for the purpose of seeking, obtaining, or providing legal assistance for the client. **12 O.S.2021, §2502(A)(5).**

*Note: The attorney-client privilege for public officers or government agencies is more limited than a private client. Government clients only enjoy the privilege when the communication concerns a pending investigation, claim, or action, when disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest. **12 O.S.2021, § 2502(D)(7).**



STATE EVIDENTIARY PRIVILEGE: ATTORNEY WORK-PRODUCT DOCTRINE

The attorney work-product privilege doctrine:

- Ordinary work product prepared in anticipation of litigation or trial = discoverable if required showing under 12 O.S.2021, § 3226(B)(2) made.
- Opinion work product prepared in anticipation of litigation or for trial = not discoverable except in extraordinary circumstances.

Application of this privilege “requires distinguishing between (1) communications and things prepared in anticipation of litigation or for trial by or for another party or by or for the representative of that other party, etc., that may be discoverable and (2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, of which a court shall protect against disclosure.” **Scott v. Peterson, 2005 OK 84, ¶ 8, 126 P.3d 1232, 1235.**



STATE EVIDENTIARY PRIVILEGE: IDENTITY OF INFORMER PRIVILEGE

Identity of the informer privilege:

"Public officials may refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer." **12 O.S.2021, § 2510(A).**

An informant's identity will not be shielded from discovery, however, if the informant's identity has been disclosed; the informant is a material witness, a codefendant, or able to give testimony; or believed to be unreliable or not credible. ***Id.* § 2510(C).**



STATE EVIDENTIARY PRIVILEGE: JUVENILE PRIVILEGE

Identity of juveniles are exempt and should be redacted.

By statute, a juvenile is “any person under eighteen (18) years of age” who has neither been convicted of a deferred sentence under the Youthful Offender Act nor certified as an adult. 10A O.S.Supp.2015, § 2-1-103(6). Juvenile Court records “shall not be open to the general public or inspected or their contents disclosed. *Id.* § 2-6-102.



EXCEPTIONS

“The exemptions contained in the Act are not privileges, sheltering information from civil litigation disclosure but rather constitute exceptions to the general requirements for disclosure under the Act.” *J.M. v. Hilldale Indep. Sch. Dist. No. I-29 of Muskogee Cty.*, No. CIV-07-367-JHP, 2008 WL 1743489, at 1 (E.D. Okla. Apr 15, 2008).



EXCEPTIONS

generally 51 O.S.2021 & Supp.2024, §§ 24A.7–24A.34

The Act applies, but these records may be kept from disclosure under the ORA. Here are some records that may be kept confidential–

Certain personnel records

Certain law enforcement records

Personal notes

Voluntarily supplied information to public body

Litigation files & investigatory reports

Federal records

Personal communications related to exercise of constitutional rights

Educational records

Information related to terrorism



PERSONNEL RECORDS

Subject to the sole discretion of the public body, it may keep personnel records confidential in two situations:

1. Internal personnel investigations, except final disciplinary action resulting in some action, *i.e.* termination, loss of pay.
2. Cases when disclosure would warrant an invasion of personal privacy.



PERSONNEL RECORDS (cont'd)

- Public bodies should utilize a balancing test weighing the public's right to know against the employee's right to privacy.
- Protected from disclosure: home addresses, home telephone numbers, Social Security numbers, private email addresses, and private mobile phone numbers of current and former public employees shall not be open to public inspection or disclosure; provided, however, that nothing in this subsection shall be construed to exempt from disclosure public records created using a private email address or private mobile phone.
- Except as may otherwise be confidential by statute, public employees have a right to access their own personnel file.



LAW ENFORCEMENT RECORDS

- Law enforcement agencies may deny access to records unless court finds that public interest or the interest of an individual outweighs reason for denial. 51 O.S. § 24A.8(B).
- Law enforcement agency cannot deny access to records that it has already previously made public under ORA or otherwise provided by law.



LAW ENFORCEMENT RECORDS

- General rule under ORA: records are open.
- Law enforcement agency rule: records are confidential, except for those identified in the ORA, if kept.
- Law enforcement agency means “any public body charged with enforcing state or local ***criminal*** laws and initiating criminal prosecutions, including, but not limited to, police departments, county sheriffs, DPS, OBNDDC, ABLE, OSBI, and OAG. **Section 24A.3(5).**



LAW ENFORCEMENT RECORDS

Arrestee descriptions or mug shots

Arrest facts, including officer & cause

Chronological list of incidents

Incident reports

Crime summaries

Radio logs, including calls dispatched

Conviction information

Disposition of all warrants

Jail registries, including booking info

Audio/video recordings from body/vehicle devices

LAW ENFORCEMENT RECORDS

Generally, unless a law enforcement record is made open by § 24A.8(A) or by another state or local law, access to the record may be denied. 51 O.S. § 24A.8(B).

- **Pleadings** in a criminal case may be kept confidential, until filed with the court clerk (unless sealed or otherwise protected). See, e.g., 22 O.S. § 385.
- **Traffic collision reports** may be withheld for up to 60 days, but the reports shall be made available as soon as practicable upon request to certain individuals (parties involved in the collision and their legal counsel, law enforcement agency, newspaper, radio, television broadcaster, etc.). 47 O.S. § 40-102; Cummings, 1993 OK 36, 849 P.2d 1087.
- **Dash/Body-mounted camera footage** is an OPEN RECORD but may be subject to redaction pursuant to § 24A.8(A)(9) and (10). See *Ward & Lee, P.L.C. v. City of Claremore*, 2014 OK CIV APP, 316 P.3d 225.



LEO RECORDS: REDACTING BEFORE RELEASE

Audio or video recordings may be redacted before release to obscure any specific portions that:

Depict death of a person or body.*

Depict nudity

Identify minors under 16 y/o.

Depict acts of severe violence resulting in great bodily injury wherein person is “clearly visible.”*

Depict great bodily injury.*

Include personal medical information not public.

Undermine assertion of privilege under mental health laws.

Identify alleged victims of sex crimes or domestic violence.

* Except when effected by law enforcement officer
51 O.S.2021, § 24A.8(A)(10)(b), Yellow Book 84-88.



LEO RECORDS: REDACTING BEFORE RELEASE

(cont'd)

Identifies any person providing information to law enforcement or the information provided by that person when person requests anonymity or disclosure of informant or information would be expected to threaten or endanger the physical safety and welfare of informant, informant's property or others or their property.

Undermine assertion of identity of informer privilege.

Includes PII other than name or license plate no official arrested, cited, charged, or issued a written warning.

Includes information that would materially compromise an ongoing criminal investigation.†

Reveals identity of law enforcement officers subject of internal investigation as a result from the event depicted in recording.



RECORDINGS IN ONGOING CRIMINAL INVESTIGATION

- Must release unredacted recordings **ten (10) days** after arraignment or initial appearance, whichever occurs first.
- Provides avenue for prosecutor or legal representative charged to grant extension of time for which recording may be kept confidential.
- Prosecutor must show that a material compromise ongoing investigation; or
- Legal representative may argue that release would compromise the right of an accused to a fair trial.
- Court must hold hearing on the request for extension and may only grant up to six (6) month extensions for a cumulative period of no more than eighteen (18) months.
- Avenue for appeal within one hundred and twenty (120) days from recording's creation if no criminal charges brought.



ONGOING DUTY TO PRODUCE RECORDINGS

- NOTHING in section 24A.8 (1) permits a law enforcement agency from denying records due to a lacking the capability to redact or obscure audio or visual records or (2) relieves the law enforcement agency from producing such records.
- Law enforcement agency must still provide prompt, reasonable access to the records.
- **REMEMBER:** The Open Records Act does not say shall; it says *may*. However, there may still cases in which the “may” is actually a shall (e.g., records of juveniles, non-public privileged health information, mental health/substance abuse health information, and PII).



CONFIDENTIAL LITIGATION FILES AND INVESTIGATIVE REPORTS

Litigation files and investigatory reports may be kept confidential by–

- Attorney General of the State of Oklahoma,
- Agency attorneys authorized by law,
- Workers' Compensation Commission,
- Office of district attorney of any county, and
- Office of municipal attorney for any municipality



CONFIDENTIAL PERSONAL NOTES

A public official may keep confidential his or her personal notes and personally created materials **prior to taking action**.

- Prior to making a recommendation
- Prior to issuing a report.

Any research leading to adoption of public policy or implementation of public project does not fall under this exemption.

REMEMBER: Consider disposition schedule; duty to maintain records for a period of time.



VOLUNTARILY SUPPLIED INFORMATION

Any information, records or other material heretofore voluntarily supplied to any state agency, board or commission shall be subject to full disclosure.

*Exception: if disclosure would give an unfair advantage to competitors or bidders in certain situations delineated in Section 24A.10(B).



HIDE-AND-SEEK: OPEN RECORDS

But see § 24A.20:

“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 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.”



CONFIDENTIAL FEDERAL RECORDS

To the extent required under federal law, a public body or official may keep confidential records coming into the possession of the public body or official or gather as a result of federal legislation.



PERSONAL COMMUNICATIONS RELATING TO EXERCISE OF CONSTITUTIONAL RIGHTS

- Public body can keep confidential the contents of any communication received by a person exercising their First Amendment right or under article II of the Oklahoma Constitution.
- Public official's written response may be kept confidential to the extent necessary to protect identity of person exercising his or her rights.



EDUCATIONAL RECORDS

Public educational institutions may keep confidential the following–

- Individual student records,
- Teacher lesson plans, tests and other teaching material, and
- Personal communications concerning individual students.
- If the public educational institution accepts federal funding, the Family Educational Rights and Privacy Act (FERPA) will apply.
- Statistical information that is not identifiable to a particular student and directory information shall be open for public inspection and copying, if kept.
- Student (18 years or older) or parent may request institution to request prior consent before release of directory information.
- **NEW!** Public educational institutions may keep confidential contracts for use of a student’s name, image, or likeness disclosed to a postsecondary institution pursuant to the Student Athlete Name, Image, and Likeness Rights Act. **51 O.S.Supp.2024, § 24A.16(A)(4).**



CONFIDENTIAL INFORMATION RELATING TO INFORMATION TECHNOLOGY AND INFRASTRUCTURE VULNERABILITY

Public body may keep confidential –

Assessments of the vulnerability of government facilities or public improvements to an act of terrorism and work papers directly related to preparing the assessment of vulnerability Information technology of a public body or public official but only if the information specifically identifies:

- design or functional schematics that demonstrate the relationship or connections between devices or systems,
- system configuration information,
- security monitoring and response equipment placement and configuration,
- specific location or placement of systems, components or devices,
- system identification numbers, names, or connecting circuits,
- business continuity and disaster planning, or response plans, or
- investigative information directly related to security penetrations or denial of services.



A FEW MORE EXCEPTIONS TO NOTE

- Information relating to terrorism may be kept confidential. **51 O.S.2021, § 24A.28.**
- A Protective Order withholding material from the public must include: (1) statement from the court, (2) specific identification of material to be withheld, and (3) a Confidential stamp or label. **51 O.S.2021, § 24A.29.**
- Court records are open, unless the court seals the record or a portion of it. To seal the record, the court must find a “compelling privacy interest exists which outweighs the public’s interest in the record.” The order sealing the record must be public and must make specific findings of fact and conclusions of law. **51 O.S.2021, § 24A.30.**
- CLEET and the Department of Public Safety shall keep certain law enforcement training records confidential. **51 O.S.2021, § 24A.8.**



NEW SECTION 24A.34 EXEMPTION

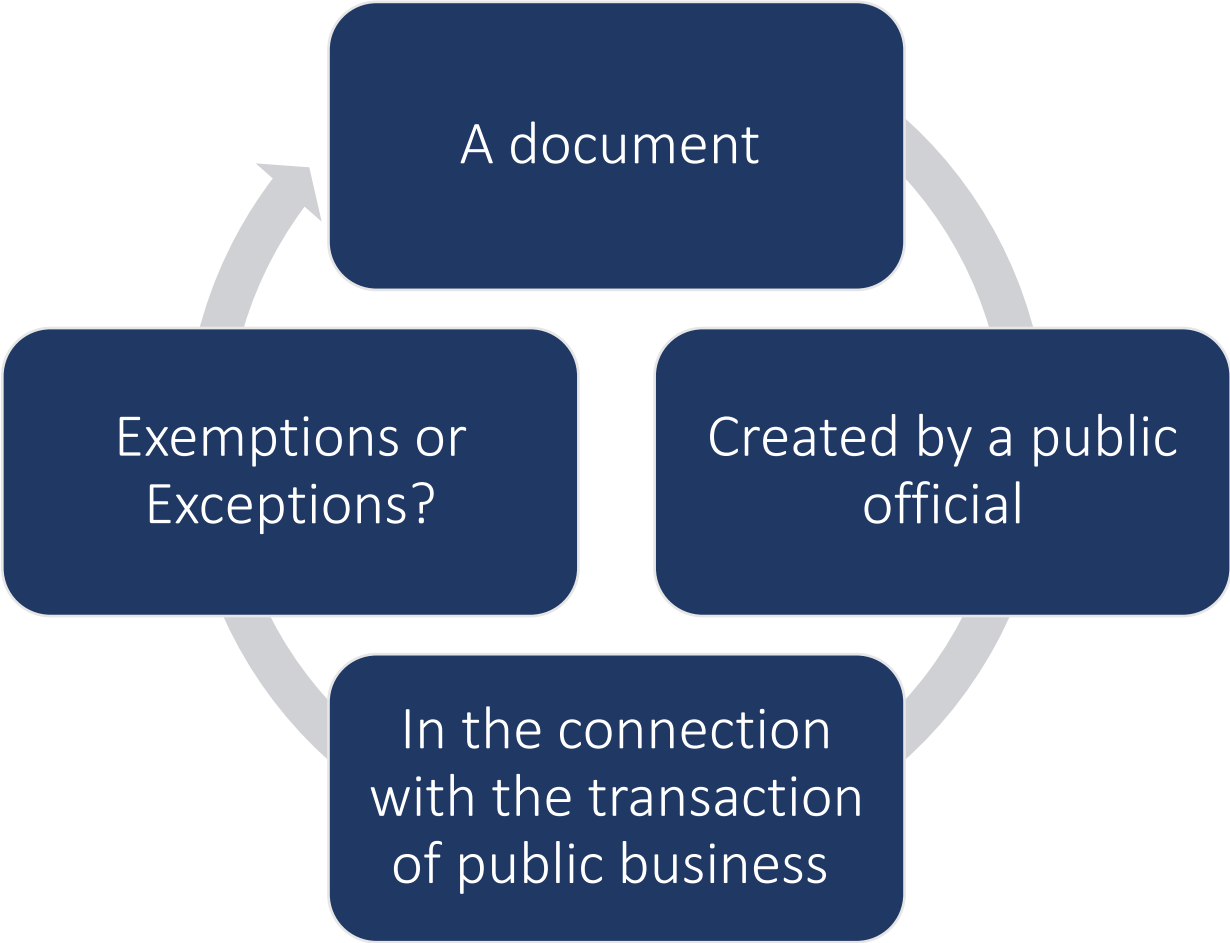
- Professional licensing boards “shall keep confidential all records of any mental health diagnosis, counseling, or treatment of a licensee retained by the licensing board.
- Records can only be disclosed to:
 - Licensee who is subject of records;
 - Authorized representative of licensing board that holds the records for evaluating fitness of licensee to practice;
 - Upon court order; or
 - In case of emergency when licensee presents danger to himself or herself or others.
- Licensee may request that the records be destroyed once the licensee retires or resigns from practice.



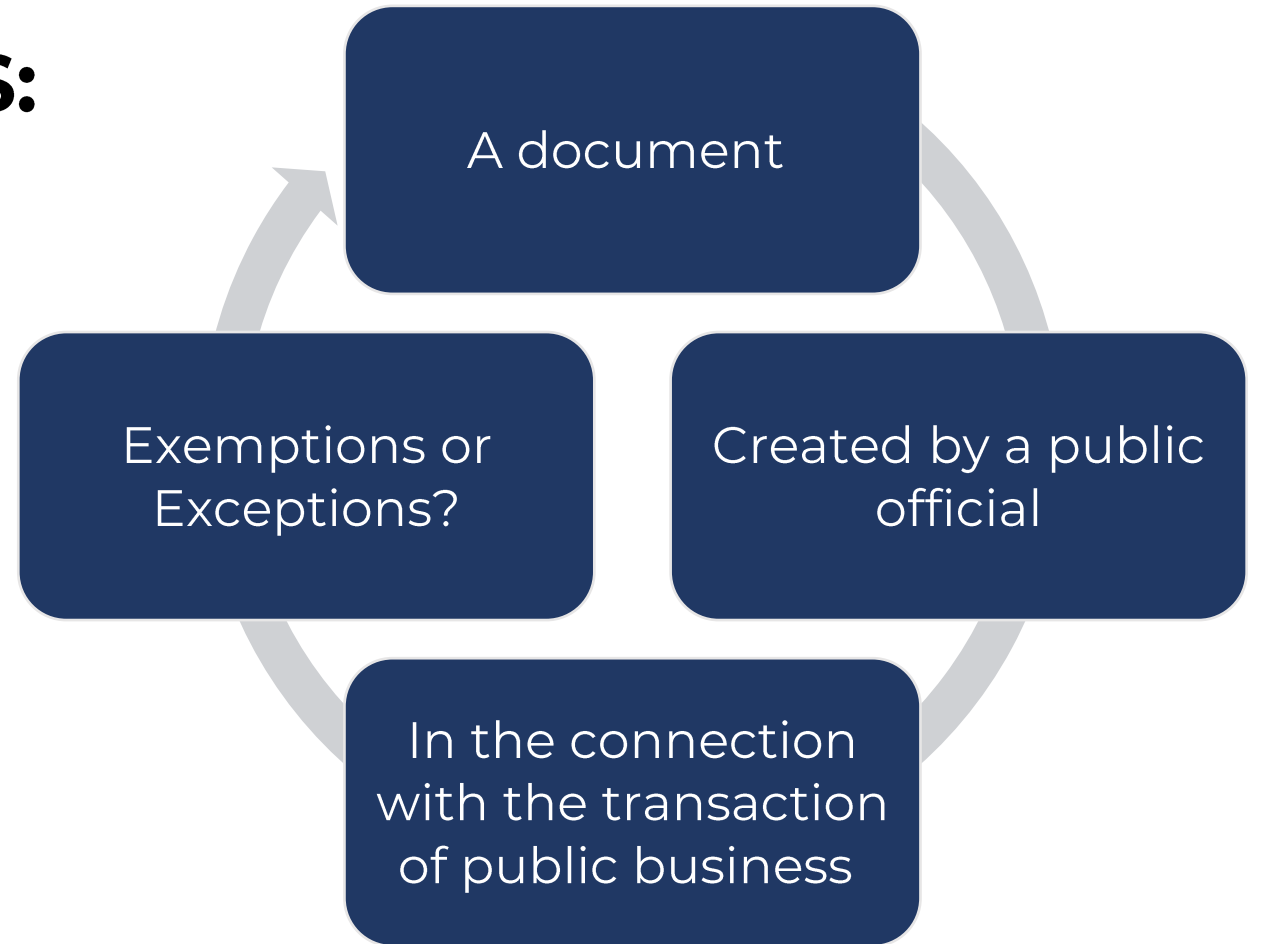
Practical Application



ARREST RECORDS: ARE THEY OPEN?

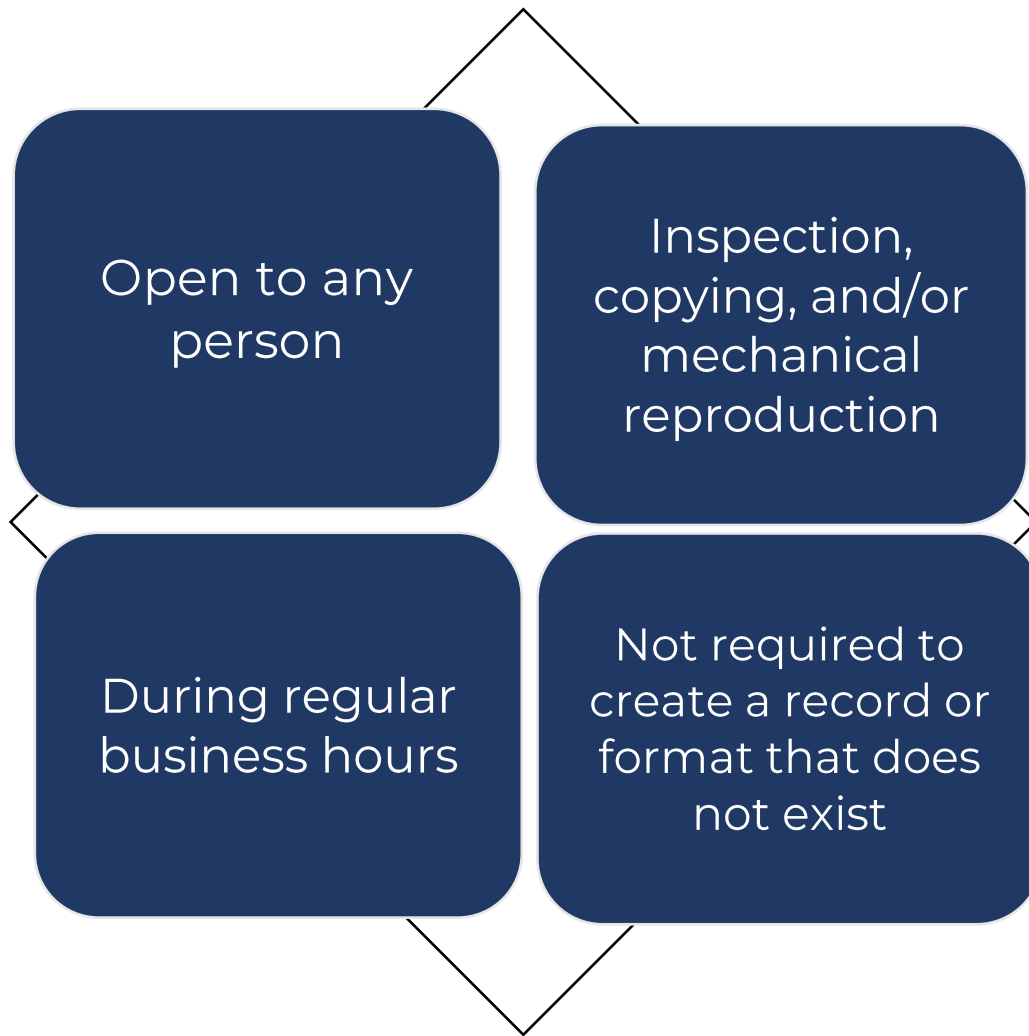


DRAFTS OF FILED BRIEFS: ARE THEY OPEN?



PRODUCTION PROCEDURES





DISCLOSURE

51 O.S.2021, §§ 24A.5 & 24A.18, Yellow Book 73, 76–78 & 98.



DISCLOSURE

- *Reasonable procedures* may be implemented to protect the integrity and organization of records and to prevent excessive disruption of essential functions. **Section 24A.5(6).**
- A public body *shall designate certain persons* who are authorized to release records of the public body for inspection, copying, or mechanical reproduction. At least one person shall be available at all times to release records during regular business hours of the public body. **Section 24A.5(7).**
- Special considerations given to public bodies maintaining less than 30 hours of regular business per week. **Section 24A.6(C).**



A REQUEST OF THE REQUESTOR

- Need to have reasonable basis for information requested.
- The relevant AG opinion has concluded that–
 - Public body can require that the request be put in writing, and
 - Sufficient information for the public body to determine whether the request is for a commercial purpose or whether charges can be imposed.
- The opinion also greenlighted requiring a name and information necessary to contact the requestor about his or her request.
- Cannot make a requester sign a contract.



CHARGING FEES

- Public body may charge fee only for recovery of the reasonable, direct costs of–
 - Copying, or
 - Mechanical reproduction (printing).
- Fees cannot exceed the following caps–
 - \$0.25 for records printed on 8.5” x 14” or smaller, or
 - \$1.00 for certified copies of records.
- Fees must be posted at the principal office and be on file with the county clerk for the county in which public body is located.
- Search fee allowed for: commercial purpose or excessive disruption.
- Reasonable fee to cover direct cost of record search and copying (time).



CHARGING FEES: MEDIA EXCEPTION

- Search fees cannot be imposed on news media.
- Search fee also cannot be imposed when release of record is in the public interest including, but not limited to, release to news media, scholars, authors and taxpayers to determine those entrusted with affairs of government are honestly, faithfully, and competently performing job duties.
- Fees “shall not be used for purpose of discouraging requests for information or obstacles to disclosure.”



TIMELINE FOR RESPONSES

PROMPT, REASONABLE ACCESS

What does it mean?

The answer will always be contextual.



PROMPT, REASONABLE ACCESS

Up to several
business days

> 30 business days



20 potentially responsive
records over a 30-day period

10,000 potentially responsive
records over a 2-year period

51 O.S.2021, §§ 24A.5(6)–24A.6, Yellow Book 78-79.



PRODUCTION OF PUBLIC RECORDS

Public body is permitted to establish “reasonable procedures” to –

- Protect integrity and organization of records, and
- Prevent excessive disruptions of its essential functions.

Delay in providing access must have nexus solely to time required for preparation of request documents and avoidance of excessive disruptions to public body’s essential functions.



PRODUCTION OF PUBLIC RECORDS (cont'd)

A public body cannot unreasonably delay completion of prior requests that will take substantially longer than a more current request.

A public body that uploads any records online meets its obligation of providing prompt, reasonable access.



DUTIES RELATED TO PRODUCTION OF RECORDS

“Any reasonably segregable portions of a record containing exempt material shall be provided after deletion of the exempt portions.”

Public body must designate certain persons authorized to release records for–

- Inspection,
- Copying, or
- Mechanical reproduction.

At least one (1) employee must be always available to release records during regular business hours.



REDACTION

Sometimes the entire record will be exempt, but if redaction is possible, the reasonably segregable portion(s) of a record containing exempt material shall be provided after the exempt portion has been removed.



SHOW ME THE RECEIPTS!

April receives a request for receipts or invoices related to purchases made by the Parks and Recreation Department over the last five years.

April sends it to Donna, who then forwards it to Leslie and Ron.

Ron and Leslie discuss and forward the request to Ben.

Ben is familiar with the transaction. What should he do?



PRODUCTION OF RECORDS: PUBLIC BODIES OPEN LESS THAN 30 HOURS A WEEK

Public body must post and maintain notice at its principal office and the county clerk where public body is located the following:

- Designate days of week when records are available for inspection, copying, or mechanical reproduction,
- Set forth name, mailing address, and telephone number of employee in charge of records; and
- Describe in detail procedures for obtaining records at least two (2) days of the week, excluding Sunday.

Requestor and public body may agree to a time and date for inspection, copying, or mechanical reproduction outside of the designated time and days described in the written notice.

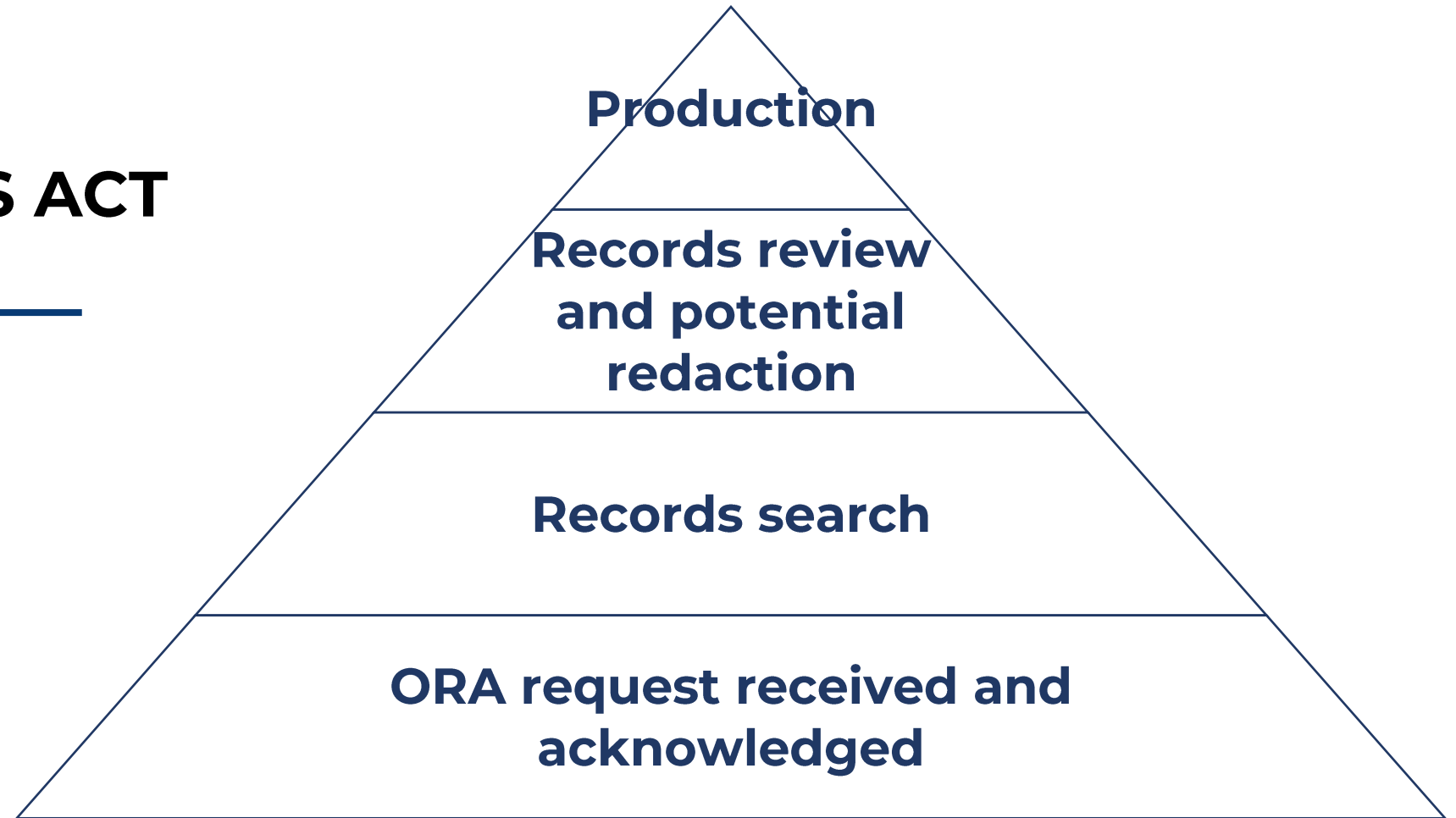


NO ADDITIONAL RECORDKEEPING REQUIREMENTS

- The ORA does not impose additional recordkeeping requirements on public bodies or public officials.
- If a record does not exist, a public body or public official DOES NOT have a duty to create one to fulfill an ORA request.
- If a public body or public official does create a record, the newly created record must be maintained for subsequent inspection, copying, or mechanical reproduction.



OPEN RECORDS ACT PROCESS



Wagner v. Office of the Sheriff of Custer Cnty.

[2021 OK CIV APP 20, 492 P.3d 1240](#)

- Out-of-state requestor asked for records from Custer County Sheriff and for the records to be emailed to him.
- Sheriff refused, stating that he would oblige the requestor with right to inspect, copy, or print the records. Requestor insisted on receiving the records by electronic mail.
- Requestor filed suit seeking relief under §24A.17(B).
- The District Court granted Sheriff's motion for summary judgment. On appeal, the Court of Civil Appeals affirmed the District Court. The court held that the ORA only provides for inspection, copying, or mechanical reproduction. Accordingly, Sheriff did not possess any obligation to email the records to the requestor.



Ross v. City of Owasso (Ross I)

[2017 OK CIV APP 4, 389 P.3d 396](#)

- City of Owasso allowed former city manager to resign following investigation into misconduct. The city hired outside counsel to conduct the investigation, resulting in the development of an investigative report. The report detailed criminal violations and violations of city policy.
- City manager received generous severance package following approval of settlement with Owasso City Council. Severance Agreement contained a confidentiality clause as well as a non-disparagement clause.
- A former councilmember (Ross) objected based on for-cause dismissal clause in the city manager's contract that stated he forfeited the severance if he was fired for cause. He asked for and was denied access to the report. He sued. Trial court ruled in Owasso's favor.
- COCA ruled that the report was a personnel record and that parties cannot, by agreement, keep records confidential and that Owasso cannot argue that the record is "not in its possession," and remanded case for determination of confidentiality.



Ross v. City of Owasso (Ross II)

[2020 OK CIV APP 66, 481 P.3d 278](#)

- Owasso City Council voted to keep the report was confidential. This determination gave rise to this appeal.
- The Court found that the report was not confidential as a matter of law and remanded the case, ordering the City to release the report.
- 51 O.S.2021, § 24A.7(A)(1) is permissive, not required.
- City did not show any public or governmental interest in withholding the report.
- Requestor was not motivated by mere curiosity or generalized desire to broadly monitor workings of government. The report was requested to investigate misconduct of a high-ranking official, not an employee of the City.
- Raise important questions about why city manager was resigning and receiving severance despite facing allegations of misconduct and instead of being fired.
- The court called it a “core” ORA matter going to legitimacy of Mayor and City Council’s good governance and use of public funds.



State ex rel. Okla. State Bd. of Medical Licensure and Supervision v. Rivero

[2021 OK 31, 489 P.3d 36](#)

- During disciplinary proceedings, parties agreed to a stipulated protective order that kept pleadings filed in the proceedings, whether filed under seal or public, from being used in another proceeding.
- On appeal, the Supreme Court held that public bodies (or parties in litigation) cannot enter protective orders that violate the expressed public policy in the Open Records Act and Discovery Code. If the order violates either the ORA or the Discovery Code, the protective order is overly broad in its application and is void as a matter of law.



Lawson v. Sequoyah Cnty. 911 Trust Auth.

[2022 OK CIV APP 39, 521 P.3d 827](#)

- 911 Center denied request from bail bondsman information concerning warrants.
- Policy of the Authority to send them to the Court Clerk.
- Court held that 911 Authority had obligation under the ORA to produce responsive records that were producible.
- Reinforced the definitional characteristic of “record.”



CIVIL PENALTIES

Requestor must be denied access to records of public body or public official

- May bring civil suit for declarative or injunctive relief, but suit is limited to records requested and denied prior to time of filing.
- If successful, requestor is entitled to reasonable attorney fees.
- If public body successfully defends suit and court finds that the suit was “clearly frivolous,” public body or official shall be entitled to reasonable attorney fees.
- Public body or official shall not be liable civilly for damages for providing access to records as allowed under the ORA.
- **NEW!** Prior to bringing civil suit, requester must notify the public body or official of his or her intent to bring suit to obtain relief ten (10) business days prior filing suit.
- **NEW!** Notice must also be sent to the Attorney General.



CRIMINAL PENALTIES

Public official who willfully violates any provision of the ORA, upon conviction, is guilty of a misdemeanor and shall be punished by–

- Fine not exceeding \$500,
- Imprisonment in the county jail for up to one (1) year, or
- Both



NEED AN EXTRA COPY?



Click on the book to take you to the Oklahoma Press Association's website store!
\$33.00 each

Free shipping