

# Openness in Government: The Open Meeting and Open Records Acts

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Regents Education Program

November 18, 2025 | Oklahoma City, OK

# **Purpose of the Open Meeting and Records Acts**

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

# JUSTICE LOUIS B. BRANDEIS

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***“Sunshine is said to be the best of disinfectants.”***



# IMPORTANT DISCLAIMER

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

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*25 O.S. 2021,  
§§ 301 – 314*



# 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).



# WHEN THE OMA APPLIES?

When a <sup>1</sup>***majority*** of a <sup>2</sup>***public body's*** members come together to <sup>3</sup>***conduct public business.***



# PUBLIC BODY DEFINED

25 O.S. 2021, § 304(1), Yellow Book (26th ed.) 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

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Supported by  
public funds

Entrusted with  
spending  
public funds

Administration  
of public  
property

Actual or de-facto  
decision-making  
authority

# EXEMPT PUBLIC ENTITIES

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The Judiciary

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State Legislature and legislators

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Administrative staff of public bodies, **including faculty meetings and athletic staff meetings of institutions of higher education when those staffs are not meeting with the public body, or entry year assistance committees.**

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

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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

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Board of Directors of federally-qualified health center

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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.\*](#)

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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.

# DEFINING ‘SUPPORT’

[2020 OK AG 2](#)

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- 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 fit in the latter.



# MEETING DEFINED

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*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.***

*Public body + Majority of public body members + conducting business = meeting that must be open*



# MAJORITY vs. QUORUM

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- OMA default for quorum is a majority.
- A specific act or rule for a particular public body may determine that less than a majority of the public body is authorized to transact business on behalf of the public body. This may be referred to as a quorum. 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 be included in your count. 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

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

Kramer has an opinion, and he smashes reply all.

Infuriated, George also replies all to ask a question.

Having an observation to share, Jerry decides to chime in and replies all.

A meeting has occurred, and the OMA is violated.



# POST-MEETING LUNCH OR COFFEE

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

Public body comprising of Charlie, Mac, Dennis, Deandra, and Frank has a properly noticed meeting in accordance with the Open Meeting Act.

The meeting adjourns at lunchtime. Charlie, Glenn, and Mac decide to grab lunch afterwards at Guigino's. While there, they decide to debrief.



# 'CONDUCTING PUBLIC BUSINESS'

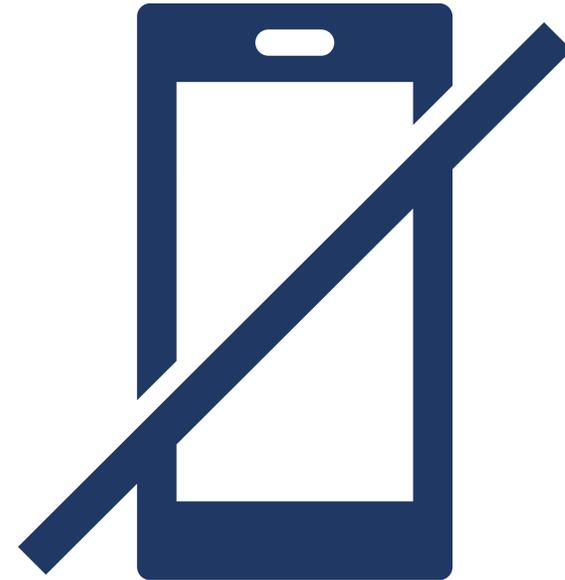
- Ordinary meaning in harmony with the Act's purpose.
- Includes the **entire** decision-making process, including presentation of information, deliberation, decision, or formal action.

*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  $\neq$  Legal.



# MEETINGS OF LESS THAN A QUORUM

[2020 OK AG 4](#)

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- 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.



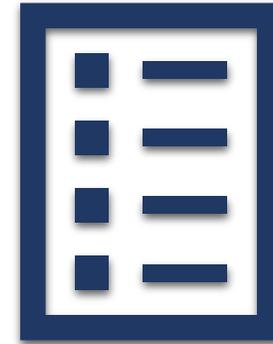
# MEETINGS



# CORE REQUIREMENTS



Provide Advance Notice



Post Agenda



# ADVANCE NOTICE TO WHOM?

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- 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

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- **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](#)

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



# TYPES OF MEETINGS

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REGULARLY  
SCHEDULED  
MEETINGS



SPECIAL  
MEETINGS



EMERGENCY  
MEETINGS



CONTINUED OR  
RECONVENED  
MEETINGS



# REGULAR & SPECIAL MEETINGS

	Regular Meeting	Special Meeting
<b>Advance notice</b>	Notice to Secretary of State of time, date, and location all regular meetings for next CY no later than December 15 of current year.	48 hours advance notice to Secretary of State of time, date, and location. Also, notify persons requesting notice of special meetings
<b>Agenda posting</b>	24 hours prior to meeting (excl. weekends and holidays).	24 hours prior to meeting (excl. weekends and holidays).
<b>Posting location</b>	Website <i>AND</i> office or meeting location for <b>STATE</b> public bodies	Website <i>AND</i> office or meeting location for <b>STATE</b> public bodies
<b>New business</b>	Allowed*	Not allowed

**25 O.S. 2021, §§ 304(3) & 311(A)(1) & (8)-(10).**

**25 O.S. 2021, § 304(4) & 311(A)(12).**

# 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.



# 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 (26th ed.) 18.



# MINUTES & RECORDING

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- 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

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- 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.
- 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.

2002 OK AG 26 & 1998 OK AG 45, Yellow Book (26th ed.) 49, 51–52.



# TAKING ACTION

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- 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

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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.



# EXECUTIVE SESSIONS



# ***TWO IMPORTANT QUESTIONS***

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## **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 sale, purchase, lease, acquisition, 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)];



# 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)].



# CONSTRUING SECTION 307

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- 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 sale, purchase, lease, acquisition, 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.



# 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)

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- 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.



# AGENDA EXAMPLE #1

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

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- 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.
- What's wrong 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.](#)

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- 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.
- What's wrong 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 took 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.
- City Council took up and adopted three amendments, reallocating funds away from Norman PD. The amendments were not attached as a part of the amendments attached to the agenda.
- 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)***

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- 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.
- The OSC affirmed the District Court, finding that the City of Norman violated the OMA.
- Agenda was written to only allow adoption or rejection of the budget, not amendment.
- OSC 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***

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- 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](#)

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- 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***

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- **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.”



# 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\*



# WHY SHOULD I COMPLY?



# VIOLATIONS OF THE ACT

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## CIVIL REMEDY

- 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*?

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- 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

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“Willfulness does not require a showing of bad faith, malice, or wantonness, but rather, encompasses *conscious, purposeful violations of law<sup>1</sup> or blatant or deliberate disregard of the law<sup>2</sup>* by those who know, or should know . . . Notice of meetings of public bodies which are **deceptively vague<sup>1</sup>** or *likely to **mislead<sup>2</sup>*** constitute a willful violation.”

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



Yellow Book (26th ed.) 45.



# **“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.



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# The Open Records Act (ORA)

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*51 O.S. 2021,  
§§ 24A.1 – 24A.40*



# 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.”*



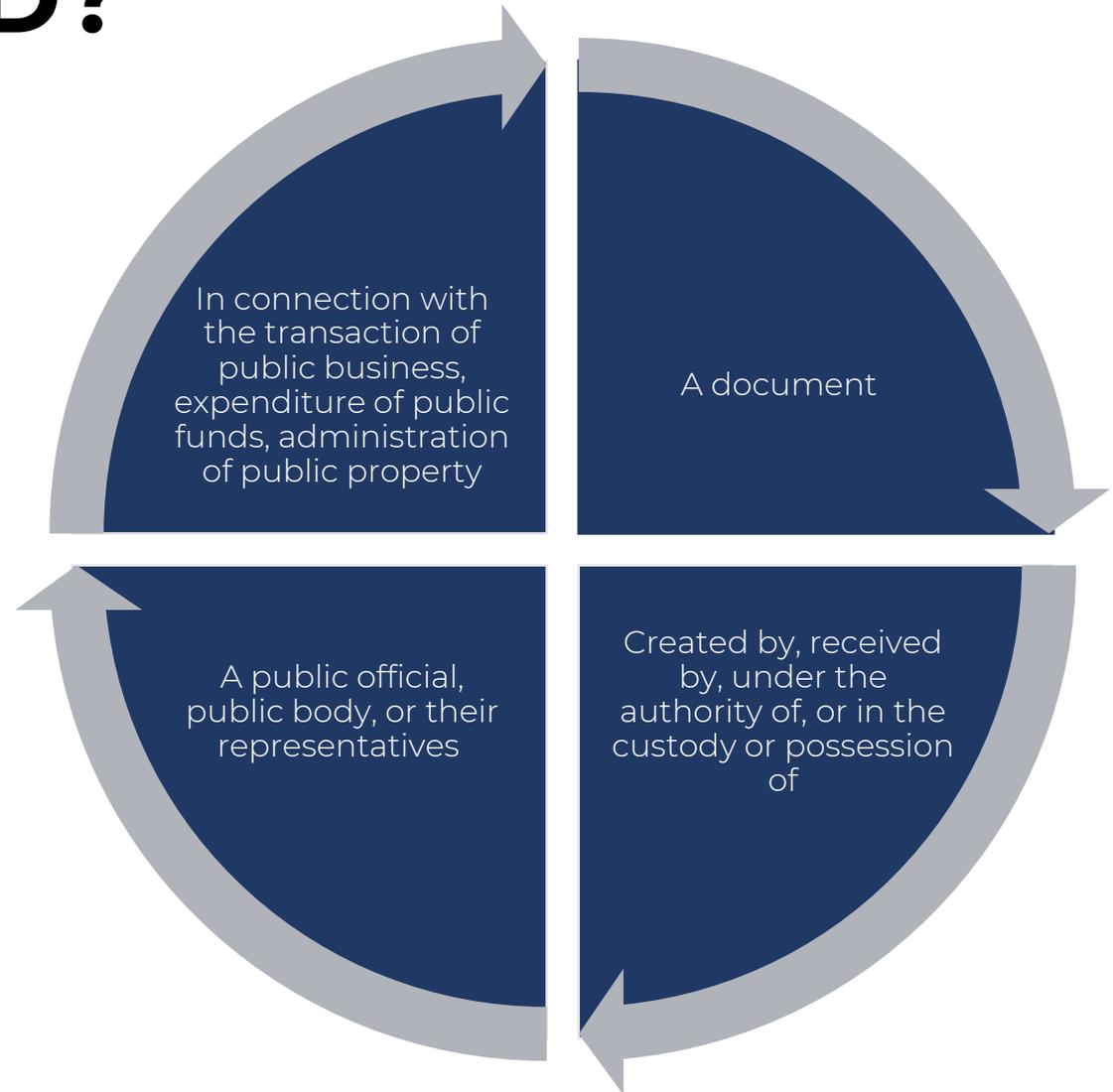
# RECORDS



# WHAT IS A RECORD?

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



**51 O.S. 2021, § 24A.2,  
Yellow Book (26<sup>th</sup> ed.) 70.**

# WHAT IS A DOCUMENT?

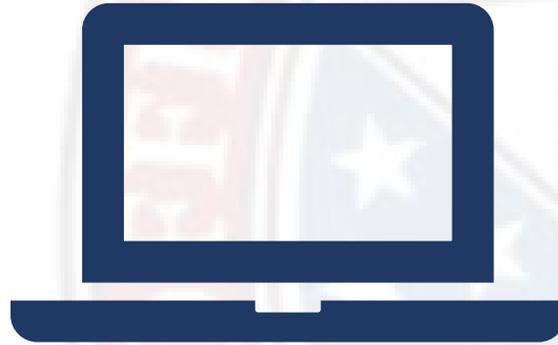
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- Books
- Papers
- Photographs
- Microfilm
- Certain data files
- Computer tape
- Disks
- Records
- Sound or Film Recordings
- Video recordings
- Emails
- Text messages.

# ELECTRONIC COMMUNICATIONS

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



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



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



# WHAT IS A NOT A RECORD?

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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), Yellow Book (26th ed.) 73–75.

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	Records specifically required to be kept confidential by law

# STATE EVIDENTIARY PRIVILEGE: ATTORNEY-CLIENT PRIVILEGE

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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\(D\)\(7\)](#).



# EXEMPTIONS & EXCEPTIONS

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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

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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)

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- 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

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- **General rule under ORA:** records are open.
- **Law enforcement agency rule:** records are confidential, except for those identified in the ORA, if kept.
- Cannot deny access to record previously produced.
- Must be maintained as specified by law.
- If there is no legal requirement to keep the records, records can be retained to the extent necessary for administrative purposes.



# LAW ENFORCEMENT RECORDS

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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

# CONFIDENTIAL LITIGATION FILES AND INVESTIGATIVE REPORTS

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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



# **HIDE-AND-SEEK: OPEN RECORDS**

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If a record is open under the Act, a public body cannot place it in an investigative or litigation file and make it confidential.



# 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).



# CONFIDENTIAL FEDERAL RECORDS

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To the extent federal law requires a public body to keep a record confidential, the following may be kept confidential:

- Records coming into possession of public body from federal government, or
- Records generated or gathered by a public body as required by federal law.



# PERSONAL COMMUNICATIONS RELATING TO EXERCISE OF CONSTITUTIONAL RIGHTS

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- 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

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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.
- Name/Image/Likeness contracts with student athletes



# TERRORISM AND INFRASTRUCTURE

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Investigative Evidence of plan or scheme to commit terrorism

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Vulnerability assessments of governmental facilities or public improvements and work papers related to preparing the vulnerability assessment

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Details about deterring or preventing or protecting from an act or threat of terrorism

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Details about responding or remediating after an act of terrorism

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Investigative evidence of an act of terrorism already committed

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# TERRORISM AND IT

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Design and functional schematics demonstrating relationships 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 or disaster planning or response plans

Investigative information directly related to security penetrations or denials of service



# TERRORISM DEFINED

- The ORA applies the title 21 definition.
- **Title 21, section 1268.1** defines terrorism as:
  - One or more kidnappings, or other act of violence;
  - Series of acts of violence, resulting in damage to property, person injury or death;
  - Threat of such act or acts that appears to be intended to:
    - Intimidate or coerce a civilian population,
    - Influence governmental policy or conduct by intimidation or coercion, or
    - Retaliate against governmental policy or conduct by intimidation or coercion.



# A FEW MORE EXCEPTIONS TO NOTE

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.



# PRODUCTION PROCEDURES





Open to **any** person



Inspection, copying, or  
mechanical reproduction



Prompt, reasonable access



Redaction



Available for release during regular  
business hours\*



Subject to permissible fees

# SIX PILLARS OF PRODUCTION

51 O.S.2021, § 24A.5, Yellow Book (26th ed.) 73, 76–80.



# TIMELINE FOR RESPONSES

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PROMPT, REASONABLE ACCESS

What does it mean?

**The answer will always be contextual.**



Inspection, copying, or  
mechanical reproduction



Prompt, reasonable access



# VIOLATIONS OF THE ACT

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## CIVIL REMEDY

- **Requester** denied records can bring petition for declaratory or injunctive relief.
- Petition limited to what records denied; cannot amend petition.
- If successful, requester entitled to reasonable attorney fees.
- If public body succeeds and demonstrates that suit was “clearly frivolous,” public body entitled to reasonable attorney fees.
- Requester must give 10 business day notice to public body and AG before filing petition.

## CRIMINAL PENALTIES

- If convicted, public official is guilty of a **misdemeanor**, and is punishable by:
  - Fine up to \$500,
  - One (1) year in the county jail, or
  - Both.

# PUBLIC ACCESS COUNSELOR

- Three bases for review—
  - Requesting review of public body’s commercial purpose determination,
  - Denial of records (must be 30 days after denial), or
  - Failure to provide prompt, reasonable access
  - 7 business days - 7 business days - 60 calendar days
- Advisory Opinions
  - Issuance of an advisory opinion is subject to the AG’s discretion
  - Public body may ask for an advisory opinion on a question related to a record.
  - Can be requested by the public body, the public body’s administrative head, or its attorney
- Future requests may be denied if a person files multiple frivolous requests.



# **PUBLIC ACCESS COUNSELOR**

## **IMMUNITY**

- If a public body or officials disclose records consistent with an OAG-PAC advisement, a public body or public officials are immune from the Act's penalties and all liabilities as a result of the disclosure.
- If a public body or officials rely in good faith on an advisory opinion, the public body is not liable for penalties under the Act so long as the facts on which the advice was given were fully and fairly disclosed to the OAG-PAC.

## **CONFIDENTIALITY**

- OAG cannot further disclose records a public body or official deems confidential or privileged.
- OAG-PAC work papers, records you provide, correspondence between public body or officials and OAG-PAC regarding advice under section 24A.40.



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# MORE RESOURCES

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## OMA and ORA Resources

[Open Records One Pager](#) 

[Open Records One Pager for Law Enforcement](#) 

[Open Meeting Act One Pager](#) 

[Executive Session Minutes Template](#) 

[Executive Session Minutes Template](#) 

[2024 Open Meeting and Records Act Presentation](#) 

[Order the Open Meeting Open Records Act book](#) >

# THANK YOU!

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Please visit OAG's website for a copy of this presentation:

<https://oklahoma.gov/oag/news/open-records-request.html>