

OPINIONS OF THE ATTORNEY GENERAL

**2014 OPINIONS
OF THE
ATTORNEY GENERAL
E. SCOTT PRUITT**

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CONTENTS

NUMERICAL INDEX OF 2014 ATTORNEY GENERAL OPINIONS	x
PREFACE	iv
STAFF OF ASSISTANT ATTORNEYS GENERAL	vi
STATEMENT OF POLICY OF THE ATTORNEY GENERAL	viii

2014 OPINIONS OF THE ATTORNEY GENERAL	1
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APPENDICES

ADMINISTRATIVE PROCEDURES ACT, RULEMAKING UNDER	116
OAC RULES CITED IN 2014 OPINIONS	137
<i>REGISTER</i> PUBLICATION DATES AND FILING DEADLINES	139
OPEN MEETING ACT, OKLAHOMA’S	141
OPEN RECORDS ACT, PUBLIC RECORDS IN OKLAHOMA	162

INDEX SECTION

OKLAHOMA CONSTITUTION CITED OR CONSTRUED	186
OKLAHOMA STATUTES CITED OR CONSTRUED	187
OKLAHOMA “ACTS” CITED OR CONSTRUED	192
PREVIOUS OPINIONS CITED OR CONSTRUED IN 2014 OPINIONS	193
2014 TOPIC INDEX.....	194
CUMULATIVE TOPIC INDEX 1983-2014	197
CUMULATIVE OPINIONS CONSTRUED 1968-2014	389

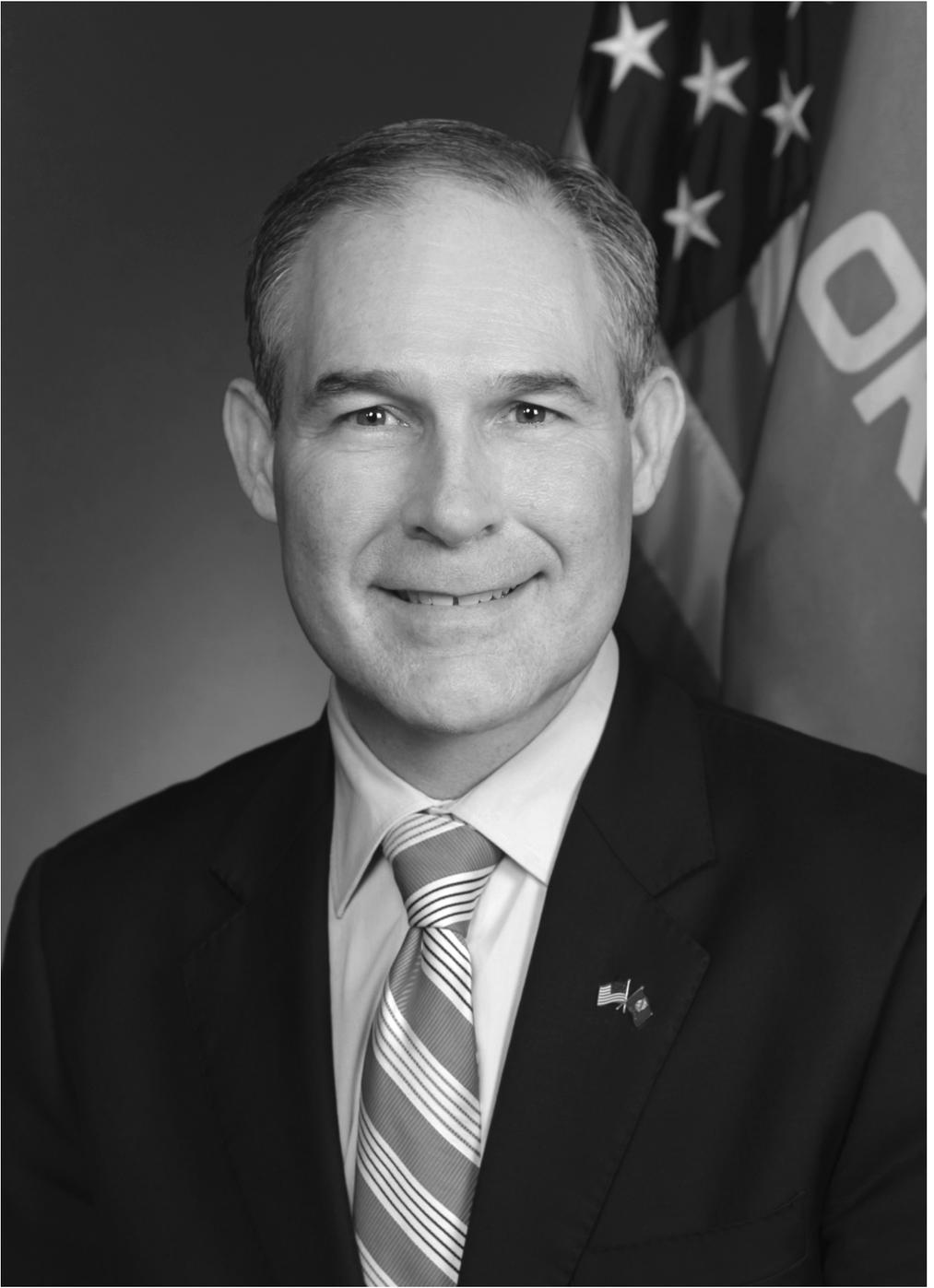
PREFACE

During the fourth year of his administration, Attorney General Scott Pruitt issued 17 formal Opinions, which are included in this 2014 volume. These Opinions provide legal clarity on issues ranging from the Legislature's authority to transfer certain funds to interpretations of the Oklahoma Open Meeting and Open Records Acts.

Attorney General Opinions provide Oklahoma policy leaders and state government officials with thorough analysis and legal guidance on any state law that gives rise to varying interpretations on enforcement or implementation. In 1990, the Oklahoma Supreme Court affirmed that the formal Opinions of the Attorney General are binding on state officials until a court of competent jurisdiction holds otherwise. *See Branch Trucking v. Okla. Tax Comm'n*, 801 P.2d 686, 690 (Okla. 1990). However, an Opinion declaring an act of the Legislature unconstitutional should be considered advisory only and is not binding until upheld by an action in district court. *See York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984).

Opinions published in this volume represent the product of a time-honored and well-established procedure used by Attorneys General. With each Opinion request eligible for review, an Assistant Attorney General is assigned to thoroughly research the legal context and precedent of all issues involved in order to draft a proposed opinion. The draft is presented in opinion conference by the Assistant Attorney General for debate and analysis among the Attorney General, the First Assistant Attorney General, the Solicitor General and a group of senior Assistant Attorneys General. Often, an Opinion is the subject of rigorous debate and multiple drafts before it is approved and signed by Attorney General Pruitt.

As has been stated by previous Attorneys General, Attorney General Opinion conferences are among the most intellectually stimulating exercises in the practice of law. The discussions range from legal history to language syntax to punctuation. While enunciating the views of the Attorneys General, an opinion reflects the minds and effort of the many participants in the process.



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STATEMENT OF POLICY OF THE ATTORNEY GENERAL REGARDING FURNISHING FORMAL OPINIONS

The Attorney General of the State of Oklahoma makes the following statement of policy regarding his statutory duty and authority to issue formal opinions:

1. The Attorney General is authorized to give his opinion in writing upon all questions of law submitted to him by the Legislature or either branch thereof, or by any state officer, board, commission or department, or by district attorneys, and then only upon matters of official interest. *See* 74 O.S.2011, § 18b(A)(5).
2. The Attorney General is not authorized to furnish formal opinions in response to a request by private citizens, public corporations, cities and towns, or other local political subdivisions of state government without explicit statutory authorization. Questions from cities, towns and school districts are to be referred to their respective attorneys.
3. The Attorney General is authorized to consult with and advise District Attorneys in matters relating to the duties of their offices. *See* 74 O.S.2011, § 18b(A)(4). All requests from District Attorneys should contain a written opinion supported by citation of authority upon the matter submitted. Requests from Assistant District Attorneys should be endorsed by the District Attorney.
4. All requests for opinions should be written and should contain a complete statement of the issues together with a concise question of law, and a clear, concise statement of the question based upon the information in the request.
5. Requests for opinions made by the state's executive officers and by all boards, commissions, departments and agencies of state government should be signed or endorsed by such executive officer as submitted by vote of the governing board or commission, or by the administrator or secretary thereof. All requests from state agencies, which have legal counsel, should include a legal opinion supported by citations of authority pertaining to the matters submitted.
6. Requests for opinions of the Attorney General should contain a question of statewide interest or application and the state officer

requesting the opinion shall state the nature and extent of his/her official interest in the question.

7. The Attorney General will not furnish a formal opinion on questions relating to legislation pending before either house of the Legislature.
8. The Attorney General will not furnish opinions on questions scheduled for a determination by any court of competent jurisdiction.
9. An opinion request will not be withdrawn without the consent of the Attorney General.
10. Exceptions to the foregoing policy may be made by the Attorney General when the public interest warrants.

E. SCOTT PRUITT
ATTORNEY GENERAL
STATE OF OKLAHOMA

**NUMERICAL INDEX OF 2014
ATTORNEY GENERAL OPINIONS**

- 2014-1 Disclosure of audio recordings of state district court proceedings**
- 2014-2 Approval of increases in long-term care insurance policies**
- 2014-3 Private investigators' right to carry firearms**
- 2014-4 Authority of Board of Career and Technology Education to annex or deannex to or from a technology center school district**
- 2014-5 Discretionary authority of board of county commissioners to provide fire protection services in the county**
- 2014-6 Leasing of municipal land by Oklahoma Tourism & Recreation Commission for the operation of a public park**
- 2014-7 Legislative transfer of funds from Oklahoma Higher Learning Access Trust Fund**
- 2014-8 Appointment of member of statewide organizations to Teachers Retirement Board**
- 2014-9 Declaration of county real property as surplus**
- 2014-10 Compliance of Allpoint Pen Technology with Oklahoma Voter Registration Act**
- 2014-11 Qualifications of probation-parole officers and district attorney personnel supervising probationers**
- 2014-12 Taxation of cigarettes and tobacco products by county government**
- 2014-13 Use of Ambulance Service District funds for wheelchair vans**

- 2014-14 Deliberation of Workers' Compensation Commission in open meetings**
- 2014-15 Use of county sales taxes for purposes set forth in county resolutions**
- 2014-16 Legislative appropriation to the Workers' Compensation Fund**
- 2014-17 Legislative transfer of funds from the Trauma Care Assistance Revolving Fund**

**OPINIONS
OF THE
ATTORNEY GENERAL
OF OKLAHOMA**

by

**E. SCOTT PRUITT
ATTORNEY GENERAL**

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**OPINIONS OF THE
ATTORNEY GENERAL
OF OKLAHOMA
VOLUME 44**

OPINION 2014-1

The Honorable Scott C. Martin
State Representative, District 46

January 13, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Are audio recordings of state district court proceedings subject to disclosure under the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2013, §§ 24A.1 – 24A.29?

We have learned through research and conversations that the specific records about which you inquire are tape recordings of district court proceedings that have been filed with a district court clerk. We, therefore, analyze your request in that context, and conclude that sound recordings of court proceedings filed with or kept in the custody of a district court clerk are open records unless they are properly sealed by court order or specifically exempted from disclosure by law.

I.

THE OPEN RECORDS ACT

The Oklahoma Open Records Act (“Act”) makes unequivocal the policy of the State of Oklahoma to make most records of public bodies open for public inspection or copying. The Act specifically provides as follows:

[I]t is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government. The Oklahoma Open Records Act shall not create, directly or indirectly, any rights of privacy or any remedies for violation of any rights of privacy; nor shall the Oklahoma Open Records Act, except as specifically set forth in the Oklahoma Open Records Act, establish any procedures for protecting any person from release of information contained in public records. ***The purpose of this act is to 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.*** The privacy interests of individuals are adequately protected in the specific exceptions to the Oklahoma Open Records Act or in the statutes which authorize, create or require the records. ***Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access;*** provided, the person, agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege.

51 O.S.2011, § 24A.2 (emphasis added) (footnote omitted).

For the purposes of the Act, a record is defined as:

[A]ll documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, ***sound recording***, film recording, video record or other material regardless of physical form or characteristic, ***created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.***

Id. § 24A.3 (emphasis added).

A public body, as defined by the Act, includes, but is not limited to:

[A]ny office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust or any entity created by a trust, county, city, village, town, township, district, school district, fair board, ***court***, executive office, advisory

group, task force, study group, or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property, and all committees, or subcommittees thereof.

Id. § 24A.3(2) (emphasis added). A public official, under the Act, includes “any official or employee of any public body.” *Id.* § 24A.3(4).

We have previously held that the offices of court clerks are public bodies as defined in the Open Records Act. *See* A.G. Opin. 99-58, at 282. We have also held that a court clerk is a public official as defined in the Open Records Act. *See* A.G. Opin. 09-27, at 187. Finally, a court is expressly defined as a public body in the Open Records Act. 51 O.S.2011, § 24A.3(2).

II.

RECORDS MAINTAINED BY A COURT CLERK

In all state courts of record, the court clerk “shall keep the records and books and papers appertaining to the court and record its proceedings.” 12 O.S.2011, §§ 33-34. The court record for a specific proceeding consists of “the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court[.]” 12 O.S.2011, § 32.1. This record is also referred to as a “judgment roll.” *See Chickasaw Tel. Co. v. Drabek*, 921 P.2d 333, 334 n.2 (Okla. 1996). However, the records maintained by court clerks are not limited to the “judgment roll” in any particular action. Court clerks may also maintain “other records as may be ordered by the court or required by law.” 12 O.S.2011, § 22.

Oklahoma’s state and federal courts have consistently held that documents filed of record in court proceedings are public records subject to disclosure under both common law and Oklahoma’s Open Records Act. *See Nichols v. Jackson*, 55 P.3d 1044, 1046 (Okla. 2002); *Search of 1638 E. 2nd St., Tulsa, Okla. v. United States*, 993 F.2d 773, 775 (10th Cir. 1993); *see also* A.G. Opin. 99-58, at 285 (determining that once records are filed with a court clerk, they must ordinarily be made available for public inspection and copying at the office of the court clerk). Moreover, even where a document is not filed of record in a court proceeding but is otherwise received by, maintained under the authority of, or comes into the custody, control or possession of a court clerk (a public official), or the office of a court clerk (a public body), it is still a “record” and subject to the disclosure requirements set forth in the Open Records Act. 51 O.S.2011, §§ 24A.3, 24A.5. However, the public’s right to access such records is not absolute. *See* A.G. Opin. 09-12, at 75 (stating that a record as defined by the Act “is subject to disclosure unless some provision of law allows it to be kept confidential”). Specifically, the Open Records Act exempts records protected by privilege or otherwise deemed confidential by state or federal

statute or sealed by court order. *In re Search of 1638 E. 2nd St., Tulsa, Okla.*, 993 F.2d at 775; *Nichols v. Jackson*, 38 P.3d 228, 231 (Okla. Crim. App. 2001); *see also* 51 O.S.2011, §§ 24A.2, 24A.5(1). Specific procedures are in place at Sections 24A.25¹ and 24A.29 for withholding or removing of pleadings or other material from a public record.

III.

ELECTRONIC RECORDINGS OF COURT PROCEEDINGS MAINTAINED BY A COURT CLERK

Audio or sound recordings of court proceedings may be made upon order of a court pursuant to 20 O.S.2011, § 106.4(A), that states, “[i]n any trial, hearing or proceedings, the judge before whom the matter is being heard may, unless objection is made by a party or counsel, order the proceedings electronically recorded.” *Id.* Thereafter, such recordings may be filed with or maintained by a court clerk pursuant to 12 O.S.2011, §§ 22, 32.1. Notably, “sound recording[s] . . . created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property” are expressly defined as public records in the Open Records Act. 51 O.S.2011, § 24A.3(1). Accordingly, sound recordings of court proceedings filed with or maintained by a court clerk are open records.

In *Fabian & Associates v. State ex rel. Department of Public Safety*, 100 P.3d 703 (Okla. 2004), the Oklahoma Supreme Court examined the issue of whether an audio tape recording of an administrative hearing was an open record. Although the tape recording was made pursuant to a statute governing administrative hearings as opposed to district court hearings, the Supreme Court noted that a record, as defined by the Open Records Act, was “broad enough to include *any* method of memorializing information . . . either created or received by the public bodies and public officials as defined in the act.” *Id.* at 705 (emphasis added). Pursuant to this analysis, an audio recording of a district court proceeding that is filed with or maintained by a court clerk is an open record. As always, however, such records may be exempt from disclosure when properly sealed by a court order or if they are otherwise deemed confidential or privileged as a matter of law. *See* 51 O.S.2011, §§ 24A.2, 24A.5(1).

¹ “Any order of the court for removal of materials from the public record shall require compliance with the provisions of paragraphs 2 through 7 of subsection C of Section 3226 of Title 12 of the Oklahoma Statutes.” *Id.*

It is, therefore, the official Opinion of the Attorney General that:

Audio recordings of court proceedings filed with or maintained by court clerks are public records and are subject to disclosure under the Oklahoma Open Records Act unless they are properly sealed by court order or specifically exempt from disclosure by law. 51 O.S.2011 & Supp.2013, §§ 24A.1 – 24A.29; *Fabian & Assoc. v. State ex rel. Dep't of Pub. Safety*, 100 P.3d 703, 705 (Okla. 2004).

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

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ASSISTANT ATTORNEY GENERAL

OPINION 2014-2

The Honorable Leslie Osborn
State Representative, District 47

February 6, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Does 36 O.S.2011, § 4430, governing approval of renewal premium increases for certain long-term care insurance policies, authorize the Oklahoma Insurance Commissioner to approve renewal premium increases for long-term care insurance policies that were approved for issue or delivery on or after November 1, 2001?

I.

INTRODUCTION

Long-term care insurance in Oklahoma is governed by the portion of the Oklahoma Insurance Code known as the Long-Term Care Insurance Act. 36 O.S.2011, §§ 4421 – 4430. The Legislature enacted the Long-Term Care Insurance Act to, in part, promote the availability of long-term care insurance policies, to protect applicants from unfair or deceptive sales or enrollment practices and to establish standards for long-term care insurance. *Id.* § 4422. Generally, the Act applies to policies delivered or issued for delivery in Oklahoma on or after November 1, 1987. *Id.* § 4423(A). Long-term care insurance includes group and individual health policies which provide coverage for long-term care. *Id.* § 4424(1)(b). The term also includes policies which provide for payment for long-term care benefits based on cognitive impairment or loss of functional capacity. *Id.* § 4424(1)(c). The Long-Term Care Insurance Act governs such matters as requirements of long-term care policies, *id.* § 4426, rescission or denial of claims, *id.* § 4426.1, the option to purchase nonforfeiture benefits, *id.* § 4426.2 and suitability standards, *id.* § 4429.

In addition to the statutes governing long-term care insurance, the Oklahoma Insurance Commissioner, pursuant to his authority, has promulgated a number of administrative rules governing long-term care insurance. OAC 365:10-5-40 – 10-5-56.

II.

SECTION 4430 OF TITLE 36 DOES NOT APPLY TO POLICIES OR CERTIFICATES ISSUED OR APPROVED FOR DELIVERY ON OR AFTER NOVEMBER 1, 2001.

You specifically ask whether 36 O.S.2011, § 4430 authorizes the Oklahoma Insurance Commissioner to approve renewal premium increases on long-term

care insurance policies that were approved for issue or delivery on or after November 1, 2001. The statute in question provides:

- A. Upon approval of the Insurance Commissioner, an insurer may charge an increased renewal premium upon showing that the increase is necessary because of utilization of policy benefits in excess of the expected rate.
- B. 1. This section does not apply to life insurance policies or riders containing accelerated long-term care benefits.
 2. For certificates issued or delivered on or after November 1, 1995, under a group long-term care insurance policy as defined in Section 4424 of this title, which policy was in force on November 1, 1995, the provisions of this section shall not apply.
 3. This section does not apply to policies or certificates approved for issue or delivery on or after November 1, 2001.

Id. The specific language of the statute states that “[t]his section does not apply to policies or certificates approved for issue or delivery on or after November 1, 2001.” *Id.* § 4430(B)(3).¹ The statute is, however, applicable to other policies. By its terms it applies to those policies or certificates approved for issue

¹ Section 4430 has been amended a number of times since its enactment. When the provision was enacted in 1995, the statute provided:

- A. 1. An insurer may not charge a renewal premium rate for a long-term care insurance policy which exceeds by more than fifteen percent (15%) any premium charged for the policy during the preceding twelve (12) months.
 2. Upon approval of the Insurance Commissioner, an insurer may charge a renewal premium exceeding the fifteen percent (15%) increase provided for in paragraph 1 of this subsection upon showing that a larger increase is necessary because of utilization of policy benefits in excess of the expected rate.
- B. 1. This section does not apply to life insurance policies or riders containing accelerated long-term care benefits.
 2. For certificates issued on or after the effective date of this act, under a group long-term care insurance policy as defined in Section 4424 of Title 36 of the Oklahoma Statutes, which policy was in force at the time this act became effective, the provisions of this section shall not apply.

1995 Okla. Sess. Laws ch. 244, § 4. In 2001, the Legislature amended the statute to make minor changes to subsection (B)(1) and to add what is now (B)(3) providing that “[t]his section does not apply to policies or certificates issued or delivered on or after November 1, 2001.” 2001 Okla. Sess. Laws ch. 363, § 21. Minor changes were made in 2002. 2002 Okla. Sess. Laws ch. 307, § 31. In 2009, the statute was amended to read as it stands today. 2009 Okla. Sess. Laws ch. 176, § 32.

or delivery before November 1, 2001, that do not fall within the two exceptions at (B)(1) and (B)(2). It establishes the showing required for the Insurance Commissioner to approve an increased renewal premium for those policies to which the statute applies. The plain language makes clear that Section 4430 simply does not apply to policies or certificates approved for issue or delivery on or after November 1, 2001.

Thus, the answer to your question is that while Section 4430 establishes the showing required for the Insurance Commissioner to approve certain premium renewal increases, it does not apply to policies or certificates approved for issue or delivery on or after November 1, 2001.

This raises the question of whether the Insurance Commissioner has the authority to approve premium renewal increases for policies or certificates approved for issue or delivery on or after November 1, 2001. To find that the Insurance Commissioner is without authority to approve premium renewal increases for policies or certificates approved for issue or delivery on or after November 1, 2001, we would have to view this section of the Long-Term Care Insurance Act in a vacuum without considering other laws or administrative rules governing long-term care insurance. This would be contrary to established rules of statutory construction as statutes are not to be viewed in isolation. *McNeill v. City of Tulsa*, 953 P.2d 329, 332 (Okla. 1998) (“In the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature’s intention and will, and attempt to avoid unnatural and absurd consequences.”). Thus, we look to the body of law governing insurance in general and long-term care insurance specifically to determine whether the Insurance Commissioner has the authority to approve renewal premium increases on policies or certificates approved for issue or delivery on or after November 1, 2001.

III.

THE OKLAHOMA INSURANCE COMMISSIONER MAY APPROVE RENEWAL PREMIUM INCREASES FOR LONG-TERM CARE POLICIES OR CERTIFICATES APPROVED FOR ISSUE OR DELIVERY ON OR AFTER NOVEMBER 1, 2001.

“Insurance” is defined by the Oklahoma Insurance Code as “a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” 36 O.S.2011, § 102. The rights of the parties, including the right to increase premiums, arise from the contractual relationship as established and limited by the provisions of the insurance policy. *O’Brien v. Dorrough*, 928 P.2d 322, 324 (Okla. Civ. App. 1996); *United States Fid. & Guar. Co. v. Walker*, 329 P.2d 852, 854 (Okla. 1958). Thus, the terms of the policy govern

the services to be provided, the premiums to be paid and the requirements for renewal of such policies. Premiums may be increased if the policy allows for such and the specific terms of the policy must be examined to determine whether an increase in premiums is authorized.

Your question does not relate to the ability of an insurer to increase premiums but to the authority of the Oklahoma Insurance Commissioner to approve such increases. In Oklahoma, the authority of the Insurance Commissioner to approve renewal premium increases for long-term care policies is established by statute for certain policies and by administrative rule for others. In addition to the general authority to adopt rules,² the Insurance Commissioner is granted specific authority to adopt rules to implement the provisions of the Long-Term Care Insurance Act, specifically including terms of renewability. *Id.* § 4427. That statute provides:

The Insurance Commissioner may adopt rules to implement the provisions of the Long-Term care Insurance Act. The Commissioner may adopt rules that apply to all providers of long-term care insurance coverage, whether or not a provider is otherwise subject to the provision of the Insurance Code, and that include, but are not limited to, standards for full and fair disclosure setting forth the manner, content, and required disclosure for the sale of long-term care insurance policies, terms of renewability

Id. § 4427(A) (footnotes omitted).

In 2001, the Legislature amended a number of statutes governing insurance, including 36 O.S.2011, § 4430, discussed above, which is applicable to the approval of long-term care insurance premium renewal increases. 2001 Okla. Sess. Laws, ch. 363, § 21. The amendment narrowed the policies to which the approval process in Section 4430 applied, providing, among other exceptions, that the approval process of that statute did not apply to policies or certificates approved for issue or delivery after November 1, 2001. During that same legislative session, a number of rules promulgated by the Insurance Commissioner governing premium renewal increases were adopted, including a rule applicable to those policies to which Section 4430 did not apply. *See* 18 Okla. Reg. 1277 (May 1, 2001).

As part of the change in the law in 2001, a specific rule was promulgated to govern premium rate schedule increases. OAC 365:10-5-47.1 (2001). This rule specifically applies to rate increases for any long-term care policy or certificate issued on or after November 1, 2001. OAC 365:10-5-47.1(a)(1). The rule applies to these policies or certificates to which Section 4430 specifically

² “The Commissioner may adopt reasonable rules and regulations for the implementation and administration of the provisions of the Insurance Code.” 36 O.S.2011, § 307.1.

does not apply and provides authority for approval of premium rate increases on these policies or certificates.

The rule establishes a procedure for approval of premium rate schedule increases by the Insurance Commissioner. Insurers are required to provide notice of a pending rate schedule increase to the Insurance Commissioner at least 60 days prior to the notice to the policyholders. OAC 365:10-5-47.1(b). That notice is to contain certain information including actuarial certification, disclosure of how reserves have been incorporated into the rate increase, disclosure of the analysis performed to determine why a rate adjustment is necessary and “[s]ufficient information for review and approval of the premium rate schedule increase by the commissioner.” OAC 365:10-5-47.1(b)(5).

The rule at OAC 365:10-5-47.1(b)(4) specifically requires inclusion in the notice of “[a] statement that renewal premium rate schedules are not greater than new business premium rate schedules except for differences attributable to benefits, unless sufficient justification is provided to the commissioner[.]” *Id.* This rule establishes an extensive list of requirements by which premium rate schedule increases may be determined. OAC 365:10-5-47.1(c).³

This rule is consistent with the powers of the Insurance Commissioner to regulate long-term care insurance statute and is not contrary to statute. *See Adams v. Prof'l Practices Comm'n*, 524 P.2d 932, 934 (Okla. 1974) (an administrative agency may not exceed the scope of its authority and act contrary to the statute which is the source of rulemaking authority). It establishes the process by which the Insurance Commissioner may approve renewal premium increases for long-term care policies or certificates issued on or after November 1, 2001. The fact that Section 4430 does not apply to these policies is of no consequence as Section 4430 applies to certain policies issued before November 1, 2001, and is not a general grant of authority to the Insurance Commissioner to approve premium renewal increases.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Insurance policies are contracts between an insurer and an insured and the terms of the policy govern the services to be provided, the premiums to be paid and the terms of renewal,**

³ The Insurance Commissioner has promulgated OAC 365:10-5-44, requiring that long-term care policies or certificates issued in this state on or after November 1, 2001, other than those exempted from the rule shall include a statement that premium rate increases may change. “Such provision shall be appropriately captioned, and shall appear on the first page of the policy.” OAC 365:10-5-44(a). The Commissioner has also provided a form at Appendix DD to provide information to long-term care policy applicants regarding premium rate schedules, rate schedule adjustments, potential rate revisions and policyholder options in the event of a rate increase. That form requires that certain information be provided, including information of the premium rate that is applicable and that will be in effect until a request is made and either filed or approved for an increase. OAC 365:10, app. DD.

including renewal premium increases. See *O'Brien v. Dorrough*, 928 P.2d 322, 324 (Okla. Civ. App. 1996).

- 2. Title 36 O.S.2011, § 4430, governing approval by the Insurance Commissioner of renewal premium increases for certain long-term care insurance policies, does not apply to policies or certificates approved for issue or delivery on or after November 1, 2001. As such, this provision does not prohibit the Insurance Commissioner from approving renewal premium increases for those policies.**
- 3. The Insurance Commissioner has specific authority to adopt rules to implement the provisions of the Long-Term Care Insurance Act, including terms of renewability for insurance policies and has promulgated rules governing the process for approval of renewal premium increases for policies or certificates approved for issue or delivery on or after November 1, 2001. 36 O.S.2011, § 4427(A).**
- 4. The process for approval by the Insurance Commissioner of policies or certificates approved for issue or delivery on or after November 2001 is set forth at OAC 365:10-5-47.1.**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

SANDRA D. RINEHART
SENIOR ASSISTANT ATTORNEY GENERAL

OPINION 2014-3

The Honorable Marty Quinn
State Representative, District 9

February 19, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

May a private investigator lawfully carry a firearm into a state courthouse or other state public building in the State of Oklahoma when acting in the course and scope of employment?

I.

INTRODUCTION

The answer to your question requires a two-step inquiry. First, we must identify the legal foundations for a private investigator to carry a firearm in the State of Oklahoma. Having determined these legal bases, we can then turn to an examination of what limitations attend each grant of firearms authority a private investigator might possess. These discussions follow in sequence.

II.

THE OKLAHOMA LEGISLATURE HAS PROVIDED THREE SOURCES OF AUTHORITY FOR A PRIVATE INVESTIGATOR TO CARRY A FIREARM.

A. Carrying a Firearm in Oklahoma

Upon gaining independence from Great Britain, the Founders amended the United States Constitution to “expressly protect” fundamental rights against interference by the federal government. *McDonald v. City of Chic., Ill.*, ___ U.S. ___, 130 S. Ct. 3020, 3066 (2010). “Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution’s text.” *Id.* Among these inalienable, natural rights was the right to keep and bear arms, which, by the time of the founding, “had become fundamental for English subjects.” *D.C. v. Heller*, 554 U.S. 570, 593 (2008).

To protect the natural, inalienable right to keep and bear arms, the Founders devised the Second Amendment, which provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. In *Heller*, the United States Supreme Court acknowledged the natural right to keep and bear arms, holding that the Second Amendment, “like the First and Fourth Amend-

ments, codified a *pre-existing* right.” *Heller*, 554 U.S. at 592. Moreover, the Court held that “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’” *Id.* Most strikingly, the Court observed that the Second Amendment “‘**is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.**’” *Id.* (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)) (emphasis added).

To protect the established, natural right of the people to keep and bear arms, the Oklahoma Constitution provides that “[t]he right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.” OKLA. CONST. art. II, § 26. The Oklahoma Legislature, in keeping with its express, constitutional role, has promulgated multiple statutes to regulate the carrying of firearms in Oklahoma. Chief among these is Section 1272(A) of Title 21, which reads:

It shall be unlawful for any person to carry upon or about his or her person, or in a purse or other container belonging to the person, any pistol, revolver, shotgun or rifle whether loaded or unloaded . . . whether such weapon be concealed or unconcealed, except this section shall not prohibit:

1. The proper use of guns and knives for hunting, fishing, educational or recreational purposes;
2. The carrying or use of weapons in a manner otherwise permitted by statute or authorized by the Oklahoma Self-Defense Act;
3. The carrying, possession and use of any weapon by a peace officer or other person authorized by law to carry a weapon in the performance of official duties and in compliance with the rules of the employing agency;
4. The carrying or use of weapons in a courthouse by a district judge, associate district judge or special district judge within this state, who is in possession of a valid handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act and whose name appears on a list maintained by the Administrative Director of the Courts; or
5. The carrying and use of firearms and other weapons provided in this subsection when used for the purpose of living history reenactment. For purposes of this paragraph, “living

history reenactment” means depiction of historical characters, scenes, historical life or events for entertainment, education, or historical documentation through the wearing or use of period, historical, antique or vintage clothing, accessories, firearms, weapons, and other implements of the historical period.

21 O.S.Supp.2013, § 1272(A).

Notably, Section 1272(A) bears numerous exceptions that allow a citizen to carry a firearm on the citizen’s person. *See id.* In fact, since 1996, the Legislature has codified various amendments to the statute for the obvious purpose of allowing Oklahoma citizens to maximize the enjoyment of their constitutional right to bear arms.¹ As an example, for a citizen serving as a private investigator, no less than *three separate licenses* allow that investigator to qualify for the exception allowing for the carrying of a firearm “in a manner otherwise permitted by statute or authorized by the Oklahoma Self-Defense Act[.]” *Id.* § 1272(A)(2). A description of these three licenses, and the authority they carry, follows below.

B. Authority by Which a Private Investigator may Carry a Firearm

The Oklahoma Security Guard and Private Investigator Act (“Act”) prescribes the qualifications and standards for security guards and private investigators in Oklahoma. 59 O.S.2011 & Supp.2013, §§ 1750.1 – 1750.14. Further, the Act empowers the Council on Law Enforcement Education and Training (“CLEET”) to issue licenses and identification cards for those meeting the Act’s requirements. 59 O.S.2011, § 1750.3(B)(7). Under Oklahoma law, “no person may be employed or operate” as either a security guard² or a private investigator³ until CLEET has issued the person a license pursuant to the Act. *Id.* § 1750.4.

¹ *See* 1996 Okla. Sess. Laws ch. 191, § 2; 2003 Okla. Sess. Laws ch. 465, § 1; 2007 Okla. Sess. Laws ch. 128, § 1; 2012 Okla. Sess. Laws ch. 259, § 1; 2013 Okla. Sess. Laws ch. 102, § 1.

² A “security guard,” for purposes of the Act, is defined as:

[A]n individual contracting with or employed by a security agency, private business or person to prevent trespass, theft, misappropriation, wrongful concealment of merchandise, goods, money or other tangible items, or engaged as a bodyguard or as a private watchman to protect persons or property

Id. § 1750.2(7). Oklahoma law defines an armed security guard as “a security guard authorized to carry a firearm[.]” *Id.* § 1750.2(8).

³ “Private investigator,” as defined by the Act, means:

[A] person who is self-employed, or contracts with, or is employed by an investigative agency for the purpose of conducting a private investigation and reporting the results to the employer or client of the employer relating to:

- a. potential or pending litigation, civil, or criminal,
- b. divorce or other domestic investigations,

Since November 1, 2013, the Oklahoma Legislature has empowered CLEET to issue nine separate licenses under the Act, including the unarmed private investigator license, the armed private investigator license, and the armed security guard license. 2013 Okla. Sess. Laws ch. 407, § 29(A) (amending 59 O.S.2011, § 1750.5(A)).

1. Unarmed Private Investigator Carrying a Firearm Under an Oklahoma Self-Defense Act License

The most basic license available to an Oklahoma private investigator under the Act is the unarmed private investigator license. 59 O.S.Supp.2013, § 1750.5(A)(3). Standing alone, this license grants the licensee absolutely no right to carry a firearm. Even so, for persons seeking only an unarmed private investigator license, the Oklahoma Self-Defense Act (“OSDA”) provides a separate, distinct avenue to lawfully carry a firearm. In fact, the OSDA authorizes any “eligible person”⁴ to whom a handgun license is issued “**to carry a loaded or unloaded handgun, concealed or unconcealed.**” 21 O.S.Supp.2013, § 1290.5(A) (emphasis added). To become eligible for an OSDA license, an unarmed private investigator need only: (1) be a citizen; (2) establish Oklahoma residency; (3) “[b]e at least twenty-one (21) years of age;” and (4) “[c]omplete a firearms safety and training course.” *Id.* § 1290.9. Additionally, an OSDA license applicant must not possess any disqualifying criminal history or mental “conditions” specified in the OSDA. 21 O.S.2011, § 1290.10.

2. Armed Private Investigator License

For private investigators seeking to maximize their authority to carry a firearm, the Act authorizes the issuance of the “Armed Private Investigator License.” 59 O.S.Supp.2013, § 1750.5(A)(7). To qualify for the armed private investigator license, an applicant must meet age, citizenship, moral character, and criminal background standards, while also successfully completing “Phase I, III and IV training,” a “psychological examination,” a “state test,” and training requirements developed by CLEET. *Id.* § 1750.5(C)(2), (H). Among other requirements, CLEET expressly requires all applicants for the armed private investigator license to “[s]uccessfully complete the firearms phase of private security training[.]” OAC 390:35-5-2(b)(2) (2011).

-
- c. missing persons or missing property, or
 - d. other lawful investigations . . . [.]

Id. § 1750.2(4). Unsurprisingly, the Act defines an “armed private investigator” as a “private investigator authorized to carry a firearm.” *Id.* § 1750.2(5).

⁴ 21 O.S.Supp.2013, § 1290.3 (authorizing the Oklahoma State Bureau of Investigation to license an eligible person to carry a concealed or unconcealed handgun as provided by the Oklahoma Self Defense Act).

Once an applicant has met all prerequisites, “[i]f the private investigator performs no functions of an armed security guard, [CLEET] may issue an armed private investigator license.” 59 O.S.Supp.2013, § 1750.5(C)(2). Then, upon receipt of the armed private investigator license, the license holder “**may carry a concealed or unconcealed firearm when on and off duty**, provided the person is in possession of a valid driver license and a valid armed private investigator license.” *Id.* § 1750.5(C)(3) (emphasis added). This right to carry, however, is subject to the respective provisions of the Act and “the rules promulgated by [CLEET].” *Id.* § 1750.5(D).

3. Unarmed Private Investigator Carrying a Firearm Under the Authority of an Armed Security Guard License

The Oklahoma Security Guard and Private Investigator Act also accords consideration for those private investigators engaging in the armed security industry. For those individuals, the Act allows, “[a] private investigator **may carry a firearm**, if the private investigator also performs the functions of an armed security guard, under the authority of the armed security guard license.” 59 O.S.Supp.2013, § 1750.5(C)(1) (emphasis added). The standards for applicants seeking the armed security guard license mirror those for the armed private investigator. *See id.* § 1750.5(H). Moreover, the right of an armed security guard to carry is similarly subject to provisions of the Act and “the rules promulgated by [CLEET].” *Id.* § 1750.5(D).

III.

RESTRICTIONS EXIST ON WHEN AND WHERE PRIVATE INVESTIGATORS MAY CARRY FIREARMS IN OKLAHOMA.

In your question, you inquire both as to **where** a private investigator may carry a firearm and **when** a private investigator may do so. Each of the three licenses mentioned above is distinct, and each carries its own scope of firearms authority. Therefore, to fully respond to your request, we must examine where and when a private investigator may carry a firearm under each license available. In each instance, our analysis begins with the Oklahoma statutes.

A. Legislative Intent

Under Oklahoma canons of construction, “[l]egislative intent governs statutory interpretation and this intent is generally ascertained from a statute’s plain language.” *State ex rel. Dep’t of Health v. Robertson*, 152 P.3d 875, 877-78 (Okla. 2006). If that language is “plain and unambiguous and its meaning clear” no further interpretation is necessary. *TRW/Reda Pump v. Brewington*, 829 P.2d 15, 20 (Okla. 1992); *see also Ledbetter v. Howard*, 276 P.3d 1031, 1035 (Okla. 2012) (“If the [statutory] language is plain and clearly expresses the legislative

will, further inquiry is unnecessary.”). “If the statute is ambiguous or its meaning uncertain, it is to be given a reasonable construction, one that will avoid absurd consequences, if this can be done without violating legislative intent.” *Dean v. Multiple Injury Trust Fund*, 145 P.3d 1097, 1101 (Okla. 2006) (citing *TRW/Reda Pump*, 829 P.2d at 20). At no time should it be presumed that the Legislature has “done a vain or useless act in the promulgation of a statute.” *State ex rel. Okla. Dep’t of Pub. Safety v. Gurich*, 238 P.3d 1, 7 (Okla. 2010).

B. Oklahoma Self-Defense Act License Holder

An unarmed private investigator licensee carrying a firearm pursuant to the OSDA may not carry a firearm into an Oklahoma state courthouse or public building, regardless of whether the investigator carries the weapon for personal use or in the course and scope of the investigator’s duties. Stated plainly, the OSDA license itself bears no relation to the private investigator’s profession. Rather, the OSDA license embodies the “citizens’ right” to carry a firearm, and when an unarmed private investigator carries pursuant to an OSDA permit, the investigator does so with the same rights and restrictions as any other citizen.

1. Carrying for Personal Use

When an unarmed private investigator licensee carries for personal use only, the Oklahoma Statutes clearly impose upon the private investigator a host of geographic prohibitions. These include: (1) all government owned or leased buildings where business is conducted with the public; (2) all prison, jail, and detention facilities; (3) any elementary or secondary school; (4) any sports arena during a sporting event; (5) any place where pari-mutuel wagering is authorized by law; and (6) any other place specifically prohibited by law. 21 O.S.Supp.2013, § 1277(A).⁵ Based on these restrictions, an unarmed private investigator licensee in possession of an OSDA permit clearly may not carry a firearm for personal use into either a state courthouse or any other state building in Oklahoma.

2. Carrying in the Course and Scope of Duty

When an unarmed private investigator licensee in possession of an OSDA permit begins acting within the course and scope of the investigator’s duties, the analysis into whether the investigator may carry a firearm into a state courthouse or public building complicates somewhat. Based on Section 1277(F)’s language that “[p]rivate investigators with a firearms authorization shall be exempt from this section when acting in the course and scope of employment,” one could argue that unarmed private investigator licensees carrying a firearm pursuant

⁵ OSDA license holders are also prevented from carrying a firearm on the grounds of any college, university, or technology school property. 21 O.S.Supp.2013, § 1277(E). This limitation, like the others enumerated in Title 21, Section 1277, carries numerous exceptions. *See generally id.* § 1277.

to an OSDA license are exempted from the locational proscriptions of Title 21, Section 1277, so long as they do so in the course and scope of duty. The statutory history of Section 1277, however, dispels this argument.

The Forty-Eighth Legislature inserted the provision “**[p]rivate investigators with a firearms authorization** shall be exempt from this section when acting in the course and scope of employment” into Title 21, Section 1277 through Senate Bill 434 of its First Regular Session. 2001 Okla. Sess. Laws ch. 396, § 2(E) (emphasis added). The same bill also amended Title 21, Section 1272.1(A), dealing with carrying firearms where liquor is consumed, to read:

It shall be unlawful for any person to carry or possess any weapon designated in Section 1272 of this title in any establishment where low-point beer, as defined by Section 163.2 of Title 37 of the Oklahoma Statutes, or alcoholic beverages, as defined by Section 506 of Title 37 of the Oklahoma Statutes, are consumed. This provision shall not apply to a peace officer, as defined in Section 99 of this title, or to **private investigators with a firearms authorization when acting in the scope and course of employment**

. . . .

[However] [n]othing in this section shall be interpreted to authorize any **private investigator with a firearms authorization** in actual physical possession of a weapon to consume low-point beer or alcoholic beverages in any establishment where low-point beer or alcoholic beverages are consumed.

2001 Okla. Sess. Laws ch. 396, § 1(A) (emphasis added). In sum, through Senate Bill 434, the Legislature codified the term “firearms authorization” in three different locations. *See* 21 O.S.Supp.2013, §§ 1272.1, 1277(F). Yet, despite having introduced this new phrase into the Oklahoma Statutes, the Legislature did not define the term “firearms authorization.” As a consequence, to determine whether “firearms authorization” could incorporate an unarmed private investigator carrying a firearm pursuant to an OSDA permit, we must establish what the Legislature’s understanding of the term “firearms authorization” would have been during its 2001 Regular Session.

By 2001, the Oklahoma Security Guard and Private Investigator Act had been in existence for fifteen years. 1986 Okla. Sess. Laws ch. 224, §§ 1 – 12 (codified at 59 O.S.Supp.1986, §§ 1750.1 – 1750.12). As originally passed, the Act stated that “[a] private investigator may carry a firearm, if also licensed as an armed security guard.” 1986 Okla. Sess. Laws ch. 224, § 5(C) (codified at 59 O.S.Supp.1986, § 1750.5(C)). Three years later, the Legislature amended the Act to provide:

A private investigator may carry a firearm, if said private investigator also performs the functions of an armed security guard, under the authority of the armed security guard license; or if said private investigator performs no functions of an armed security guard, the Council may add an endorsement to the license of the private investigator that states “**Firearms Authorized**”, in lieu of the armed security guard license, provided the private investigator completes the same training and testing requirements of the armed security guard. The Council will charge the same fee for the “**Firearms Authorized**” endorsement on the private investigator’s license as the cost of the armed security guard license.

1989 Okla. Sess. Laws ch. 225, § 2(C) (emphasis added). At the time the Legislature considered and incorporated the exemption for “private investigators with a firearms authorization” into Title 21, Section 1277, this version remained in force. See 59 O.S.Supp.2000, § 1750.5(C). Furthermore, at the time the Legislature passed this exclusion, this was the only instance in the Oklahoma Statutes to discuss “firearms authorization” or “firearms authorized.” Later, in 2007, the Legislature abandoned the term “firearm authorized” in favor of the less ambiguous “armed private investigator license.” 2007 Okla. Sess. Laws ch. 360, § 3(C).

The CLEET rules available for review in 2001 communicated a similar understanding of “firearms authorized.” Notably, the rules divided “[a]pplicants for Armed Security Guard” from “firearms authorized licenses.” OAC 390:35-5-2(b) (2011). Moreover, CLEET rules clarified that “[l]icensed private investigators who wish to carry a firearm and perform[] no security guard functions, must obtain a ‘firearms authorized’[] endorsement on the private investigator’s license.” OAC 390:35-5-8(a) (1999). Most importantly, despite the statutory shift in the Act’s nomenclature from “firearms authorized” to “armed private investigator license,” CLEET rules have yet to be amended. Therefore, while statutes now employ the term “armed private investigator license,” the regulations providing the process for that license still refer to the license as a “firearms authorized endorsement.” For purposes of the instant inquiry, we consider these terms to be transposable.

For the reasons detailed above, the Forty-Eighth Legislature would have understood “firearms authorization” to be synonymous with a private investigator holding a “firearms authorized” endorsement on that individual’s private investigator license.⁶ Accordingly, in 2001, when the Legislature excluded “[p]rivate

⁶ Amendments to the Act support the notion that the Legislature may now consider an armed security guard licensee to fall within the rubric of those with a “firearms authorization” for purposes of Title 21, Section 1277. See e.g., 59 O.S.Supp.2013, § 1750.5(D). Nevertheless,

investigators with a firearms authorization . . . when acting in the course and scope of employment”⁷ from the location proscriptions of Title 21, Section 1277, we conclude that the Legislature intended only to exempt private investigators with a firearms endorsement, or what is currently referred to as an armed private investigator license. Had the Legislature intended to exempt unarmed private investigators carrying pursuant to the OSDA from Title 21, Section 1277, they could have, as they specifically and repeatedly refer to those “in possession of a valid handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act” or “licensed pursuant to the Oklahoma Self-Defense Act” in other areas of the statute. Because “[t]he Legislature is not presumed to have done a vain or useless act in the promulgation of a statute,”⁸ we must conclude that the use of “[p]rivate investigators with a firearms authorization,” as opposed to private investigators “in possession of a valid handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act” was purposeful. Accordingly, we find that an unarmed private investigator licensee carrying pursuant to the OSDA *may not* carry a firearm into an Oklahoma state courthouse or public building, irrespective of whether the investigator is carrying for personal use or in the course and scope of the investigator’s duties.

C. Armed Private Investigator License Holder

Pursuant to the Oklahoma Security Guard and Private Investigator Act, an armed private investigator licensee may carry a firearm into an Oklahoma state courthouse or other public building whether the investigator is in the course and scope of duties or not. The authority granted by the Act originates outside the OSDA, and as a result, the armed private investigator license may not be circumscribed by statutes that restrict where an OSDA permit holder may carry a firearm. The contours of this authority are described below.

1. *When an Armed Private Investigator may Carry a Firearm*

The Act details when the holder of an armed private investigator license may carry a firearm. Without equivocation, the Act communicates that a licensee may “carry a concealed or unconcealed firearm when *on and off duty*, provided the person is in possession of a valid driver license and a valid armed private investigator license.” 59 O.S.Supp.2013, § 1750.5(C)(3) (emphasis added). Plainly, if a licensee may carry on and off duty, the licensee need *not* be acting in the course and scope of employment when exercising this right. Recent amendments to the Act reinforce this fact, as the 2013 Legislature expressly repealed the phrase “in the performance of his or her duties” in the section Act

such an analysis would fail to dispose of any relevant issues related to your question. For that reason, this Opinion will forgo that examination.

⁷ 21 O.S.Supp.2013, § 1277(F).

⁸ *Gurich*, 238 P.3d at 7.

stating that an “armed private investigator is authorized to carry a firearm *in the performance of his or her duties* subject to the provisions of [the Act] and the rules promulgated by [CLEET].” 59 O.S.2011, § 1750.5(D) (emphasis added) (amended by 2013 Okla. Sess. Laws ch. 407, § 29(D)). Because we may never presume that the Legislature has performed “a vain or useless act in the promulgation of a statute,” the intent of the Legislature is clear. *See Gurich*, 238 P.3d at 7. Upon receipt of the armed private investigator license, the licensee may carry a concealed or unconcealed firearm, on or off duty, so long as the investigator carries the proper identification. 59 O.S.Supp.2013, § 1750.5(C)(3). At all times, however, the armed private investigator licensee is subject to the respective provisions of the Oklahoma Security Guard and Private Investigator Act and “the rules promulgated by [CLEET].” *Id.* § 1750.5(D).

2. *Where an Armed Private Investigator may Carry a Firearm*

Unfortunately, neither statutes nor administrative rules prescribe *where* the holder of an armed private investigator license may carry a firearm. Indeed, the only relevant limitation on the licensee’s right to carry is that the licensees must maintain both a driver’s license and their armed private investigator license on their person wherever they carry a firearm. *Id.* § 1750.5(D). Had the Legislature intended to place locational constraints on this right, the Legislature could have done so. By comparison, the Legislature placed numerous controls on where OSDA licensees may carry a firearm. *See* 21 O.S.Supp.2013, § 1277 (detailing the various restrictions on where an OSDA licensee may carry a firearm). Yet, nowhere in the Oklahoma Security Guard and Private Investigator Act has the Legislature sought to impose similar restraints on armed private investigators. Moreover, nothing in the current CLEET regulations restricts where an armed private investigator licensee may carry a firearm.

But for the ambiguous language of Title 21, Section 1277, our inquiry could terminate at this juncture. *See State ex rel. Okla. Firefighters Pension & Ret. Sys. v. City of Spencer*, 237 P.3d 125, 132 (Okla. 2009) (“If a statute is plain and unambiguous, it will not be subjected to judicial construction, but will receive the effect its language dictates.”). Instead, based on the uncertainty in both this statute and the other acts it affects, we must observe the Supreme Court’s guidance that statutes “must be construed as a consistent whole in harmony with common sense and reason and every portion thereof should be given effect *if possible*.” *Cowart v. Piper Aircraft Corp.*, 665 P.2d 315, 317 (Okla. 1983) (emphasis added).

As a means of harmonizing the statutes, one might posit that Title 21, Section 1277(F) should be read to disallow armed private investigators from carrying firearms into courtrooms or other state buildings unless they do so in the course and scope of duties. This approach, however, necessarily ignores the numerous, express references in Section 1277 to persons “in possession of a valid handgun

license issued pursuant to the provisions of the Oklahoma Self-Defense Act” or “licensed pursuant to the Oklahoma Self-Defense Act.” See 21 O.S.Supp.2013, § 1277(A)-(E). Just as the Legislature cannot be presumed to have vainly incorporated the exemptions in Section 1277(F), the Legislature cannot be presumed to have exclusively applied each and every one of the subsections preceding Section 1277(F) to persons with an OSDA permit in vain. See *Gurich*, 238 P.3d at 7. Had the Legislature intended for the restrictions of Section 1277 to be more expansive, they could have drafted the statute accordingly. In fact, both Sections 1272 and 1272.1 of Title 21 refer to “any person,” as opposed to the language in Section 1277, which clearly references “any person in possession of a valid handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act.” See 21 O.S.Supp.2013, § 1272 (outlining unlawful carry generally); *Id.* § 1272.1 (providing limitations for the carrying of firearms where liquor is consumed); *Id.* § 1277 (defining locational proscriptions on OSDA permit holders). Because the Legislature declined to expand the proscriptions of Section 1277 despite its obvious awareness of how to do so, it is not within our province to reconcile the statute’s conflicting subsections by expanding its restraints to include all persons carrying or possessing a weapon.

Next, this argument violates the rule that “[p]rovisions in the same statutory scheme should be given a construction which will result in harmonizing the provisions and giving reasonable effect to both sections **without doing violence to either.**” *Roach v. Atlas Life Ins. Co.*, 769 P.2d 158, 163 (Okla. 1989) (emphasis added). Obviously, to harmonize the subsections of Section 1277 by expanding its proscriptions, we would be forced to discount the numerous, explicit mentions of OSDA permit holders throughout the statute’s substantive subsections. See 21 O.S.Supp.2013, § 1277(A)-(E). Further, we would have to neglect the Legislature’s transparent desire to expand, rather than contract, the firearms authority of armed private investigators. See 2013 Okla. Sess. Laws ch. 407, § 29(C)(3), (D) (allowing armed private investigators to “carry a concealed or unconcealed firearm when on and off duty” and expressly repealing the previous requirement that they carry only in the course and scope of duties).

Although statutes “must be construed as a consistent whole in harmony with common sense and reason,” we need only give effect to every portion “**if possible.**” *Cowart*, 665 P.2d at 317 (emphasis added). Here, we cannot properly construe the limitations on the OSDA permit holders contained in Title 21, Section 1277 as applying to armed private investigators. As a consequence, the exception for private investigators with a firearms authorization when acting in the course and scope of employment cannot constrain the armed private investigator. Accordingly, based on the authority conferred by the Oklahoma Security Guard and Private Investigator Act, an armed private investigator licensee may carry a firearm into an Oklahoma state courthouse or other public building whether the investigator is in the course and scope of duties or not.

D. Armed Security Guard License Holder

The Oklahoma Security Guard and Private Investigator Act stands silent on both when and where an armed security guard licensee may carry a firearm. Nevertheless, each licensee remains subject to administrative rules promulgated by CLEET. 59 O.S.Supp.2013, § 1750.5(D).

For its part, CLEET has clarified that “[a]n Armed Security Guard License grants no authority to carry a firearm *when not acting directly in the course and scope of employment.*” OAC 390:35-5-2(c) (2011) (emphasis added). Thus, regardless of where a licensee carries a firearm, the licensee may do so under this license only when acting directly in the course and scope of employment.

Like the Legislature, CLEET has remained silent on what geographic limitations attach to the armed security guard license. Had the Legislature intended to place locational restrictions on this class of license, it could have done so. Similarly, had CLEET intended to restrict this license geographically, it could have done so. Nevertheless, neither the Legislature nor CLEET have exercised their authority to enact locational restrictions. Therefore, under current Oklahoma law, the armed security guard license confers upon its holder a right to carry a firearm in the course and scope of employment bereft of locational prohibitions.⁹

IV.

CONCLUSION

A private investigator in Oklahoma may carry a firearm under three separate licenses. The first two - the armed private investigator and armed security guard licenses - derive from the Act, while the third comes from the OSDA. Under the two licenses deriving their authority from the Act, a private investigator may carry a firearm into a state courthouse or state public building in Oklahoma, so long as the investigator is acting in the course and scope of the investigator’s duties. In addition, a private investigator in possession of the armed private investigator license may carry a firearm both in and outside the course and scope of the investigator’s duties, into any state courthouse or state public building in Oklahoma. An unarmed private investigator in possession of an OSDA permit, however, carries a firearm with no superior firearms rights than any other Oklahoma citizen, and may not carry a firearm into an Oklahoma state courthouse or state public building, regardless of whether the investigator is on duty or not.

⁹ Although it fails to inform as to when or where an armed security guard may carry a firearm, the rules do mention that “[a]ll armed security guards not in uniform apparel must carry their firearm concealed from view.” OAC 390:35-13-1(b) (2011).

It is, therefore, the official Opinion of the Attorney General that:

- 1. A private investigator in possession of an armed private investigator license may carry a firearm into a state courthouse or other state public building in the State of Oklahoma, regardless of whether the person is acting inside or outside the scope of employment. 59 O.S.Supp.2013, § 1750.5.**
- 2. A private investigator in possession of an armed security guard license may carry a firearm into a state courthouse or other state public building in the State of Oklahoma, so long as the person is acting directly in the course and scope of employment. OAC 390:35-5-2(c) (2011).**
- 3. A private investigator in possession of an unarmed private investigator license may not carry a firearm pursuant to an Oklahoma Self-Defense Act permit into a state courthouse or other state public building in the State of Oklahoma, regardless of whether the person is acting in the course and scope of employment. 21 O.S.Supp.2013, § 1277(A), (F).**
- 4. A private investigator with an unarmed private investigator license may not carry a firearm without some additional grant of authority from a separate license, as the unarmed private investigator license confers no right to carry a firearm upon the licensee. See 59 O.S.Supp.2013, § 1750.5(A).**

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ATTORNEY GENERAL OF OKLAHOMA

KRISTOPHER DALE JARVIS
ASSISTANT ATTORNEY GENERAL

OPINION 2014-4

The Honorable Mike Shelton
State Representative, District 97

March 10, 2014

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Does the State Board of Career and Technology Education have the authority to promulgate a rule that allows a common school district to annex to a technology center school district or to deannex from a technology center school district?**
- 2. If legislation were enacted pursuant to OKLA. CONST. art. X, § 9B(H) to specifically prescribe procedures related to annexation to and deannexation from a technology center school district, would the legislation supersede the effect of the administrative rule promulgated at OAC 780:15-3-5 by the State Board of Career and Technology Education?**
- 3. If a tax levy in a technology center school district is established through an election called for that purpose, does the State Board of Career Technology Education have the authority to promulgate a rule providing for a gradual phase-in or phase-out of the tax levy for newly annexed or deannexed schools?**

The Oklahoma Constitution allows for technology center school districts to be established, including a tax levy on an ad valorem basis to support the district. OKLA. CONST. art. X, § 9B(A). In order to be established, the levy must be approved by a majority of the electors of the technology center school district at an election called for that purpose. *Id.* The levy is to be made each year until repealed by a majority of the electors in the technology center school district. *Id.*

The State Board of Career and Technology Education (“State Board”) is granted authority to prescribe criteria and procedures for the establishment and governance of technology center school districts. OKLA. CONST. art. X, § 9B(G) (“districts shall be established in accordance with criteria and procedures prescribed by the State Board of Career and Technology Education”); *see also* 70 O.S.2011, § 14-108(A). The various technology center school districts encompass specific geographical territories, and “[t]erritory may be annexed to or detached from a technology center school district, in accordance with rules prescribed by the State Board of Career and Technology Education.” *Id.* § 14-108(H).

Annexations may be proposed through various means, such as by the board of education of a local public school district or by the patrons and electors of that school district through a petition process. OAC 780:15-3-5(b)(1)(A)-(C) (2011). If an annexation is approved by the electors of the local school district

at an election, then the local school district is incorporated into the territory of the technology center school district creating a partnership where the students of the local school district may attend the various programs and classes at the technology centers in lieu of taking classes at their regular school. These programs provide hands-on learning to explore careers in a variety of “Career Clusters” including, but not limited to: architecture, finance, health sciences, hospitality and tourism, and information technology.¹ In this respect, an annexation does not refer to “taking control” of local school district or affecting the governance of the local district, but is instead the formation of a partnership between a technology center school district and a local school district to provide services to students. Finally, a similar process is also contemplated for any local school district who wishes to deannex from a technology center school district. OAC 780:15-3-5(c).

You have asked questions regarding the State Board’s authority to adopt certain administrative rules relating to annexation, deannexation, and the rules’ effect on tax levies. These questions are answered as follows.

I.

DOES THE STATE BOARD OF CAREER AND TECHNOLOGY EDUCATION HAVE THE AUTHORITY TO PROMULGATE A RULE THAT ALLOWS A COMMON SCHOOL DISTRICT TO ANNEX TO A TECHNOLOGY CENTER SCHOOL DISTRICT OR TO DEANNEX FROM A TECHNOLOGY CENTER SCHOOL DISTRICT?

You first ask if the State Board has the authority to promulgate an administrative rule that allows a common school district to annex or deannex itself to or from a technology center school district. We initially recognize that “an agency created by statute may exercise only those powers granted and may not expand those powers by its own authority.” *City of Hugo v. State ex rel. Pub. Emp’s Relations Bd.*, 886 P.2d 485, 492 (Okla. 1994). “In determining what authority may be implied from a statutory scheme, the statute as a whole is considered; and the legislative intent must be determined.” *Id.* “The fundamental rule of statutory construction is to ascertain and give effect to legislative intent, and that intent is first sought in the language of the statute.” *YDF, Inc. v. Schlumar, Inc.*, 136 P.3d 656, 658 (Okla. 2006).

Here, we look first to the language of the Oklahoma Constitution, which provides, “Until otherwise provided for by law, technology center school districts and the government of technology center school districts shall be established in accordance with criteria and procedures prescribed by the State Board of

¹ See <http://www.okcareertech.org/students>.

Career and Technology Education.” OKLA. CONST. art. X, § 9B(G). It is apparent that the State Board was granted authority and deference in areas where the law is otherwise silent on matters pertaining to the creation and governance of technology center school districts. In addition, with respect specifically to annexation and deannexation, Oklahoma statutes provide, “Territory may be annexed to or detached from a technology center school district, in accordance with rules prescribed by the State Board of Career and Technology Education.” 70 O.S.2011, § 14-108(H). The State Board has been granted authority by the plain language of the Constitution and statutes to promulgate rules for establishing technology center school districts and the process by which territory may be annexed or detached from a technology center school district, and where a statute is plain and unambiguous it will receive the effect its language dictates. *State ex rel. Okla. Firefighters Pension & Ret. Sys. v. City of Spencer*, 237 P.3d 125, 132 (Okla. 2009).

The plain language of the Constitution and statutes give authority to the State Board to adopt rules for establishing technology center school districts and procedures for how territory may be annexed or detached from a technology center school district. Because of this, we conclude that the State Board does have the authority to promulgate a rule that allows a common school district to annex to or deannex from a technology center school district.

II.

IF LEGISLATION WERE ENACTED PURSUANT TO OKLA. CONST. ART. X, § 9B(H) TO SPECIFICALLY PRESCRIBE PROCEDURES RELATED TO ANNEXATION TO AND DEANNEXATION FROM A TECHNOLOGY CENTER SCHOOL DISTRICT, WOULD THE LEGISLATION SUPERSEDE THE EFFECT OF THE ADMINISTRATIVE RULE PROMULGATED AT OAC 780:15-3-5 BY THE STATE BOARD OF CAREER AND TECHNOLOGY EDUCATION?

We previously acknowledged that the Oklahoma Constitution gives authority to the State Board to promulgate rules to govern technology center school districts. OKLA. CONST. art. X, § 9B(G) (“districts shall be established in accordance with criteria and procedures prescribed by the State Board of Career and Technology Education”). In addition, administrative rules have the force and effect of law. *Texas Okla. Express v. Sorensen*, 652 P.2d 285, 287 (Okla. 1982). “As long as these administrative standards do not conflict with a statute they have the force and effect of law.” *Hoar v. Aetna Cas. & Sur. Co.*, 968 P.2d 1219, 1221 (Okla. 1998). With regard to the State Board, authority is conditioned and only granted “[u]ntil otherwise provided by law.” OKLA. CONST. art. X, § 9B(G).

The Constitution further provided: “The Legislature may alter, amend, delete, or add to the provisions of this section by law.” OKLA. CONST. art. X, § 9B(H). The State Board has authority to adopt rules necessary to implement procedures related to annexation and deannexation so long as the Legislature has not implemented procedures by statute. Indeed, if there is an irreconcilable conflict between a statute and a rule, the statute must prevail. *Ark. La. Gas Co. v. Travis*, 682 P.2d 225, 227 (Okla. 1984). Therefore, if legislation were enacted to specifically prescribe procedures for annexation to and deannexation from a technology center school district, the legislation would supersede the effect of the administrative rule if the rule conflicts with the legislation.

III.

IF A TAX LEVY IN A TECHNOLOGY CENTER SCHOOL DISTRICT IS ESTABLISHED THROUGH AN ELECTION CALLED FOR THAT PURPOSE, DOES THE STATE BOARD OF CAREER TECHNOLOGY EDUCATION HAVE THE AUTHORITY TO PROMULGATE A RULE PROVIDING FOR A GRADUAL PHASE-IN OR PHASE-OUT OF THE TAX LEVY FOR NEWLY ANNEXED OR DEANNEXED SCHOOLS?

Tax levies to support technology center school districts may only be made on an ad valorem basis “when the levy is approved by a majority of the electors of the technology center school district, voting on the question at an election called for that purpose.” OKLA. CONST. art. X, § 9B(A). This levy “shall be made each fiscal year thereafter until repealed by a majority of the electors of the technology center school district, voting on the question at an election called for that purpose.” *Id.* It is clear by this language that the authority to levy the tax and set the rate is solely vested with the electors of the technology center school district.

The State Board has promulgated the following rule:

For all successful annexation elections occurring after January 1, 2005, the collection of ad valorem taxes from patrons in the annexing territory shall begin with a phase-in period of three consecutive tax years following the successful annexation election. Taxes will be collected according to the following schedule:

- (A) First tax year following the election, 50% of the current technology center rate.
- (B) Second tax year following the election, 80% of the technology center rate.

- (C) Third tax year following the election, 100% of the technology center rate and to remain at 100% for all subsequent years unless a successful deannexation election occurs as outlined in these rules.

OAC 780:15-3-5(b)(4) (2011).

There is also a similar phase-out period implemented in the administrative rule for any deannexation. *See* OAC 780:15-3-5(c)(1)(I). You ask if the State Board has authority to adopt this rule creating a phase-in and phase-out period.

As previously mentioned, it is clear that the authority to levy any tax and set the rate pursuant to OKLA. CONST. art. X, § 9B(A) is vested with the electors of the technology center school district. Technology center school districts may be established “when the levy is approved by a majority of the electors of the technology center school district, voting on the question at an election called for that purpose.” *Id.* And while we again recognize the State Board was given authority to promulgate rules for the establishment and governance of technology center school districts, that authority does not empower the State Board to adopt a rule that modifies the ad valorem tax rate for a technology center school district. “Executive and ministerial officials enforce the tax laws, but, in doing so, they must keep strictly within the authority those laws confer. They neither have nor can have roving commission to levy and collect taxes from people without authority of law, but they can only do so in the manner prescribed by the law” *Prince v. St. Louis & S. F. Ry. Co.*, 237 P. 106, 106 (Okla. 1925).

In this instance, the electors of a technology center school district have prescribed a tax levy through an election and that tax continues until repealed by the electors. OKLA. CONST. art. X, § 9B(A). Further, when the electors of a common school district vote to annex the common school district’s territory into a technology center school district, real property within the annexed common school district becomes subject to the property tax levy on land within the technology center school district. Conversely, a vote to deannex common school territory from a technology center school district removes the deannexed land from the territory subject to the tax levy established on land within the technology center school district. In both cases, the State Board is without authority to establish a phased-in or phased-out tax rate, because only the electors of a technology center school district may impose or modify a tax levy on land within a technology center school district. *See id.*

“Section 9, article 10, of the Constitution, is both a limitation and a grant of power. It is a grant of power to a majority of the voters of a school district voting at an election held for that purpose to increase the annual rate of taxation on an ad valorem basis for school purposes” *Excise Bd. v. Sch. Dist. No. 34*, 10 P.2d 643, 643 (syllabus ¶2) (Okla. 1932). It is not a grant of power to the State Board to modify the ad valorem rates on a phased-in or phased-out

basis. Therefore, because the authority to establish and modify a tax levy in a technology center school district is vested in the electors, the State Board of Career Technology Education does not have the authority to promulgate a rule that modifies the ad valorem rate by providing for a gradual phase-in or phase-out of the tax levy for newly annexed or deannexed schools.²

It is, therefore, the official Opinion of the Attorney General that:

- 1. The State Board of Career and Technology Education has the authority to promulgate an administrative rule that establishes procedures for common school districts to annex to a technology center school district or to deannex from a technology center school district pursuant to OKLA. CONST. art. X, § 9B and 70 O.S.2011, § 14-108(H).**
- 2. If legislation were enacted pursuant to OKLA. CONST. art. X, § 9B(H) to specifically prescribe procedures related to annexation to and deannexation from a technology center school district, the legislation would supersede the effect of the administrative rule promulgated at OAC 780:15-3-5 by the State Board of Career and Technology Education when there is an irreconcilable conflict between the rule and the statute.**
- 3. If a tax levy in a technology center school district is established through an election called for that purpose, the State Board of Career Technology Education does not have the authority to promulgate a rule providing for a gradual phase-in or phase-out of the tax levy for newly annexed or deannexed territory. OKLA. CONST. art. X, § 9B.**

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ATTORNEY GENERAL OF OKLAHOMA

GEOFFREY LONG
ASSISTANT ATTORNEY GENERAL

² We also recognize the Constitution requires, "Taxes shall be uniform upon the same class of subjects." OKLA. CONST. art. X, § 5(B). However, it is unnecessary to address this issue because we have found on other grounds that the State Board is without authority to promulgate an administrative rule imposing a phased-in or phased-out approach to ad valorem taxation on newly annexed or deannexed territory.

OPINION 2014-5

The Honorable Wade Rousselot
State Representative, District 12

April 11, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Is a board of county commissioners under a legal duty to supply fire protection coverage to unincorporated areas of the county that are not currently receiving fire protection services?**
- 2. Is a board of county commissioners financially liable for not supplying fire protection coverage to unincorporated areas of the county that are not currently receiving fire protection services?**

I.

BOARDS OF COUNTY COMMISSIONERS POSSESS DISCRETIONARY LEGAL AUTHORITY TO PROVIDE FIRE PROTECTION SERVICES IN THE COUNTY.

A board of county commissioners derives its power and authority from statutes, and acts performed by the board must be done pursuant to statutory authority. *Tulsa Exposition & Fair Corp. v. Bd. of County Comm'rs*, 468 P.2d 501, 508 (Okla. 1970). Powers conferred upon a board of county commissioners must be exercised in the manner provided by law. *Id.* Unambiguous statutes granting this authority are accorded the effect of the plain ordinary meaning of the words used. *State ex rel. Okla. Firefighters Pension & Ret. Sys. v. City of Spencer*, 237 P.3d 125, 132 (Okla. 2009).

Boards of county commissioners are expressly and unambiguously authorized by statute to provide fire protection services in each county:

- A The board of county commissioners of each county of this state is hereby authorized to provide firefighting service in the county and for such purpose to use county funds to rent, lease or purchase firefighting equipment and to rent or construct and equip and operate fire stations and to employ necessary personnel to provide such service. The board of county commissioners shall also have the authority to determine and collect charges for firefighting services performed by the county from any person to whom such services are provided.

19 O.S.2011, § 351(A) (emphasis added).¹ It should first be observed that by its terms, Section 351(A) does not confine the authority of a board of county commissioners to provide fire protection services to only those areas within unincorporated areas of the county, but instead authorizes the provision of such services “in the county.” Accordingly, a board of county commissioners may provide such services anywhere in the county including incorporated areas.

It is also notable that the foregoing provision is stated in a manner that is permissive, not mandatory. Unambiguous statutes are to be understood according to the plain ordinary meaning of the words used in the statute. *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69, 72 (Okla. 2011). Section 351(A) states that boards of county commissioners are “authorized” to provide fire protection services in the county. To “authorize” means:

1. To grant authority or power to.
2. To approve or give permission for sanction: authorize a highway project.
3. To be sufficient grounds for; justify.

AMERICAN HERITAGE DICTIONARY 142 (2nd Coll. ed.). In construing the word “authorized” within other statutes, courts have understood it to confer discretionary authority or permission: “The term ‘authorized’ . . . does not mean ‘mandatorily directed’ . . . It is synonymous with the word empowered . . .” *Morgan v. Wilson*, 450 P.2d 902, 903-04 (Okla. 1969) (citation omitted) (holding that the Legislature’s use of “authorized” in 11 O.S.Supp.1963, § 541a provided a municipality legal authority to set up a pension and retirement plan “if it is so inclined,” *id.*, but not a legal duty to do so). *See also Kroth v. City of Okla. City*, 990 P.2d 906, 908-09 (Okla. Civ. App. 1999) (construing the use of “authorized” under 85 O.S.Supp.1998, § 3(6) to not mean “mandatorily directed,” but to mean “empowered,” such that a police officer agreeing to accept a citizen’s offer of aid in taking a suspect into custody transformed the citizen into a “voluntary worker” for the city under the Workers Compensation Act such that injuries to the citizen incurring in the course of such assistance were compensable); *Hullum v. R. J. Edwards, Inc.*, 103 P.2d 527, 529 (Okla. 1940) (holding that the use of “authorized” in 62 O.S.Supp.1933, § 431, did not mean a town was “mandatorily directed” to provide for a special tax levy for the payment of matured bonds that could not be paid from an underfunded sinking fund, as opposed to undertaking other funding options such as voluntarily paying the bonds from other available monies or permitting a judgment be entered thereon and enforced). Since the authority conferred on a board of

¹ In addition to the general authority to provide fire protection services in the county, boards of county commissioners are also authorized to acquire real property for right-of-ways and easements needed for the construction of roads and the installation of dry hydrants required for fire protection services, and to use county funds and equipment for such purposes. 19 O.S.2011, § 351(B). Additionally, boards of county commissioners are authorized, upon request, to use county personnel and county equipment to fight fires where an emergency is deemed to exist. *Id.* § 351(C).

county commissioners under 19 O.S.2011, § 351(A) is permissive rather than mandatory in nature, a board of county commissioners possesses lawful discretion to either provide or not provide fire protection services “in the county.” *Compare Morgan*, 450 P.2d at 903-04 (holding the use of the term “authorized” does not mandate a legal duty), *with* 19 O.S.2011, § 351(A) (using the term “authorized”). Consequently a board of county commissioners is not mandated by law to provide fire protection services in the county.

That a board of county commissioners is authorized but not required under Section 351(A) to provide fire protection services throughout the county is also seen in subsection D of Section 351. That section authorizes a board of county commissioners under certain defined circumstances to organize a county fire department serving certain specific territory according to defined borders² as a separate entity that is not supervised by the board of county commissioners, but is supervised by a separate board of directors. 19 O.S.2011, § 351(D).³

While the county may provide fire protection services through a county fire department anywhere “in the county,” implicit within Section 351(A)’s permissive grant of authority to provide such services is a legislative recognition that a board of county commissioners need not duplicate fire protection services provided by other legal entities within the county. In this regard, all municipalities located “in the county” are also authorized to provide fire protection services both within and outside of their incorporated areas. 11 O.S.2011, § 29-105(1), (2), (6). Other statutes authorize the organization and operation of charitable corporations to provide fire protection services within unincorporated areas of a county. *See* 18 O.S.2011, §§ 592 – 594. Additionally, where organized, a fire protection district is a separate political subdivision. 19 O.S.2011, § 901.7(B).

² The rural territory served by a rural fire department organized under subsection D must be contiguous within its boundaries; it may not exclude unincorporated, rural areas that are completely surrounded by territory otherwise included within the boundaries to be served. *See* 19 O.S.2011, § 351(D)(1).

³ The permissive authority of a board of county commissioners found in Section 351 to provide fire protection services “in the county” must be distinguished from the mandatory duty of county road workers to fight and control fires located in the right of way of county roads. *See* 2 O.S.2011, § 16-22, providing:

Every member of a road construction or maintenance crew, whether employed by the State Highway Department or county commissioners of any county, and every road contractor or subcontractor of the Highway Department or county commissioners and their employees shall keep all fires under control and confined to the right-of-way of any state, county or public road, or highway on and adjacent to which the crew, contractor, subcontractor, and employees are employed.

Id. (emphasis added). Use of the word “shall” is generally understood to be expressive of a command equivalent to the use of the word “must.” *See State ex. rel. Macy v. Freeman*, 814 P.2d 147, 153 (Okla. 1991). Willful refusal, failure, or neglect to perform this specific duty is a misdemeanor. *See* 2 O.S.2011, § 16-24.

Fire protection districts are distinct from county fire departments⁴ and are organized to provide fire protection services within the defined territory of the fire protection district. 19 O.S.2011, § 901.2. Fire protection districts may contract on a fiscal year basis with municipalities to provide fire protection services for the municipality, *id.* § 901.25(A), and may contract with others to supply fire protection services to persons and property located outside of the boundaries of the fire protection district. *Id.* § 901.25(B).

In addition to its general authority to provide fire protection services through a county fire department as provided by 19 O.S.2011, § 351(A), boards of county commissioners also have specific legal authority to contract with municipalities to provide fire protection services to persons and property not located within the corporate limits of a municipality, and to pay for such services from available monies in the county's general fund⁵ or the county highway fund. 19 O.S.2011, § 351.1.⁶ A board of county commissioners may also enter into reciprocal agreements with other counties to provide fire protection services within the others' respective territories. *Id.* Similarly, a board of county commissioners may contract with a fire protection corporation or a fire protection district⁷ to provide fire protection services within unincorporated areas of the county and pay for such services from available funds in the county general fund or county highway fund. 19 O.S.2011, § 351.3. However, the legal authority of a municipality, a charitable corporation or a fire protection district to provide fire protection services to persons or property located outside of the entity's regular service boundaries is not dependent upon any agreement with the board of county commissioners.

In summary, the Legislature has granted discretionary legal authority to boards of county commissioners to directly organize county fire departments for the purpose of providing fire protection services either "in the county," *see* 19 O.S.2011, § 351(A), or within certain defined areas. *See id.* § 351(D). The Legislature has

⁴ Fire protection districts are expressly excluded from the statutes pertaining to county fire departments. *See* 19 O.S.2011, § 351.2. *See also Pub. Serv. Co. v. Nw. Rogers Co. Fire Prot. Dist.*, 675 P.2d 134, 137 (Okla. 1983) (finding that counties have no substantial power over nor responsibility for fire protection districts, and such districts are not "county corporations").

⁵ Funds that may be available in the county's general fund may include both sales tax revenues as levied and approved by the voters (68 O.S.2011, § 1370(A)), and ad valorem tax revenues or other monies lawfully appropriated to the fund. *See, c.f., A.G. Opin. 96-70*, at 148.

⁶ A.G. Opin. 80-15, at 28, concluding in part that county highway funds could not be used to fund fire protection contracts with a municipality, has been superceded by a subsequent amendment to 19 O.S.2011, § 351.1, that now specifically authorizes the such use of such funds and is hereby withdrawn as to that conclusion.

⁷ A.G. Opin. 82-251, at 382-83, concluding in part that counties could not appropriate monies to a fire protection district for fire protection services, has been superceded by the subsequent enactment of 19 O.S.2011, § 351.3 and is hereby formally withdrawn. *See also A.G. Opin. 96-70*, at 149-50 (finding specific legal authority for counties to contract with fire protection districts for fire protection services).

also conferred discretionary legal authority on boards of county commissioners to provide fire protection services in unincorporated areas of the county through contracts for such services with municipalities, *see id.* § 351.1, with corporations organized to provide fire protection services, *see id.* § 351.3, and with existing fire protection districts. *Id.* Though it has discretionary authority to provide fire protection services in the county, a board of county commissioners is not under an affirmative legal duty to provide such services, and may defer the provision of such services to other legal entities providing fire protection services in the county. Accordingly, as the legal authority conferred on boards of county commissioners is permissive rather than mandatory, a board of county commissioners has discretion to determine as a matter of policy whether, when, how, and where within the county to provide fire protection services.

II.

A BOARD OF COUNTY COMMISSIONERS IS IMMUNE FROM LIABILITY FOR THE EXERCISE OF ITS DISCRETION NOT TO PROVIDE FIRE PROTECTION SERVICES.

As shown above, a board of county commissioners has discretionary authority to provide, or not provide, fire protection services in part or the whole of the county. Your second question involves the financial liability that accrues from exercising that discretion.

By enacting the Governmental Tort Claims Act (“Tort Claims Act”), *see* 51 O.S.2011 & Supp.2013, §§ 151 – 172, the Legislature statutorily established the doctrine of sovereign immunity in Oklahoma in favor of the State and its political subdivisions, together with its officers and employees acting within the scope of their official duties, making them immune from liability for torts committed by them. 51 O.S.2011, § 152.1(A). Counties are included within the meaning of “political subdivisions” in the Tort Claims Act. *Id.* § 152(11)(c).

In the same legislation, the Legislature waived the liability protection of sovereign immunity for such torts for the State and its political subdivisions only, (*id.* §§ 152.1(B); 153) except for certain specific exemptions from that waiver. 51 O.S.Supp.2013, § 155.⁸ As observed by the Oklahoma Supreme Court:

The general waiver [of sovereign immunity] is not an infinite blue sky. The scope of liability is limited in § 153 of the Act to torts committed within the scope of employment where private persons or entities would be liable under the laws of this state and is subject to other limitations and exceptions specified in

⁸ Limits on the extent of the waiver of financial liability for harms caused by tort are set forth in 51 O.S.2011, § 154.

the Act. Thirty carefully enumerated exemptions from liability are provided in 51 O.S.Supp.1989, § 155.

Nguyen v. State, 788 P.2d 962, 964 (Okla. 1990).⁹ Section 155 provides in relevant part:

The state or a political subdivision shall not be liable if a loss or claim results from:

.....

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;
5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;
6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;

.....

18. An act or omission of an independent contractor or consultant or his or her employees, agents, subcontractors or suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred[.]

51 O.S.Supp.2013, § 155.

The Supreme Court of Oklahoma has ruled that Section 155(5)'s discretionary function exception to the general waiver of sovereign immunity under the Tort Claims Act is not as unlimited as the text appears to suggest:

From the outset we note that the discretionary function exemption from governmental tort liability is extremely limited. *Robinson v. City of Bartlesville Bd. of Educ.*, 700 P.2d 1013 (Okla. 1985). This is so because a broad interpretation would completely eradicate the government's general waiver of immunity. Almost all acts of government employees involve some element of choice and judgment and would thus result in immunity if the discretionary exemption is not narrowly construed. Just as the

⁹ Section 155's list of exemptions to the general waiver of sovereign immunity has grown from 30 to 37 since the court issued its opinion in *Nguyen*. See 51 O.S.Supp.2013, § 155.

waiver is not a blue sky of limitless liability, the discretionary exemption is not a black hole enveloping the waiver.

Nguyen, 788 P.2d at 964 (footnote omitted). In view of the foregoing concern, the Oklahoma Supreme Court chose to adopt a “planning-operational” approach to understanding the scope of Section 155(5)’s discretionary exemption from Oklahoma’s general waiver of sovereign immunity:

The majority approach under the Federal Tort Claims Act (FTCA) and similar state acts is the planning-operational approach. This approach is in accord with *Robinson*, at 1017. Under this approach initial policy level or planning decisions are considered discretionary and hence immune, whereas operational level decisions made in the performance of policy are considered ministerial and not exempt from liability.

Id. at 964-65 (footnotes omitted).¹⁰

The Oklahoma Supreme Court has similarly narrowly construed the exemption found in Section 155(6) to also reflect the planning-operational approach:

Exemptions 4, 5, and 6, when read together with this Court’s explanations, define clearly the scope of statutory immunity concerning law enforcement. The State and its political subdivisions enjoy immunity for the choice to adopt or enforce a law, the formulation of law enforcement policy, and the method by which policy is implemented. The exemptions do not apply to tortious acts of government servants in the daily implementation of policy. The blanket immunity the State seeks concerning police pursuits does not exist in Oklahoma’s statutory law or jurisprudence.

State ex rel. Dep’t of Pub. Safety v. Gurich, 238 P.3d 1, 4 (Okla. 2010).

Should a board of county commissioners choose to contract with a municipality, a charitable corporation, or a fire protection district to provide fire protec-

¹⁰ Other cases applying this approach are *Robinson v. City of Bartlesville Board of Education*, 700 P.2d 1013, 1017 (Okla. 1985) (holding that the negligent maintenance of a parking lot operated by the Board of Education was an operational level decision and not exempt from liability) and *Carlson v. City of Broken Arrow*, 884 P.2d 1209, 1212 (Okla. Civ. App. 1994) (affirming the dismissal of a widow’s claim that her husband would have survived a heart attack but for inadequate care available in the city’s Level I ambulance, holding that the City of Broken Arrow’s decision to provide Level I ambulance care instead of Level IV ambulance care was a policy decision that exempted the city from liability). The Legislature appears to have acceded to the Oklahoma Supreme Court’s interpretation of Section 155(5) since it has not since chosen to amend Section 155(5) to broaden the exemption.

tion services in the county, such legal entities, being legally distinct from the county, would be independent contractors. Absent any reservation by the board of county commissioners of the right to direct or supervise the provision of such services, the county would be financially exempt from any torts committed by such independent contractors. *See* 51 O.S.Supp.2013, § 155(18).

In summary, under the “planning-operational approach” set forth above, the policy decision of a board of county commissioners expressing its lawful discretion to either provide or not provide fire protection services directly, pursuant to the provisions of 19 O.S.2011, § 351, or by contracting for such services pursuant to the authority of 19 O.S.2011, §§ 351.1, 351.3, would be protected by sovereign immunity from claims for financial liability pursuant to the exemption from its waiver provided by 51 O.S.Supp.2013, § 155(4), (5), (6). Accordingly, a policy decision by a board of county commissioners not to provide fire protection services in a portion of an unincorporated area of the county not currently receiving fire protection services would, under Section 155(5), be immune from financial liability. *See Carlson*, 884 P.2d at 1211 (an entity that is given discretionary authority to provide services at different levels is provided immunity to determine as a matter of policy the level of services it is willing to provide). On the other hand, if a board of county commissioners decides to directly provide fire protection services in a portion of an unincorporated area of the county not currently receiving fire protection services, the actual provision of fire protection services might not be exempt under Section 155(5) if such services, in fact, are not provided or if they, in fact, are negligently provided. *See Robinson*, 700 P.2d at 1017 (once an entity exercises its discretion to perform an act, it is liable for harm caused by negligence committed by it in the performance of the act).

A decision by a board of county commissioners to contract with a municipality, a charitable corporation, or a fire protection district to provide fire protection services in a portion of an unincorporated area of the county not currently receiving fire protection services in lieu of the county directly providing fire protection services, is likewise immune from financial liability pursuant to Section 155(5). The county is also immune from liability pursuant to Section 155(18) for any torts committed by a legal entity contracting to perform the fire protection services for the county, to the extent the contracting legal entity is shown to be an independent contractor.

It is, therefore, the official Opinion of the Attorney General that:

- 1. A board of county commissioners has discretionary authority to provide fire protection services in the county, either directly or through contracts, but is not under an affirmative legal duty to provide such services. *See* 19 O.S.2011, §§ 351, 351.1, 351.3.**
- 2. The legal authority conferred on boards of county commissioners to provide fire protection services in the county is**

permissive, rather than mandatory, and boards of county commissioners have discretion to determine as a matter of policy whether, when, how, and where within the county to provide fire protection services.

3. When a policy decision is made by a board of county commissioners to directly provide or not provide fire protection services in an unincorporated area of the county not currently receiving fire protection services the county is protected by sovereign immunity. *See* 51 O.S.Supp.2013, § 155(4), (5), (6); *Nguyen v. State*, 788 P.2d 962, 964-65 (Okla. 1990); *State ex rel. Dep't of Pub. Safety v. Gurich*, 238 P.3d 1, 4 (Okla. 2010).
4. When a policy decision is made by a board of county commissioners to directly provide fire protection services in an unincorporated area of the county not currently receiving fire protection services, any torts committed in operationally carrying out that policy are not shielded from financial liability by sovereign immunity. *See Nguyen*, 788 P.2d at 964-65; *State ex rel. Dep't of Pub. Safety*, 238 P.3d at 4.
5. When a policy decision is made by a board of county commissioners to not directly provide fire protection services in an unincorporated area of the county not currently receiving fire protection services, but instead to contract with a municipality, charitable corporation, or a fire protection district to provide such fire protection services in such area, the county is protected from financial liability by sovereign immunity. *See* 51 O.S.Supp.2013, § 155(5); *Nguyen*, 788 P.2d at 964-65; *State ex rel. Dep't of Pub. Safety*, 238 P.3d at 4.
6. When a policy decision is made by a board of county commissioners to not directly provide fire protection services in an unincorporated area of the county not currently receiving fire protection services, but instead to contract with a municipality, charitable corporation, or a fire protection district to provide such fire protection services in such area, the county is immune from any torts operationally committed by the contracting entity if the contracting entity is found to be an independent contractor. 51 O.S.Supp.2013, § 155(18).

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

CHARLES S. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL

OPINION 2014-6

Ms. Deby Snodgrass, Executive Director
Oklahoma Tourism and Recreation Department

April 22, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

May the Oklahoma Tourism and Recreation Commission, pursuant to its statutory authority and consistent with constitutional limitations on the use of public funds, lease municipal land for the operation of a public park if the expenses associated with such lease and operation result in a financial loss to the Commission?

INTRODUCTION

The Oklahoma Tourism and Recreation Commission (“Tourism Commission” or “Commission”) was created in 1972 pursuant to the Oklahoma Tourism and Recreation Act. *See* 1972 Okla. Sess. Laws ch. 152, § 2. The statutory purposes of the Tourism Commission, along with the department that it oversees, include the following:

- to “[c]onserve and protect the parkland under the control of the Commission;”
- to “[o]versee the operation and maintenance of the state’s lodges and golf courses;”
- to “[p]romote tourism by publicity and dissemination of information;”
- to “[a]ssist in promotion of events sponsored by municipalities, associations, and organizations commemorating special events of local or historical interest;”
- to “[e]ducate the public on the people, places, events, culture, and history of Oklahoma; and”
- to “[f]unction in an advisory capacity to the Governor, State Legislature, state agencies, municipalities, and to private organizations on matters pertaining to tourism and recreation.”

74 O.S.2011, § 2202(A).

In addition to these broad purposes, the Commission is granted certain specific authority by statute. With regard to state parks, the Commission is authorized to “[h]ave the exclusive possession and control of, and to operate and maintain for the benefit of the people of the State of Oklahoma all state parks and

all lands and other properties now or hereafter owned or leased by the state or Commission for park or recreational purposes[.]” 74 O.S.2011, § 2212(1). The Commission also is specifically authorized to acquire, maintain, use and operate real property deemed “necessary or convenient to the exercise of [its] powers, rights, privileges and functions[.]” *Id.* § 2212(2). The Commission may acquire such property through a variety of means, including “purchase, exchange, lease, gift, condemnation, or in any other manner[.]” *Id.*; *see also id.* § 2212(3) (authorizing the Commission “from time to time [to] lease, without restriction as to term, any property which the Commission shall determine to be necessary or convenient to more fully carry into effect [its] duties and powers”).

According to your request, the Tourism Commission currently leases property from certain Oklahoma municipalities for the purpose of operating public parks. In each case, the Commission pays only nominal consideration for the lease, but pays the municipality to provide services such as water, sewer and trash collection in the park. In addition, we understand that the Commission incurs additional cost to provide law enforcement, groundskeeping and maintenance services for the parks. Finally, our understanding is that in some of these parks, the Commission has paid to erect or improve certain structures on park property. According to your request, each park operates at a financial loss to the Tourism Commission.

ANALYSIS

You ask whether the Commission’s use of appropriated funds to lease and maintain municipal land for state-run parks as described above comports with applicable law. By the plain terms of Section 2212, the Commission may lease real property that is “necessary or convenient” to the exercise of the Commission’s statutory functions. *See* 74 O.S.2011, § 2212(2). Of course, one such function is the operation and maintenance of state parkland and other property “now or hereafter owned or leased by the state or Commission for park or recreational purposes[.]” *Id.* § 2212(1). Accordingly, the leasing arrangements you describe are statutorily permissible.

As you recognize in your request, the use of public funds also must satisfy certain constitutional requirements. Specifically, you ask whether the leasing of municipal land for public parks, including the ancillary expenses incurred to operate the parks in question, violates either of two clauses in Sections 14 and 15 of Article X of the Oklahoma Constitution. First, Section 14 prohibits the State from “assum[ing] the debt of any county, municipal corporation, or political subdivision of the State.” OKLA. CONST. art. X, § 14(A). Second, under Section 15 “the credit of the State shall not be given, pledged, or loaned to any

. . . municipality, or political subdivision of the State[.]” OKLA. CONST. art. X, § 15(A). We address each constitutional provision in turn.¹

In common usage, debt is defined as “something (as money, goods, or services) owed by one person to another.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 583 (3d ed. 1993). “Assumption of indebtedness, in the ordinary acceptance of the words, means for one person to bind himself to pay the debt incurred by another.” *Pawnee County Excise Bd. v. Kurn*, 101 P.2d 614, 618 (Okla. 1940) (quoting *Salmon River-Grande Ronde Highway Improvement Dist. v. Scott*, 27 P.2d 183, 184 (Ore. 1933)). In addition to prohibiting the literal assumption of municipal debt, Section 14 also prohibits financing arrangements that involve state instrumentalities issuing bonds for the benefit of a particular municipality, see *In re Oklahoma Capitol Improvement Authority*, 289 P.3d 1277, 1282-83 (Okla. 2012), or essentially serving as a contingent guarantor of a municipal obligation. See *Reherman v. Okla. Water Res. Bd.*, 679 P.2d 1296, 1301 (Okla. 1984).

Based on your description of the Tourism Commission’s leasing arrangements, nothing therein can be characterized as an assumption of municipal debt by the Commission. The Commission’s lease of land from the municipalities merely creates a lessor-lessee relationship,² while concomitant payments to the municipalities for the provision of utility and other services amounts to nothing more than a consumer-provider relationship. In return for the amounts expended, the Commission is receiving control of the leased property and the benefits of the services provided by the municipalities. While this arrangement may be economically beneficial to the municipalities and arguably detrimental to the finances of the Commission, it does not involve an assumption of municipal debt or other financing scheme that would be prohibited by Section 14.

For similar reasons, the leasing arrangement does not involve a pledge of credit by the State that would violate Section 15 of Article X of the Oklahoma Constitution. See *Okla. Capitol Improvement Auth.*, 289 P.3d at 1282 (describing the provisions of Sections 14 and 15 as “intertwined”). Credit is commonly understood to mean, among other things, “financial or commercial trustworthiness[.]” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 533; see also A.G. Opin. 84-5, at 15 (defining “credit” in the context of Section 15 as “[t]he ability of a business or person to borrow money, or obtain goods on

¹ We note that Section 14 also requires that taxpayer funds be used only for public purposes. OKLA. CONST. art. X, § 14(A). However, we find extended discussion of the “public purpose” requirement to be unnecessary to answer your question; there can be little dispute that operating a public park fits within the meaning of “public purpose” under Section 14(A). See, e.g., *Burkhardt v. City of Enid*, 771 P.2d 608, 610 (Okla. 1989) (“For taxation purposes, public use ‘requires that the work shall be essentially public and for the general good of all the inhabitants of the taxing body.’”) (quoting *Bd. of Comm’rs v. Shaw*, 182 P.2d 507, 515 (Okla. 1947)).

² Of course, if the Commission wishes to discontinue these relationships, it can simply cancel the leases or elect not to renew, subject to the terms of the lease agreements.

time, in consequence of the favorable opinion held by the particular lender as to solvency and reliability”) (quoting BLACK’S LAW DICTIONARY 331 (rev. 5th ed. 1979)). There is simply nothing in the leasing arrangements that involves the municipalities benefitting in any way from a pledge or loan of credit from the State. Accordingly, the leasing arrangements do not violate that provision of Section 15.

Finally, we conclude that nothing in the leasing arrangements – including improvements made to the leased property – amounts to an unconstitutional “gift” prohibited by Section 15. *See* OKLA. CONST. art. X, § 15(A) (“[N]or shall the State...make a donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.”). A plain reading of this prohibition shows that it does not apply to municipalities or political subdivisions. Indeed, where this office has concluded that a particular transaction was an unconstitutional gift, the transactions at issue were for the benefit of private entities, not municipalities or political subdivisions. *See, e.g.*, A.G. Opin. 81-16 (concluding that state expenditures for permanent improvements to leased property, where the lessor is a private actor, violate Section 15); A.G. Opin. 80-283 (concluding, in part, that a state appropriation to improve properties owned by private entities violates Section 15).

It is, therefore, the official Opinion of the Attorney General that:

The Oklahoma Tourism and Recreation Commission may, pursuant to 74 O.S.2011, § 2212 and Sections 14 and 15 of Article X of the Oklahoma Constitution, lease municipal land for the operation of a public park, even if the expenses associated with such operation result in a financial loss to the Commission.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

ETHAN SHANER
ASSISTANT ATTORNEY GENERAL

OPINION 2014-7

The Honorable Scott M. Inman
State Representative, District 94

June 18, 2014

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following question:

Section 144 of Senate Bill 2127—the general appropriations bill for the coming fiscal year—purports to direct the State Board of Equalization to (1) increase by approximately \$7.9 million the amount it certified for appropriation, and (2) correspondingly reduce by approximately \$7.9 million the amount that the Board set aside for transfer to Oklahoma’s Higher Learning Access Trust Fund. Is Section 144 lawful?

I.

INTRODUCTION

In 1992, the Oklahoma Legislature passed the “Oklahoma Higher Learning Access Act,” which created a college scholarship program called “Oklahoma’s Promise.” 70 O.S.2011 & Supp.2013, §§ 2601 – 2605. Oklahoma’s Promise provides college tuition assistance to Oklahoma students who might otherwise not be able to afford to attend college. Subject to the availability of funds, the program guarantees that those students who meet the eligibility criteria will be awarded tuition assistance. *Id.* In the decade plus since its creation, the program has awarded tuition assistance to thousands of Oklahoma students, allowing those students to achieve their dream of receiving a college education. To date, the program has never had to turn down a qualifying student due to lack of funding.

The tuition assistance paid by Oklahoma’s Promise comes from the Oklahoma Higher Learning Access Trust Fund (“Trust Fund”). 70 O.S.Supp.2013, § 3953.1. Since 2007, funding for the Trust Fund has been governed by 62 O.S.Supp.2013, § 34.87, which creates a three-step process for funding Oklahoma’s Promise.

First, no later than November 1 of each year, the State Regents for Higher Education are required to estimate the amount of revenue they deem necessary to fund the scholarship awards for the fiscal year beginning the following July 1, and then provide this estimate to the State Board of Equalization. *Id.* § 34.87(1).

Second, at its December meeting, the State Board of Equalization “shall determine the total amount of revenue necessary to fund awards . . . for the fiscal year which begins the following July 1 and subtract such amount from the amount it certifies as available for appropriation from the General Revenue Fund by the Legislature for such fiscal year[.]” *Id.* § 34.87(2).

Third, “[n]otwithstanding any other provisions of law directing the apportionment of revenues . . . the Director of the Office of Management and Enterprise Services shall transfer on a periodic basis as needed the amount of revenue subtracted pursuant to the provisions of paragraph 2 of this section to be deposited to the Oklahoma Higher Learning Access Trust Fund, in lieu of being deposited to the General Revenue Fund.” *Id.* § 34.87(3).

On October 23, 2013, the State Regents fulfilled their obligation under 62 O.S.Supp.2013, § 34.87(1) to provide the State Board of Equalization with an estimate of the amounts necessary to fund Oklahoma’s Promise for fiscal year 2015. In a letter to Governor Mary Fallin, in her capacity as Chair of the State Board of Equalization, Chancellor Glen Johnson estimated that the program needed \$61 million to fund the estimated 18,300 eligible students.¹ The State Regents recommended that \$57 million be allocated to the Trust Fund, with the remaining \$4 million to be funded from Trust Fund reserves. *Id.* n.1.

On December 19, 2013, the State Board of Equalization fulfilled its obligation under 62 O.S.Supp.2013, § 34.87(2) to determine the amount necessary to fund Oklahoma’s Promise, concluding that the full \$57 million requested by the State Regents should be set aside for transfer into the Trust Fund. Minutes from the State Bd. of Equalization (Dec. 19, 2013) (on file with author). The State Board of Equalization thus subtracted that \$57 million from the amount it certified to the Legislature as being available in the General Revenue Fund for appropriation.

On May 23, 2014, the Legislature approved S.B. 2127, the general appropriations bill for fiscal year 2015. Section 144 of S.B. 2127 states as follows:

The State Board of Equalization shall reduce the amount subtracted from the monies being deposited to the General Revenue Fund, as certified by the Board February 18, 2014, pursuant to provisions of paragraph 2 of Section 34.87 of Title 62 of the Oklahoma Statutes for fiscal year 2015 by Seven Million Eight Hundred Ninety-four Thousand Seven Hundred Thirty-seven Dollars (\$7,894,737.00), requiring that the Oklahoma Higher Learning Access Trust Fund be used for any additional monies needed to fund the Oklahoma Higher Learning Access Program for fiscal year 2015.

2014 Okla. Sess. Laws ch. 420, § 144.

Section 144 thus purports to require the State Board of Equalization to increase the amount certified by the State Board of Equalization as available for general

¹ Letter from Glen D. Johnson, Chancellor, Okla. State Regents for Higher Educ. to Mary Fallin, Governor of Oklahoma (Oct. 23, 2013) attached to Minutes from the State Bd. of Equalization (Dec. 19, 2013) (on file with author).

appropriation by \$7,894,737, and in turn, correspondingly reduce the amount set aside for transfer to the Trust Fund by \$7,894,737.

In effect, the Legislature has attempted to siphon \$7,894,737 away from Oklahoma's Promise so that it can be spent elsewhere. You ask whether the Legislature's attempt to do so is lawful. We conclude that it is not.

II.

SECTION 144 VIOLATES ARTICLE V, SECTIONS 56 AND 57 BECAUSE IT IS A SUBSTANTIVE LAW PROVISION THAT ALTERS THE STATE BOARD OF EQUALIZATION'S CONSTITUTIONAL AND STATUTORY CERTIFICATION OBLIGATIONS, AS WELL AS THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND ENTERPRISE SERVICES' OBLIGATION UNDER 62 O.S.SUPP.2013, § 34.87 TO TRANSFER INTO THE TRUST FUND THE FULL AMOUNT OF FUNDS CERTIFIED BY THE BOARD OF EQUALIZATION AT ITS DECEMBER MEETING.

Section 144 of S.B. 2127 purports to alter two substantive legal obligations. First, it alters the State Board of Equalization's obligation under Article X, Section 23 to certify the amount available for appropriation. Second, it alters the State Board of Equalization's obligation under 62 O.S.Supp.2013, § 34.87(2) to determine the amount needed to fund Oklahoma's Promise for the coming year. Section 144 also has the downstream effect of altering the Director of the Office of Management and Enterprise Services' substantive obligation under 62 O.S.Supp.2013, § 34.87(3) to "notwithstanding any other provision of law directing the apportionment of revenues" transfer to the Trust Fund the full amount certified by the State Board of Equalization at its December meeting.

S.B. 2127 is, however, a *general* appropriations bill. *See* 2014 Okla. Sess. Laws ch. 420 (where the title of the Act describes it as, "An Act relating to general appropriations for the expenses of various agencies of the executive, legislative and judicial departments of the state[.]"). As such, Article V, Section 56 of the Oklahoma Constitution requires that it contain only appropriative provisions. *Id.*; *see also Fent v. State ex rel. Office of State Fin.*, 184 P.3d 467, 476 (Okla. 2008) ("[A] general appropriation bill may only make appropriations to the exclusion of any substantive law provisions."). For purposes of Article V, Section 56, an appropriation is "the designation or authorization of the expenditure of public moneys and stipulation of the amount, manner and purpose for a distinct use or for the payment of a particular demand." *Smith ex rel. State v. State Bd. of Equalization*, 630 P.2d 1264, 1266 (Okla. 1981). Section 144 does not effectuate an appropriation because it is not the designation of a specific

amount of money for a distinct use.² Rather, Section 144 is a direction to the State Board of Equalization to alter substantive obligations imposed on the Board by Article X, Section 23 and 62 O.S.Supp.2013, § 34.87.³ This attempt

² Nor can Section 144 be considered a mere transfer of funds the likes of which are sometimes found in general appropriations bills. *See, e.g.*, Sections 145-171 of S.B. 2127 (requiring the Director of Office of Management and Enterprise Services to transfer money between various funds, and labeling these provisions as “transfers” in both the act’s title and in the heading to each provision). Transfers of that sort involve legislative direction to the Director of the Office of Management and Enterprise Services to move *cash on hand* between accounts, and thus have no effect on the State Board of Equalization’s obligation to certify the amount of revenues expected to be realized in the coming fiscal year. Additionally, Section 144 is more than a mere transfer because it requires a constitutionally created board to vote to take an official action altering actions taken by that board pursuant to statutory and constitutional mandates. In any event, any argument that Section 144 was a mere transfer would be squarely foreclosed by the fact that even the Legislature did not view Section 144 as a transfer, as it neither labeled it as such, nor described it as such in the title of S.B. 2127.

³ Article X, Section 23 provides in relevant part:

To ensure a balanced annual budget, pursuant to the limitations contained in the foregoing, procedures are herewith established as follows:

1. Not more than forty-five (45) days or less than thirty-five (35) days prior to the convening of each regular session of the Legislature, the State Board of Equalization shall certify the total amount of revenue which accrued during the last preceding fiscal year to the General Revenue Fund and to each Special Revenue Fund appropriated directly by the Legislature, and shall further certify amounts available for appropriation which shall be based on a determination, in accordance with the procedure hereinafter provided, of the revenues to be received by the state under the laws in effect at the time such determination is made, for the next ensuing fiscal year, showing separately the revenues to accrue to the credit of each such fund of the state appropriated directly by the Legislature.

....

2. Such certification shall be filed with the Governor, the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives. The Legislature shall not pass or enact any bill, act or measure making an appropriation of money for any purpose until such certification is made and filed, unless the State Board of Equalization has failed to file said certification at the time of convening of said Legislature. In such event, it shall be the duty of the Legislature to make such certification pursuant to the provisions of this section. All appropriations made in excess of such certification shall be null and void; provided, however, that the Legislature may at any regular session or special session, called for that purpose, enact laws to provide for additional revenues or a reduction in revenues, other than ad valorem taxes, or transferring the existing revenues or unappropriated cash on hand from one fund to another, or making provisions for appropriating funds not previously appropriated directly by the Legislature. Whereupon, it shall be the duty of the State Board of Equalization to make a determination of the revenues that will accrue under such laws and ninety-five percent (95%) of the amount of any increase or decrease resulting, for any reason, from such changes in laws shall be added to or deducted from the amount previously certified available for appropriation from each respective

to change those substantive obligations of the State Board of Equalization—and in turn the substantive obligation of the Director of the Office of Management and Enterprise Services to transfer the amount of funds initially certified by the Board of Equalization—is invalid because it is a substantive provision of law in a general appropriations bill.⁴

And even if S.B. 2127 is considered a special appropriations bill because it contains a mixture of substantive and appropriative provisions, it is unconstitutional because it fails to comply with Article V, Section 57's single subject requirement. *Fent*, 184 P.3d at 476 (“If the multiple provisions in a special appropriation bill include substantive law as well as the appropriation law, each and every provision must be closely related to a single subject.”).

The test under the single subject rule is “germaneness,” a test that looks to see if the provisions in the bill all relate to a common theme or purpose. *Id.* Senate Bill 2127 plainly fails that test, as it contains a host of appropriations and transfers to various agencies for various purposes, and the Oklahoma Supreme Court has previously rejected the notion that such wide-ranging appropriations can be considered germane to a broad theme like “allocating revenues.” *Fent*, 184 P.3d at 476.⁵

fund, as the case may be. The State Board of Equalization shall file the amount of such adjusted certification, or additional certification for funds not previously appropriated directly by the Legislature, with the Governor, with the President and President Pro Tempore of the Senate, and the Speaker of the House of Representatives, and such adjusted amount shall be the maximum amount which can be appropriated for all purposes from any such fund for the fiscal year being certified.

Id.

⁴ Another way to look at it is this: are the provisions in Article X, Section 23 and 62 O.S.Supp.2013, § 34.87 that impose the underlying obligations on the State Board of Equalization substantive law provisions? As codified provisions of law imposing ongoing substantive obligations, of course they are. With that so, Section 144, which purports to alter those underlying obligations cannot plausibly be characterized as anything *other* than a substantive provision.

⁵ Section 144 might well be constitutionally infirm for two additional reasons. First, the legal process established by 62 O.S.Supp.2013, § 34.87 for the certification and transfer of funds to the Trust Fund likely constitutes a “proceeding” for purposes of Article V, Section 54, which prevents the Legislature from substantively altering that proceeding once it has been initiated. Second, Section 144's diversion of Trust Funds away from their intended purpose likely violates the principle announced in *Moran v. State ex rel. Derryberry*, 534 P.2d 1282, 1288 (Okla. 1975), that Article II, Section 15 prevents the Legislature from diverting trust funds to which trust beneficiaries have a vested right. *Id.*; see *Tulsa Stockyards, Inc. v. Clark*, 321 P.3d 185, 192 (Okla. 2014) (“A ‘vested right’ is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has once been created, and has become absolute, it is protected from the invasion of the Legislature by those provisions in the Constitution which apply to such rights.”) (quoting *Moran*, 34 P.2d at 1288).

III.

THE LEGISLATURE LACKS THE AUTHORITY TO DIRECT THE STATE BOARD OF EQUALIZATION HOW TO CARRY OUT ITS CONSTITUTIONAL DUTY TO CERTIFY THE AMOUNT OF FUNDS AVAILABLE TO THE LEGISLATURE FOR APPROPRIATION.

Section 144 of S.B. 2127 purports to require the State Board of Equalization to do two things. First, the State Board of Equalization must increase by nearly \$7.9 million the amount that it at its December meeting determined—pursuant to its constitutional obligation under Article X, Section 23 to do so—was available for the Legislature to appropriate to fund government operations for the coming year. Second, the State Board of Equalization must reduce by nearly \$7.9 million the amount that it at its December meeting determined—pursuant to its statutory obligation under 62 O.S.Supp.2013, § 34.87(2) to do so—was needed to fund Oklahoma’s Promise for the coming year.

Article X, Section 23 imposes upon the State Board of Equalization the duty to determine, prior to the start of each regular session of the Legislature, how much money will be available in the General Revenue Fund for appropriation by the Legislature. While the Legislature is bound by the certification of revenues made by the State Board of Equalization, Article X, Section 23(2) allows the Legislature to “enact laws to provide for additional revenues or a reduction in revenues,” in which case the State Board of Equalization must “make a determination of the revenues that will accrue under such laws.” *Id.* In other words, the State Board of Equalization has a constitutional duty to meet after the end of the legislative session to determine if it needs to amend the amount it has certified as available for appropriation due based on any changes in the law that will affect general revenues expected in the coming fiscal year.

Here, the Legislature has attempted to do more than simply pass a law that “provides for additional revenue or for a reduction in revenues.” *Id.* To the contrary, Section 144 does nothing to increase or decrease revenues to be received by the State in the coming year. Rather, it simply directs the State Board of Equalization to increase the amount it has certified, and by a specific amount. Article X, Section 23 does not give the Legislature the authority to determine how much should be certified as available for it to appropriate. Only the State Board of Equalization has that authority, and the Constitution vests that authority solely with the State Board of Equalization precisely to prevent the Legislature from attempting to determine how much should be available to it for appropriation. Article X, Section 23 creates a structural separation of powers between the State Board of Equalization and the Legislature. With Section 144 of S.B. 2127, the Legislature has infringed upon the State Board of Equalization’s constitutional authority to determine the amount available for appropriation. Thus, the Legislature is without authority to direct the State Board of Equalization in this manner.

IV. CONCLUSION

Given the invalidity of Section 144, 62 O.S.Supp.2013, § 34.87 remains the provision of law governing the obligations of the State Board of Equalization and the Director of the Office of Management and Enterprise Services with regard to the funding of the Oklahoma Higher Learning Access Trust Fund. As such, the State Board of Equalization must decline to reduce the amount it has set aside in December for transfer to the Trust Fund, and the Director of the Office of Management and Enterprise Services must comply with his statutory duty under 62 O.S.Supp.2013, § 34.87(3) to transfer to the Trust Fund the full \$57 million set aside for that purpose by the Board at its December meeting.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Because S.B. 2127 is a general appropriations bill, it can contain only appropriations, and cannot contain any substantive law. *Fent v. State ex rel. Office of State Fin.*, 184 P.3d 467, 476 (Okla. 2008). Section 144 is substantive law. Section 144 thus violates Article V, Section 56 of the Oklahoma Constitution.**
- 2. Even if S.B. 2127 is considered a special appropriations bill (i.e., a bill that contains a mixture of appropriative and substantive law provisions), Section 144 is still unconstitutional, because special appropriations bills must comply with the single-subject rule of Article V, Section 57 of the Oklahoma Constitution and S.B. 2127 plainly addresses multiple non-germane subjects.**
- 3. Pursuant to Article X, Section 23 of the Oklahoma Constitution, the Legislature lacks the authority to direct the State Board of Equalization how to calculate the amount to be certified as available for appropriation.**
- 4. Given the invalidity of Section 144, 62 O.S.Supp.2013, § 34.87 remains the provision of law governing the obligations of the State Board of Equalization and the Director of the Office of Management and Enterprise Services with regard to the funding of the Oklahoma Higher Learning Access Trust Fund.**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

PATRICK R. WYRICK
SOLICITOR GENERAL
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL

OPINION 2014-8

The Honorable Sally Kern
State Representative, District 84

July 3, 2014

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Does 2014 Okla. Sess. Laws ch. 13, § 1 allow all statewide organizations representing retired educators to each appoint a member to serve concurrently on the Oklahoma Teachers' Retirement System Board of Trustees, or only one organization to appoint a single member?**
- 2. If the answer to the first part of the question is only one, then what is the appropriate process by which the organization's appointed member will be selected from the number of statewide organizations representing retired educators that presently exist in Oklahoma?**

I.

INTRODUCTION

Your question relates to the interpretation of an amendment to 70 O.S. Supp. 2013, § 17-106.¹ This section sets forth the administration, operation, and maintenance of the Oklahoma Teachers' Retirement System Board of Trustees ("Teachers' Retirement Board"). Most relevant here, Section 17-106(2)(a)-(1) provides for the Teachers' Retirement Board's composition. According to the statute, the Teachers' Retirement Board shall consist of the following members:

- (a) The State Superintendent of Public Instruction, ex officio or a designee.
- (b) The Director of the Office of Management and Enterprise Services, ex officio or a designee.
- (c) The Director of the Oklahoma Department of Career and Technology Education, ex officio, or his or her designee.
- (d) One member appointed by the Governor whose initial term of office shall expire on January 14, 1991. The members thereafter appointed by the Governor shall serve a term of office of four (4) years which is coterminous with the term of office of the office of the appointing authority.

¹ 2014 Okla. Sess. Laws ch. 13, § 1 amended 70 O.S. Supp. 2013, § 17-106 (eff. July 1, 2014).

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- (e) Two members shall be appointed by the Governor of the State of Oklahoma and approved by the Senate. The two members shall be: 1. a representative of a school of higher education in Oklahoma whose term of office shall initially be one (1) year, and 2. a member of the System of the nonclassified optional personnel status whose initial term of office shall be two (2) years. After the initial terms of office the terms of the members shall be four (4) years.
 - (f) Upon the expiration of the term of office of the stockbroker member of the Board, the Governor shall appoint a member to the Board whose initial term of office shall expire on January 14, 1991. The members thereafter appointed by the Governor shall serve a term of office of four (4) years which is coterminous with the term of office of the office of the appointing authority.
 - (g) Upon the expiration of the term of office of the representative of the insurance industry member of the Board, the Governor shall appoint a member to the Board whose initial term of office shall expire on January 14, 1991. The members thereafter appointed by the Governor shall serve a term of office of four (4) years which is coterminous with the term of office of the office of the appointing authority.
 - (h) Upon the expiration of the term of office of the investment counselor member of the Board, the Governor shall appoint a member to the Board whose initial term of office shall expire on January 14, 1991. The members thereafter appointed by the Governor shall serve a term of office of four (4) years which is coterminous with the term of office of the office of the appointing authority.
 - (i) Upon the expiration of the term of office of the active classroom teacher member of the Board, the President Pro Tempore of the Senate shall appoint a member to the Board, who shall be an active classroom teacher and whose initial term of office shall expire on January 8, 1991. The members thereafter appointed by the President Pro Tempore of the Senate shall serve a term of office of four (4) years.
 - (j) Upon the expiration of the term of office of the retired classroom teacher member of the Board, the Speaker of the House of Representatives shall appoint a member to the Board, who shall be a retired member of the System

and whose initial term of office shall expire on January 8, 1991. The members thereafter appointed by the Speaker of the House of Representatives shall serve a term of office of four (4) years.

- (k) The Speaker of the House of Representatives shall appoint a member to the Board, who shall be an active classroom teacher and whose initial term of office shall expire on January 3, 1989. The members thereafter appointed by the Speaker of the House of Representatives shall serve a term of office of four (4) years.
- (l) The President Pro Tempore of the Senate shall appoint a member to the Board, who shall be a retired member of the System and whose initial term of office shall expire on January 3, 1989. The members thereafter appointed by the President Pro Tempore of the Senate shall serve a term of office of four (4) years.

Id. This statute was amended by 2014 Okla. Sess. Laws ch. 13, § 1 (“2014 Session Laws”) to include subsection (m) that provides: “A statewide organization representing retired educators shall appoint a member to the Board who shall be a nonvoting member.” *Id.* There are currently two statewide organizations representing retired educators: the Retired Professional Oklahoma Educators and the Oklahoma Retired Educators Association. You ask whether subsection (m) allows for both organizations to appoint a member to serve on the Teachers’ Retirement Board concurrently, or whether it only allows for the appointment of one member representing one organization.

II.

THE LEGISLATURE INTENDED THE 2014 SESSION LAWS TO ADD TO THE TEACHERS’ RETIREMENT BOARD ONLY ONE REPRESENTATIVE FROM “A STATEWIDE ORGANIZATION REPRESENTING RETIRED EDUCATORS.”

“The fundamental rule of statutory construction is to ascertain and give effect to legislative intent.” *J.L.M. v. State*, 109 P.3d 336, 338 (Okla. 2005). Legislative intent is found by looking at the statutory language as a whole, rather than piecemeal. *See City of Tulsa v. State ex rel. Pub. Emp. Relations Bd.*, 967 P.2d 1214, 1220 (Okla. 1998). The statutory language will be given its “plain and ordinary meaning unless it is contrary to the purpose and intent of the statute.” *Stump v. Cheek*, 179 P.3d 606, 611 (Okla. 2007). And if the language is plain and clearly expresses the intent of the Legislature, no further discussion is necessary. *Cattlemen’s Steakhouse, Inc. v. Waldenville*, 318 P.3d 1105, 1110 (Okla. 2013).

Looking at Section 17-106 as a whole, it is clear that the Legislature intended for the 2014 Session Laws to add to the Teachers' Retirement Board only one member appointed by one statewide organization representing retired educators.

The 2014 Session Laws amended Section 17-106(2) to include, as a nonvoting member, a representative from “[a] *statewide organization* representing retired educators.” 2014 Okla. Sess. Laws ch. 13, § 1(m) (emphasis added). Notably, the Legislature used the word “a” in describing “statewide organization.” The plain and ordinary meaning of “a” is that it refers to a single thing or entity. In fact, the dictionary defines “a” as a word “used as a function word *before most singular nouns* . . . when the individual in question is undetermined, unidentified, or unspecified, esp. when the individual is being first mentioned or called to notice.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1 (3d ed. 1993) (emphasis added). If the Legislature had intended to allow the addition of multiple non-voting members, they would have used a more expansive word to describe statewide organization such as “any” instead of “a” or said “statewide organizations” instead of the singular “organization.” Instead, the Legislature chose “a” and the singular form of “organization,” indicating its intent to allow only one statewide organization to serve on the Board pursuant to subsection (m). Because the language is plain and clearly expresses the Legislature’s intent, no further statutory construction is necessary.

Reading the word “a” in the amendment to mean “any” would not make sense in the context of Section 17-106. If one were to read the statute in this manner, the door would be open for members to be added on the Teachers' Retirement Board any time a new organization met the “statewide organization representing retired educators” requirement. This could not have been the Legislature’s intent. Looking at the other subsections detailing who serves on the Teachers' Retirement Board further supports this conclusion.

Each subsection specifically states the number of appointees that it is allowing. For example, subsections (a)-(c) name specific individuals who shall be a member of the Teachers' Retirement Board; subsections (d) and (f)-(l) state either that an individual shall appoint “one member” or shall appoint “a member;” and subsection (e) provides that “[t]wo members shall be appointed by the Governor . . . and approved by the Senate[,]” listing specific qualifications those individuals must meet. 70 O.S.Supp.2013, § 17-106(2). Each of these subsections specifically list how many individuals shall be placed on the Teachers' Retirement Board, with all but one providing for the placement of one member. And in that one instance when the statute allows more than one member to be appointed through the same subsection, it specifically says so and sets out distinct qualifications for those individuals. Most importantly, none of the subsections leave open-ended the number of individuals to be appointed. Therefore, reading subsection (m) to allow for the addition of an undefined amount of appointments

to the Teachers' Retirement Board would be inconsistent with the structure of Section 17-106(2) as a whole.

III.

BECAUSE THE LEGISLATURE HAS NOT ESTABLISHED A PROCEDURE FOR DETERMINING WHO SITS ON THE TEACHERS' RETIREMENT BOARD, THE BOARD CAN PROMULGATE RULES PRESCRIBING THAT PROCEDURE.

Because the Legislature intended subsection (m) to add only one non-voting member to the Teachers' Retirement Board, the Board is faced with the practical problem of determining who fills that single, available seat. The Teachers' Retirement Board is responsible for "the general administration and...operation of the retirement system *and for making effective the provisions of the act.*" 70 O.S.Supp.2013, § 17-106(1) (emphasis added). Further, the Teachers' Retirement Board is authorized under Section 17-106(10) to "establish rules and regulations for the administration of the funds created by this act and *for the transaction of its business.*" *Id.* § 17-106(10) (emphasis added). Prescribing the process by which the Oklahoma Teachers' Retirement System will select an appointee pursuant to subsection (m) relates to the general administration and operation of the retirement system, and is also necessary to transact the System's business.

In order to conduct its business the Teachers' Retirement Board must be able to identify its members. Voting and nonvoting members alike affect how the Teachers' Retirement Board conducts business. While voting members can influence policy and decisions through their voting power, non-voting members affect the same through their participation at Board meetings, and ability to attend executive sessions. Because of this, there is an obvious need to clarify the process by which a member from a statewide organization representing retired educators is chosen. Indeed, without the ability to proscribe this process, the Teachers' Retirement Board would be faced with the practical problem of deciding who to seat as a member when more than one representative from a statewide organization attended the Teachers' Retirement Board's meetings. Therefore, promulgating these rules is the only way the Teachers' Retirement Board can *transact its business* and *make effective* subsection (m). *See* 70 O.S.Supp.2013, § 17-106(1), (10).

Because Section 17-106(1) and (10) authorize the Teachers' Retirement Board to promulgate rules implementing the amended statute, the process can therefore be determined by that agency. *See Adams v. Prof'l Practices Comm'n*, 524 P.2d 932, 934 (Okla. 1974) (finding that it is "necessary and proper for administrative agencies to adopt rules of procedure as to matters coming under [their] jurisdiction"). Further, these rules will be valid so long as they are not arbitrary

and capricious, *Kifer v. Oklahoma Tax Commission*, 956 P.2d 162, 166 (Okla. Civ. App. 1997), and do not conflict with Oklahoma's Constitution. *Horvat v. State, ex rel Dep't of Corr.*, 95 P.3d 190, 192 (Okla. Civ. App. 2004).

It is, therefore, the official Opinion of the Attorney General that:

- 1. The Legislature intended 2014 Okla. Sess. Laws ch. 13, § 1 to allow for the appointment of one member to the Oklahoma Teachers' Retirement System Board of Trustees representing one statewide organization of retired educators.**
- 2. Rules governing the process by which the Oklahoma Teachers' Retirement System Board of Trustees will select a member from multiple statewide organizations representing retired educators to serve on the Teachers' Retirement Board may be promulgated by that agency. 70 O.S.Supp.2013, § 17-106(10). These rules will be valid as long as they are not arbitrary and capricious, *Kifer v. Oklahoma Tax Commission*, 956 P.2d 162, 166 (Okla. Civ. App. 1997), and do not otherwise exceed the scope of their authority. *Adams v. Prof'l Practices Comm'n*, 524 P.2d 932, 934 (Okla. 1974).**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

SARAH A. GREENWALT
ASSISTANT SOLICITOR GENERAL

OPINION 2014-9

The Honorable Arthur Hulbert
State Representative, District 14

September 16, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Does 19 O.S.Supp.2013, § 421.2 prohibit a board of county commissioners from declaring county-owned real property as surplus to the needs of the county during the time period beginning 30 days before the filing period for any election of a county commissioner and ending the day after a county commissioner is sworn in?

INTRODUCTION

Before turning to your question, we provide a brief summary of the powers granted to a board of county commissioners under Oklahoma law regarding the administration of county-owned property.

It is well established that counties within Oklahoma are “involuntary, subordinate political subdivision[s] of the state,” *Herndon v. Anderson*, 25 P.2d 326, 329 (Okla. 1933), that may exercise only those powers that have been granted to them by statute. *Tulsa Exposition & Fair Corp. v. Bd. of Cnty. Comm’rs*, 468 P.2d 501, 507 (Okla. 1970) (citing *Johnston v. Conner*, 236 P.2d 987 (Okla. 1951) and *Herndon*, 25 P.2d at 329). A county exercises its statutory authority through an elected board of county commissioners. *See* 19 O.S.2011, § 3. Like the counties themselves, “Boards of County Commissioners derive their powers and authority wholly from the statutes, and acts performed by them must be done pursuant to authority granted by valid legislative action.” *Tulsa Exposition & Fair Corp.*, 468 P.2d at 508. However, a board’s authority also includes powers that are “necessarily or fairly implied or incidental to the powers expressly granted.” *See Shipp v. Se. Okla. Indus. Auth.*, 498 P.2d 1395, 1398 (Okla. 1972).

Among the powers specifically granted to counties by statute is a broad authority to administer property belonging to the county. For instance, counties are empowered to “purchase and hold real and personal estate for the use of the county.” 19 O.S.2011, § 1(2). Similarly, counties may “sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants[.]” *Id.* § 1(3). As noted above, this broad authority is exercised on behalf of the county by its board of county commissioners, but county commissioners also have specific statutory authority to, among other things, “make all orders respecting the real property of the county.” *Id.* § 339(A)(1).

In order to sell county-owned property a board of county commissioners, in most cases, must comply with the procedures set forth in Section 421.1 of Title

19. For county-owned “tools, apparatus, machinery or equipment” for which the original cost exceeded \$500, the statute requires a sealed bid procedure or public auction, with limited exception for property used as a trade-in for the purchase of similar property. *See* 19 O.S.Supp.2013, § 421.1(A)-(F). For county-owned land, Section 421.1 authorizes county commissioners to “sell real property belonging to the county without declaring such property surplus” only after a number of conditions, including a certified appraisal and sealed bid process, have been satisfied.¹ *Id.* § 421.1(G).

For property that has been deemed by the board of county commissioners as surplus to the needs of the county, the Legislature established separate procedures to sell or otherwise transfer real and personal property. For surplus real property, Section 349(B) of Title 19 permits county commissioners to transfer such lands to a municipality if the lands are located within the municipality’s corporate limits. That section provides, in pertinent part, as follows:

The county commissioners of counties of the State of Oklahoma are hereby authorized and empowered to execute deeds of conveyance of such lands as are owned by the counties within the corporate limits of any city or town providing such lands are deemed by the county commissioners of the county to be surplus to the needs of the county. Any such lands so conveyed may be used by such city or town for any purpose authorized by law or conveyed by such city or town in any manner authorized by law.

19 O.S.2011, § 349(B). For surplus machinery, equipment and vehicles, Section 421.2 of Title 19 permits a board, subject to certain conditions, to transfer such property to political subdivisions of the state. *See* 19 O.S.Supp.2013, § 421.2.

ANALYSIS

Your question seeks clarification as to whether Section 421.2 limits the ability of county commissioners to declare county-owned real property as surplus. Section 421.2 provides, in pertinent part, as follows:

A unanimous vote of the board of county commissioners may transfer ***any machinery, equipment or vehicle*** belonging to the county, which is deemed by the board to be surplus, to a political subdivision of the state which is in need of such machinery, equipment or vehicle. ***Upon such transfer, the subject property*** shall be removed from the inventory of the county. Except as otherwise provided in this section, the board of county com-

¹ In other limited circumstances not relevant here, a board of county commissioners may sell or otherwise transfer real property belonging to the county without declaring it surplus or complying with the procedures of Section 421.1(G). *See* 19 O.S.2011, §§ 339.1, 342, 349(C).

missioners may not deem *any property* to be surplus during the period of time beginning thirty (30) days before the filing period for any election of a county commissioner and ending the day after a county commissioner is sworn in as such. If the incumbent draws no opponent or if the incumbent county commissioner wins reelection, either at the primary, special, or general election, the prohibition of declaring county property or material surplus until the swearing in of county officials shall be removed and the county may dispose of surplus property as provided in this section.

19 O.S.Supp.2013, § 421.2 (emphasis added).

To determine whether Section 421.2's temporal limitation on declaring county property as surplus applies to real property, we must look first to the language of the statute itself. If that language is "plain and unambiguous and its meaning clear," no further interpretation is necessary. *TRW/Reda Pump v. Brewington*, 829 P.2d 15, 20 (Okla. 1992); see also *Ledbetter v. Howard*, 276 P.3d 1031, 1035 (Okla. 2012) ("If the [statutory] language is plain and clearly expresses the legislative will, further inquiry is unnecessary."). However, if the language is ambiguous or in conflict with other statutory provisions, we must turn to the rules of statutory interpretation to ascertain the intent of the Legislature in adopting the law. See *Ledbetter*, 276 P.3d at 1035 (noting that "in cases of ambiguity or conflict . . . rules of statutory construction [are] employed"); *In re BTW*, 241 P.3d 199, 205 (Okla. 2010) ("The determination of legislative intent controls statutory interpretation . . .").

"The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation." *YDF, Inc. v. Schlumar, Inc.*, 136 P.3d 656, 658 (Okla. 2006). In Section 421.2, the use of the phrase "any property" in prohibiting county commissioners from deeming county property as surplus in the time period surrounding elections renders that provision ambiguous. Specifically, the use of the word "any" can be interpreted to suggest that the prohibition applies to *all* county-owned property, including real property. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1993) (defining "any" to mean, among other things, "every" or "all"); see also *JPMorgan Chase Bank, N.A. v. Specialty Rest., Inc.*, 243 P.3d 8, 14 (Okla. 2010) ("The term 'any' is all-embracing and means nothing less than 'every' and 'all.'"). On the other hand, the prohibition appears in a statutory section that otherwise appears to apply only to county-owned machinery, equipment and vehicles. Indeed, the transfer of surplus county-owned real property is specifically addressed by separate statute. See 19 O.S.2011, § 349. Having found the language to be ambiguous, we look to the relevant rules of statutory construction to determine the most reasonable interpretation.

For two reasons, we conclude that the better reading of Section 421.2 is that the temporal prohibition on declaring county property as surplus applies only to machinery, equipment and vehicles. First, the interpretation of ambiguous language cannot be accomplished in a vacuum. Rather, we must take into account the relevant context in which the language is used. *See Hogg v. Okla. Cnty. Juvenile Bureau*, 292 P.3d 29, 33 (Okla. 2012) (“In determining legislative intent this Court will look at the context of any ambiguous provisions and not limit our consideration to any one word or phrase.”); *State v. Tate*, 276 P.3d 1017, 1020 (Okla. 2012) (“Words and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context, and they must harmonize with other sections of the Act.”). Taking the whole of Section 421.2 in context, it makes more sense that the limitation stated therein would apply only to the types of property referenced specifically in that section. The first two sentences of that section refer solely to the transfer of county-owned machinery, equipment and vehicles. 19 O.S.Supp.2013, § 421.2. Likewise, the statute identifies circumstances that would cause the prohibition on declaring property as surplus to be lifted and permit the county to “dispose of surplus property as provided in this section.” *Id.* (emphasis added). Of course, Section 421.2 provides only for the disposal of surplus machinery, equipment and vehicles. Thus, in the otherwise narrow context of Section 421.2, it would be an odd juxtaposition to insert a broad temporal limitation on declaring any county property as surplus.²

The second, and related, reason supporting this conclusion involves a broader review of Title 19. Specifically, the transfer of surplus county lands is explicitly addressed in a separate section of Title 19. Section 349(B) permits county commissioners to convey surplus land to municipalities, much like Section 421.2 permits such transfers for machinery, equipment and vehicles. *See* 19 O.S.2011, § 349(B). Unlike Section 421.2, however, Section 349(B) does not include any temporal limitation on the authority of a board of county commissioners to declare such property as surplus. Section 349(B) was adopted in 1990, *see* 1990 Okla. Sess. Laws ch. 67, § 2, one year prior to the adoption of Section 421.2. *See* 1991 Okla. Sess. Laws ch. 155. We must assume that, at the time it enacted Section 421.2, the Legislature was aware that the transfer of surplus county-owned real property was addressed specifically in Section 349(B). *See Williams v. Bailey*, 268 P.2d 868, 872 (Okla. 1954) (noting the “general rule of interpretation to assume that the legislature in the enactment of a statute was

² This conclusion is also consistent with the doctrine of *noscitur a sociis*, by which the meaning of an ambiguous term used in a statute may be ascertained by reference to the meaning of words associated with it. *See Sullins v. Am. Med. Response of Okla., Inc.*, 23 P.3d 259, 263 (Okla. 2001); *see also* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16 at 352-53 (7th ed. 2007) (noting that *noscitur a sociis* “in practical application means that a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense” (footnotes omitted)).

aware of established rules of law applicable to the subject matter of the statute” (quoting 50 AM. JUR. *Statutes* § 339)); *see also State ex rel. Dep’t of Transp. v. OPUBCO, Inc.*, 50 P.3d 1146, 1149 (Okla. Civ. App. 2002). Yet the Legislature chose not to amend Section 349(B) to include a temporal limitation on declaring real property as surplus, but included such a limitation in Section 421.2, applicable to applicable to machinery, equipment and vehicles. We assume that this omission is intentional. *See Broadway Clinic v. Liberty Mut. Ins. Co.*, 139 P.3d 873, 877 (Okla. 2006) (“Where a word or phrase is absent from a statute, we must presume that its absence is intentional.”); *see also OPUBCO*, 50 P.3d at 1149 (“Legislative silence, when it has authority to speak, may be considered as giving rise to an implication of legislative intent.” (quoting *City of Duncan v. Bingham*, 394 P.2d 456, 460 (Okla. 1964))).

It is, therefore, the official Opinion of the Attorney General that:

Title 19 O.S.Supp.2013, § 421.2 does not prohibit a board of county commissioners from declaring county-owned real property as surplus to the needs of the county during the time period beginning 30 days before the filing period for any election of a county commissioner and ending the day after a county commissioner is sworn in.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

ETHAN SHANER
ASSISTANT ATTORNEY GENERAL

OPINION 2014-10

Paul Ziriax, Secretary
State Election Board

September 25, 2014

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following question:

Does Allpoint Pen technology satisfy Oklahoma’s legal requirements for a valid signature in a voter registration application?

You state that Voter Participation Center, a voter registration project, has submitted to county election boards numerous voter registration applications using National Voter Registration Act forms, some of which have been signed using Allpoint Pen technology.¹ You also explain that, in effect, Allpoint Pen technology involves an individual making the motions of a signature on an electronic device, and those motions are then transmitted to a machine with an actual pen that imitates those motions with wet ink on a printed copy of an otherwise completed voter registration form.² Your question relates to whether the use of this technology satisfies the requirements for a valid signature on a voter registration application under Oklahoma law. You note that Voter Participation Center maintains that Allpoint Pen technology satisfies Oklahoma law because it is a “traditional, pen-on-paper, ‘wet’ signature.”³ We conclude that the technology does not satisfy the law, disagreeing with Voter Participation Center for the reasons below.

I.

THE ALLPOINT PEN TECHNOLOGY, AS DESCRIBED, DOES NOT SATISFY THE REQUIREMENTS OF 26 O.S.2011, § 4-112(A), A STATUTE WHICH GOVERNS THE REQUIREMENTS FOR OKLAHOMA’S VOTER REGISTRATION APPLICATIONS.

Oklahoma’s Election Code authorizes the Secretary of the State Election Board to develop voter registration applications; the Election Code also requires that the Secretary’s application include several pieces of information, including an applicant’s name, date of birth, and place of residence. 26 O.S.2011, § 4-112(A). The Election Code also provides the following:

¹ See Letter from Paul Ziriax, Secretary of the State Election Board, to E. Scott Pruitt, Oklahoma Attorney General (Aug. 4, 2014) (on file with author).

² *Id.*

³ *Id.*

A voter registration application shall be signed by the applicant in writing. The applicant shall personally subscribe his or her name to or make his or her mark on the application, and no agent, representative or employee of the applicant may sign or mark on the applicant's behalf. The signature or mark must be the original, handwritten signature, autograph or mark of the applicant. No facsimile, reproduction, typewritten or other substitute signature, autograph or mark will be valid.

Id. The statute thus requires that a valid voter application include a signature that is “original,” “handwritten,” and made “personally” with no “facsimile, reproduction, [] or other substitute signature.” *Id.* The Allpoint Pen technology, as described, simply cannot meet these requirements. The technology requires that signature motions on an electronic device be recorded and transmitted to a machine that reproduces the signature on a printed voter application. The resulting signature could not be said to have been made “personally” by the applicant because the signature is made by a machine after having signature motions transmitted to it. What the applicant did personally—make signature motions on an electronic device—does not satisfy the statute’s requirements. Nor could the signature be “handwritten”: the actual signature apparent on the form was produced by a mechanical pen reproducing movements transmitted to it.

Further, it would be unreasonable to suggest that the resulting signature would be anything other than a “facsimile” or “reproduction” rather than an “original signature.” A facsimile signature is one “produced by mechanical means but recognized as valid by law for many banking, financial, and business transactions.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 813 (3d ed. 1993). On the other hand, something that is original “constitut[es] the product or model from which copies are made.” *Id.* at 1592. It is clear the Allpoint Pen technology, as described, requires that “original” motions be made on an electronic device that are then reproduced by a mechanical pen in another location. Allpoint Pen technology thus does not satisfy the requirements of the statute.

II.

THE ALLPOINT PEN TECHNOLOGY, AS DESCRIBED, DOES NOT SATISFY THE REQUIREMENTS OF OAC 230:15-5-84, AN ADMINISTRATIVE RULE THAT PROVIDES THE REQUIREMENTS FOR VOTER APPLICATIONS UNDER THE NATIONAL VOTER REGISTRATION ACT.

As noted above, the Voter Participation Center uses National Voter Registration forms developed by the federal government’s Election Assistance Commission,

not state voter applications. Under the National Voter Registration Act and its amendments, the Election Assistance Commission develops federal forms while states must develop procedures to accept them. The statutory provision discussed in the prior section, 26 O.S.2011, § 4-112(A), would thus not necessarily delineate the signature requirements for federal forms. However, in that same statutory provision providing the requirements for a state voter application, the Legislature has required that the Secretary must “prescribe procedures to accept and use federal registration applications as required by the National Voter Registration Act of 1993.” 26 O.S.2011, § 4-112(A). It is to these regulations that we now turn.

The State Election Board currently has only one set of requirements in the Oklahoma Administrative Code that governs acceptance of both the national and state voter registration forms. *See* OAC 230:15-5-84. In 1993, Congress passed the National Voter Registration Act, which imposed various requirements on the states to, among other things, accept federally-developed voter registration applications. *See generally* Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501 – 20511). In response, the Oklahoma Legislature sought to implement the Act’s requirements; one part of that implementation involved a requirement that the Secretary of the Election Board promulgate rules regarding the acceptance of state and federal voter applications. *See* 1994 Okla. Sess. Laws ch. 260, § 13 (codified as amended at 26 O.S.2011, § 4-112). In response to these mandates the Secretary did promulgate rules, including the one at issue here. *See* 12 Okla. Reg. 2197, 2207–08 (1995).

That one regulation simply requires the “[a]pplicant’s original signature or [] original mark.” OAC 230:15-5-84(b)(8). However, in light of the statutory standard discussed above, Allpoint Pen technology does not satisfy this requirement on federal forms. The “original signature” or “original mark” language in the administrative rule imposes the same obligation as the statutory provision discussed earlier, 26 O.S.2011, § 4-112(A), for two key reasons. First, the regulation covers acceptance of both state and national voter registration forms and includes many of the elements listed in the statute for state forms. The most reasonable reading of the regulation would be that it mirrors the signature requirement of the statute, not that it imposes a different, independent standard that conflicts with the state requirement and because of that only actually applies to the national form.

Second, as mentioned above, an “original” signature stands in contrast to a “facsimile” or “reproduction” signature. The text in 26 O.S.2011, § 4-112(A) that a signature must be “original” and that “[n]o facsimile, reproduction, typewritten or other substitute signature . . . will be valid” are not impositions of two different requirements but an expression of one requirement. Hence, by stating in OAC 230:15-5-84 that only an “original” signature or mark is required, the rule necessarily rules out facsimile and reproduction signatures.

The standard governing valid signatures in voter applications is thus substantially the same whether the signature requirement for all applications in OAC 230:15-5-84 or the requirement for state applications in 26 O.S.2011, § 4-112(A) governs. Because the Allpoint Pen technology as described involves an applicant making signature motions on an electronic device that are then transmitted to a machine that reproduces that signature, the result is not an “original” signature and does not satisfy the Oklahoma Administrative Code.

III. CONCLUSION

Both the Oklahoma Voter Registration Application⁴ and the National Voter Registration Act form⁵ require that the applicant swear or affirm that several statements are correct, including that the information provided on the form is true. The federal form’s signature area includes a statement that the person signing knows they do so under the penalty of perjury, and the state form spells out even more clearly that the penalties for providing false information may include a prison sentence, a sizeable fine, or both. Requiring an original signature in the manner required by Oklahoma law for both forms thus ensures that applicants understand the seriousness of signing a voter registration application, a reasonable interest for a state to advance. Allpoint Pen technology might provide a slightly more convenient way for a citizen to register to vote, but the current state of Oklahoma law does not protect convenience only; it purposefully imposes the minor inconvenience of personally signing a form in order to communicate the legal ramifications of the application.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Under 26 O.S.2011, § 4-112(A), an Oklahoma Voter Registration Application must include an “original signature, autograph or mark” that is not a “facsimile, reproduction, typewritten or other substitute signature, autograph or mark.” *Id.***
- 2. Under OAC 230:15-5-84, a National Voter Registration Act application must include an “original signature” or “original mark,” which precludes any signature or mark that would be a facsimile, reproduction, or substitute.**
- 3. The Allpoint Pen technology, as described, requires signature motions be recorded on an electronic device and transmitted to a machine that reproduces a signature, does not satisfy the requirements for Oklahoma Voter Registration Applications or**

⁴ Available at <http://ok.gov/elections/documents/vrform.pdf>.

⁵ Available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_6-25-14_ENG.pdf.

National Voter Registration Act applications under 26 O.S.2011, § 4-112(A) and OAC 230:15-5-84, because the resulting signatures are not original signatures.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

JARED HAINES
ASSISTANT SOLICITOR GENERAL

OPINION 2014-11

The Honorable Jerry Ellis
Oklahoma State Senator, District 5

October 1, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Does 57 O.S.Supp.2013, § 515, which requires that a probation officer have a bachelor's degree with at least twenty-four (24) credit hours of study in psychology, sociology, social work, criminology, education, criminal justice administration, penology, or police science apply to employees of a district attorney who provides probation supervision services?**
- 2. Is a district attorney in violation of 21 O.S.Supp.2013, §§ 263 and 1532 by directing a member of his or her staff to conduct court-ordered probation supervision if the staff member does not have the training and experience described in 57 O.S.Supp.2013, § 515?**

I.

INTRODUCTION

Procedures governing probation supervision during a deferred or suspended sentence are not derived from federal or state constitutional law. Probation supervision is not a right, privilege, or entitlement the defendant may claim as his own. Instead, probation supervision is a condition of a *criminal sentence* and a creature of statute ordered into existence at the discretion of the trial judge. 22 O.S.Supp.2013, §§ 991a(A)(1), 991c(A)(7); *Gray v. State*, 1974 OK CR 186, ¶ 10, 527 P.2d 338, 343. Courts have the authority to suspend or defer the execution of a sentence and order probation supervision. 22 O.S.Supp.2013, § 991a(A)(1) (suspended sentences); *id.* § 991c(A)(7) (deferred sentences). As a part of the sentencing process, the court may order probation supervision by one of three entities: “a Department of Corrections employee, a private supervision provider, or other person designated by the court[.]” *Id.* § 991a(A)(1)(s). The district attorney’s office is not explicitly listed as an entity that may conduct court-ordered probation supervision in Section 991a(A)(1)(s), and there is no statute that expressly empowers the district attorney to supervise defendants. However, the Oklahoma Court of Criminal Appeals held that courts may consider the district attorney’s office as an “other person designated by the court,” which permits a district attorney to provide probation supervision services to defendants in accordance with a court order under Section 991a(A)(1)(s). *State ex rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 14, 288 P.3d 247, 251.

II.

A DEFENDANT UNDER PROBATION SUPERVISION BY A DISTRICT ATTORNEY IS NOT ENTITLED TO A PROBATION SUPERVISOR WITH CERTAIN TRAINING SPECIFIED IN 57 O.S.SUPP.2013, § 515.

In your Opinion request¹ you raise concerns that a defendant under supervision by the district attorney should not be supervised by a person unless that person meets the specific qualifications found in 57 O.S.Supp.2013, § 515 and 70 O.S.Supp.2013, § 3311. These statutes are located in the section of the law that addresses requirements for probation-parole officers under the Department of Corrections and peace officers, and should be considered in that context. Specifically, Title 57 of the Oklahoma Statutes addresses prisons and reformatories, and Section 515 of Title 57 contains laws governing probation-parole officers employed by the Oklahoma Department of Corrections. Notably, a “district attorney” is not referenced or even alluded to in any part of these statutes. Title 57 O.S.Supp.2013, § 515 reads:

All probation-parole officers shall be deemed peace officers and shall possess the powers granted by law to peace officers. Probation-parole officers shall meet all of the training and qualifications for peace officers required by Section 3311 of Title 70 of the Oklahoma Statutes. Qualifications for probation-parole officers shall be good character and a bachelor’s degree from an accredited college or university including at least twenty-four (24) credit hours in any combination of psychology, sociology, social work, criminology, education, criminal justice administration, penology or police science.

Id. In addition, 70 O.S.Supp.2013, § 3311, referenced in Section 515 above, describes the powers and functions of the Council on Law Enforcement Education and Training (“CLEET”) and the minimum criteria to become a CLEET certified officer. *See id.* These statutes dictate the training and qualifications for peace officers and Oklahoma Department of Corrections probation-parole officers, and cannot be read so broadly as to dictate minimum qualifications for employees in the district attorneys’ offices who supervise probation. Nowhere in these two statutes are training requirements for a district attorney’s office mentioned because these requirements apply only to Department of Corrections probation-parole officers and peace officers. Without further instruction by the sentencing judge, Department of Corrections probation-parole officer is the only probation officer who can be held to these standards.

¹ Letter from Jerry Ellis, Oklahoma State Senator, to Scott Pruitt, Attorney General of Oklahoma (July 14, 2014) (on file with author).

Furthermore, it is a well-established principle of statutory construction that statutes should be construed according to their plain and ordinary meaning. *Wallace v. State*, 1996 OK CR 8, ¶ 14, 910 P.2d 1084, 1086 (citations omitted). In fact, “[t]he fundamental rule of statutory construction is to ascertain and give effect to legislative intent, and that intent is first sought in the language of the statute.” *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656, 658; see *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 11, 230 P.3d 853, 859 (footnotes omitted); *World Pub. Co. v. Miller*, 2001 OK 49, ¶ 7, 32 P.3d 829, 832 (footnotes omitted). Title 57 O.S.Supp.2013, § 515 is under the section of law dealing with the Department of Corrections and reflects the intent of the Legislature to provide duties and requirements for probation officers employed by the Oklahoma Department of Corrections.

In 2014, the Oklahoma Legislature enacted a new law, 2014 Okla. Sess. Laws ch. 414, § 2 (codified as 57 O.S.Supp.2014, § 515a, effective November 1, 2014), which addresses other supervision standards that apply to felony probation supervision. In this section, the Department of Corrections, a district attorney, and the private supervision provider are each listed specifically by name, and the Legislature is clear that this new law applies to all three entities, including a district attorney. *Id.* § 515a(A). The language of the statute in Section 515a exhibits the Legislature’s intent to create minimum supervision standards fully described in Section 515a(B) for those entities mentioned by name in Section 515a(A); however, the new law does not include specific educational requirements for probation supervision officers. *Id.*

What 57 O.S.Supp.2014, § 515a does do is impose minimum supervision standards on the supervising agency and describes duties such as intake and orientation procedure, mandatory evaluations of the offender, and the process for issuing sanctions. With this new law, the Legislature neither incorporates into Section 515a the educational requirements from Section 515 that apply to probation-parole officers, nor does it revise the language of Section 515 to expressly list the “Department of Corrections, a district attorney, or private supervision provider[s],” as it does in the new law. 57 O.S.Supp.2014, § 515a(A). Giving full effect to the intent of the Legislature, as expressed in 57 O.S.Supp.2013, § 515 and 57 O.S.Supp.2014, § 515a, the statutes do not require a district attorney or his or her staff members who conduct supervision to possess the educational requirements in Section 515. District attorneys and their staff are acting within their authority to serve as probation supervisors. Additionally, there is no indication the Oklahoma Legislature created Section 515 to control district attorneys or their employees in the course of providing probation supervision services, and it would be improper to enlarge the meaning of these words beyond their intended scope. As a result, a plain language reading supports the conclusion that the requirements for probation officers listed in 57 O.S.Supp.2013, § 515 and 70 O.S.Supp.2013, § 3311, do not apply to employees in the district attorney’s office who provide supervision services.

III.**A DISTRICT ATTORNEY IS NOT IN VIOLATION OF STATE LAW BY DIRECTING STAFF MEMBERS, WHO DO NOT HAVE THE TRAINING AND EDUCATION ENUMERATED IN 57 O.S.SUPP.2013, § 515, TO CONDUCT PROBATION SUPERVISION.**

Pursuant to Oklahoma State Statutes, as interpreted by the Oklahoma Court of Criminal Appeals, a district attorney may provide probation supervision services to defendants ordered by the court to serve their suspended or deferred sentences on probation. 22 O.S.Supp.2013, § 991a(A)(1)(s); *Stice*, 2012 OK CR at ¶ 14, 288 P.3d at 251. Employing the reasoning in Part I of this Opinion, Oklahoma law does not require district attorney probation supervision services to be conducted by one with the education and training requirements for Department of Corrections officers listed in 57 O.S.Supp.2013, § 515, and accordingly a district attorney is not in violation of state law² by providing such services.

It is, therefore, the official Opinion of the Attorney General that:

- 1. The qualifications for probation-parole officers found in 57 O.S.Supp.2013, § 515 apply to probation-parole officers who are employed by the Oklahoma Department of Corrections, and this statute was not intended to govern employees in district attorneys' offices who supervise offenders.**
- 2. A district attorney and his or her staff are not in violation of 21 O.S.Supp.2013, §§ 263 and 1532 by providing probation supervision with probation officers who do not have educational and training requirements delineated in 57 O.S.Supp.2013, § 515. The requirements in Section 515 of Title 57 apply to probation-parole officers under the Department of Corrections, and this statute cannot be construed so broadly as to apply to and control a district attorney's office.**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

LAUREN E. HAMMONDS
ASSISTANT ATTORNEY GENERAL

² In your Opinion request, you specifically cite to 21 O.S.Supp.2013, § 263, which criminalizes pretending to be an executive officer, and 21 O.S.Supp.2013, § 1532, which criminalizes false impersonation and receiving money or property intended for another. *See* n.1. Without specific facts, a district attorney does not violate these laws when he or she simply directs a staff member to conduct court-ordered probation supervision services.

OPINION 2014-12

The Honorable Patrick Anderson
State Senator, District 19

October 15, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

May a county government impose a tax on tobacco products and/or cigarettes in addition to what is collected under state law?

I.

INTRODUCTION

The Oklahoma Tax Code distinguishes between “tobacco products” and “cigarettes.” According to the Oklahoma Tax Code, a “tobacco product” is defined as:

[A]ny cigars, cheroots, stogies, smoking tobacco (including granulated, plug cut, crimp cut, ready rubbed and any other kinds and forms of tobacco suitable for smoking in a pipe or cigarette), chewing tobacco (including cavendish, twist, plug, scrap and any other kinds and forms of tobacco suitable for chewing), however prepared; and shall include any other articles or products made of tobacco or any substitute therefor.

68 O.S.2011, § 401(g). As distinguished from “tobacco products,” the Tax Code defines “cigarettes” as follows:

The term “cigarette” is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes[.]

Id. § 301(1).

Article 4 of the Oklahoma Tax Code provides that “tobacco products” are subject to taxation by the State:

The sale, barter or exchange of tobacco products or possession of tobacco products for consumption, is hereby declared to be subject to taxation authorized by Section 12 of Article X of the Oklahoma Constitution, and it is the purpose and intention of this article to provide revenue for the expense of the state government. The revenue, including interest and penalties, collected under this article shall be paid monthly by the Tax Commission to the State Treasurer to be placed in the General

Revenue Fund, to be paid out pursuant to direct appropriation by the Legislature.

Id. § 404. While Article 4 of the Oklahoma Tax Code imposes a tax on “tobacco products,” it is Article 3 of the Tax Code by which the State imposes a tax on “cigarettes”:

The sale, gift, barter, or exchange of cigarettes, or the having possession of cigarettes for consumption, is hereby declared to be subject to taxation authorized by Section 12 of Article X of the Oklahoma Constitution, and it is the purpose and intention of the State of Oklahoma, and it is the purpose and intention of this article, to provide revenue for the expense of the state government. The revenues, including interest and penalties, collected under this article shall be paid monthly by the Tax Commission to the State Treasurer to be apportioned as follows: Of the amounts specified by law to be used for the payment and discharge of the interest on and the principal of the bonds issued pursuant to the provisions of Sections 57.31 through 57.43, 57.61 through 57.73, 57.81 through 57.92, 57.101 through 57.112, 57.121 through 57.135 and 57.300 through 57.313 of Title 62 of the Oklahoma Statutes or any other law providing for such payment and discharge, any amount in excess of the amount necessary for such payment and discharge shall be deposited in the General Revenue Fund of this state, to be paid out only on direct appropriations of the Legislature of the State of Oklahoma.

Id. § 303.

Thus, from the foregoing, it is clear that the Oklahoma Tax Code defines “tobacco products” and “cigarettes” differently, taxes “tobacco products” and “cigarettes” at different rates, and imposes the taxes on “tobacco products” and “cigarettes” under different articles of the Tax Code. *Compare* 68 O.S.2011, §§ 401(g), 404 (taxation of “tobacco products”), *and* 68 O.S.2011, §§ 301(1), 303 (taxation of “cigarettes”).

II.

COUNTIES ARE INVOLUNTARY POLITICAL SUBDIVISIONS WITHOUT INHERENT TAXING POWERS.

A county is an involuntary political subdivision of the State without inherent powers. *See Johnston v. Conner*, 1951 OK 262, ¶ 7, 236 P.2d 987, 989; *Hern-*

don v. Anderson, 1933 OK 490, ¶ 16, 25 P.2d 326, 329; A.G. Opin. 2003-29, at 166. A county is subject to unqualified legislative control except as restrained by the Constitution:

A county being an involuntary, subordinate political subdivision of the state, created to aid in the administration of governmental affairs of said state, and possessed of a portion of the sovereignty, has no inherent powers but derives those powers solely from the state. All of the powers intrusted to it are the powers of the sovereignty which created it. Its duties are likewise the duties of the sovereignty.

Johnston, 1951 OK 262, ¶ 7, 236 P.2d at 989 (citations omitted); *Herndon*, 1933 OK 490, ¶ 16, 25 P.2d at 329; *accord* A.G. Opin. 2003-29, at 166. “Counties have only such authority as is granted by statute.” *Tulsa Expo. & Fair Corp. v. Bd. of County Comm’rs*, 1970 OK 67, ¶ 26, 468 P.2d 501, 507. Thus, a county, being an involuntary political subdivision of the State without inherent powers of its own, derives all of its power from the State.

“Our Constitution vests the whole matter of taxation exclusively within the power of the Legislature as limited by the Constitution.” *City of Sand Springs v. Dep’t of Pub. Welfare*, 1980 OK 36, ¶ 19, 608 P.2d 1139, 1148; A.G. Opin. 2003-29 at 163 (quoting *City of Sand Springs v. Dep’t of Pub. Welfare*, 1980 OK 36, ¶ 19, 608 P.2d 1139, 1148). Specifically, the Oklahoma Constitution provides:

The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

OKLA. CONST. art. X, § 12; *see also* OKLA. CONST. art. X, § 13 (“The State may select its subjects of taxation, and levy and collect its revenues independent of the counties, cities, or other municipal subdivisions.”). A county, having no inherent powers of its own, cannot, by its own power, impose a tax:

“A county . . . cannot impose taxes; that power is derived from the state. The power to impose taxes is vested in the Legislature of the state. The apportionment of that tax is included in the power to impose taxes.”

. . . .

Within the boundaries of the State the power to tax and to collect taxes, limited only by the provisions of the Constitutions

of the State and of the Nation, rests in the State itself springing from its sovereignty.

Johnston, 1951 OK 262, ¶¶ 7-8, 236 P.2d at 989-90 (citations omitted); *see also Herndon*, 1933 OK 490, ¶ 16, 25 P.2d at 329; *accord* A.G. Opin. 2003-29, at 166. Accordingly, it is the Legislature that has the power to tax. Thus, a county having no inherent powers of its own, may not autonomously impose a tax.

Even though a county may not autonomously impose a tax, the Oklahoma Constitution provides that the Legislature may confer the power to assess and collect certain types of taxes upon counties:

The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes.

OKLA. CONST. art. X, § 20. “It is to be observed that under section 20 of article 10 of the Oklahoma Constitution the power is reserved in the Legislature to confer upon the county the power to assess and collect taxes for the purposes of the county, and that the Legislature has the power to define and designate the purpose for which it authorized the county to assess and levy taxes.” *Herndon*, 1933 OK 490, ¶ 33, 25 P.2d at 332-33. “By legislative enactment, [the power to tax and to collect certain taxes] has been delegated [by the Legislature] to the officers of the several counties.” *Johnston*, 1951 OK 262, ¶ 8, 236 P.2d at 990; *see also* A.G. Opin. 2003-29, at 166 (holding the power to impose taxes is vested in Legislature and delegated to counties).

Thus, from the foregoing, three things become clear: 1) county governments are involuntary political subdivisions of the State without inherent powers of their own; 2) the whole matter of taxation lies exclusively within the power of the Legislature; and 3) the Legislature, through legislative enactment, may give county governments the authority to impose and collect certain taxes. Against this backdrop, we will turn to the question presented.

III.

THE OKLAHOMA LEGISLATURE SPECIFICALLY EXCLUDED COUNTY GOVERNMENTS FROM THE AREA OF TOBACCO AND CIGARETTE TAXATION WHEN IT ENACTED 37 O.S.2011, § 600.10.

The Oklahoma Legislature has spoken directly to a county government’s ability to impose taxes on “tobacco products” and “cigarettes” in the Prevention of

Youth Access to Tobacco Act (37 O.S.2011, §§ 600.1 – 600.23). In 37 O.S.2011, § 600.10, the Oklahoma Legislature provides as follows:

No agency or other political subdivision of the state, including, but not limited to, municipalities, counties or any agency thereof, may adopt any order, ordinance, rule or regulation concerning the . . . taxation of tobacco products, except as provided in Section 1511 of Title 68 of the Oklahoma Statutes,¹ Section 1-1521 et seq. of Title 63 of the Oklahoma Statutes² and Section 1247 of Title 21 of the Oklahoma Statutes.³ Provided, however, nothing in this section shall preclude or preempt any agency or political subdivision from exercising its lawful authority to regulate zoning or land use or to enforce a fire code regulation regulating smoking or tobacco products⁴ to the extent that such regulation is substantially similar to nationally recognized standard fire codes.

Id. (emphasis added) (footnotes added).⁵

¹ Title 68 O.S.2011, § 1511 provides “that cities, municipalities and towns are authorized to levy a license or occupation tax upon coin-operated devices, or persons operating the same, or premises where same are located, in an amount not in excess of seventy-five percent (75%) of the [state] fee hereby imposed.” The “coin-operated device” exception to 37 O.S.2011, § 600.10 is not applicable to the question presented.

² Title 63 O.S.2011, § 1-1521 through 63 O.S.Supp.2013, § 1-1527 constitutes the “Smoking in Public Places and Indoor Workplaces Act.” The “Smoking in Public Places and Indoor Workplaces Act” exception to 37 O.S.2011, § 600.10 is not applicable to the question presented.

³ Title 21 O.S.Supp.2013, § 1247 is a statute that pertains to smoking in “public areas,” “indoor workplaces,” and “educational facilities.” The version of 21 O.S.Supp.2013, § 1247 that was in effect at the time this Opinion was written was amended by the Oklahoma Legislature on April 25, 2014 to include provisions related to “veterans centers operated by the State.” The new version of this statute that contains the language related to “veterans centers” does not go into effect until November 1, 2014. *See* 2014 Okla. Sess. Laws ch. 167, § 1. The “smoking in public areas,” “indoor workplaces,” and “educational facilities” exception to 37 O.S.2011, § 600.10 is not applicable to the question presented. Additionally, the amendatory language pertaining to “veterans centers” that goes into effect on November 1, 2014 is not applicable to the question presented. *See* 2014 Okla. Sess. Laws ch. 167, § 1.

⁴ The question presented does not involve the regulation of “zoning or land use,” nor does it involve the enforcement of “a fire code regulation regulating smoking or tobacco products.”

⁵ Note that the language of the version of 37 O.S.2011, § 600.10 that is in effect at the time this Opinion is written was amended by the Oklahoma Legislature on April 25, 2014. 2014 Okla. Sess. Laws ch. 162, § 10. However, the new version of the statute containing the amendatory language will not be effective until November 1, 2014. *Id.* § 14. The amendatory language does nothing to change the version cited above except to make that section also include “vapor products.” The amendatory language that will be effective November 1, 2014 reads as follows:

No agency or other political subdivision of the state, including, but not limited to, municipalities, counties or any agency thereof, may adopt any order, ordinance, rule

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The Prevention of Youth Access to Tobacco Act defines “tobacco products” in a more expansive manner than does the Tax Code. The Prevention of Youth Access to Tobacco Act defines “tobacco product” to include any product that contains tobacco and is intended for human consumption:

“Tobacco product” means any product that contains tobacco and is intended for human consumption[.]

37 O.S.2011, § 600.2(5).⁶ It is clear that both “tobacco products” and “cigarettes,” as defined under the Tax Code, contain tobacco, are intended for human consumption, and therefore fit within the definition of “tobacco products” as provided in the Prevention of Youth Access to Tobacco Act. *See* 68 O.S.2011, § 401(g) (Tax Code definition of “tobacco product”); 68 O.S.2011, § 301(1) (Tax Code definition of “cigarette”).

Accordingly, the Legislature has specifically excluded county governments from the taxation of “tobacco products” and “cigarettes” in 37 O.S.2011, § 600.10. *See* 37 O.S.2011, § 600.10 (providing “no . . . count[y] . . . may adopt any order, ordinance, rule or regulation concerning the . . . taxation of tobacco products” (emphasis added)). Consequently, since county governments are involuntary political subdivisions of the State without inherent powers of their own, and since the whole matter of taxation lies exclusively within the power of the Legislature, a county government does not have the power to impose a tax on “tobacco products” and/or “cigarettes” in addition to what is collected under state law. *See City of Sand Springs*, 1980 OK 36, ¶ 19, 608 P.2d at 1148; A.G. Opin. 2003-29, at 163 (holding the whole matter of taxation lies exclusively within the power of the Legislature); *see also Johnston*, 1951 OK 262, ¶¶ 7-8, 236 P.2d at 989-90; *Herndon*, 1933 OK 490, ¶ 16, 33, 25 P.2d at 329, 332-33; A.G. Opin. 2003-29, at 163, 166 (holding county’s power to tax is derived from state Legislature).

or regulation concerning the . . . taxation of tobacco products or vapor products, except as provided in Section 1511 of Title 68 of the Oklahoma Statutes, Section 1-1521 et seq. of Title 63 of the Oklahoma Statutes and Section 1247 of Title 21 of the Oklahoma Statutes. Provided, however, nothing in this section shall preclude or preempt any agency or political subdivision from exercising its lawful authority to regulate zoning or land use or to enforce a fire code regulation regulating smoking or tobacco products to the extent that such regulation is substantially similar to nationally recognized fire codes.

2014 Okla. Sess. Law ch. 162, § 10. Thus, the amendatory language to include “vapor products” does not change the conclusion reached in this Opinion.

⁶ Note that the language of the version of 37 O.S.2011, § 600.2 that is in effect at the time this Opinion is written was amended by the Oklahoma Legislature on April 25, 2014. 2014 Okla. Sess. Laws ch. 162, § 3. However, the new version of the statute containing the amendatory language will not be effective until November 1, 2014. *Id.* § 14. The amendatory language does nothing to change the definition of “tobacco product” cited above. *See* 2014 Okla. Sess. Law ch. 162, § 10.

It is, therefore, the official Opinion of the Attorney General that:

A county government may not impose a tax on tobacco products and/or cigarettes in addition to what is collected under state law. 37 O.S.2011, § 600.10.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

RYAN R. CHAFFIN
ASSISTANT ATTORNEY GENERAL

OPINION 2014-13

The Honorable Dustin Roberts
Oklahoma State Representative, District 21

October 17, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. May an Emergency Medical Service District, formed by vote of taxpayers under the provisions of Article X, Section 9C of the Oklahoma Constitution, lawfully use funds collected from the tax levy established by that section to purchase and operate a wheelchair van to transport patients discharged from a medical facility to a nursing home or place of residence when the medical necessity for an ambulance is not met but special circumstances exist that require transportation?**
- 2. May a wheelchair van be used for transportation of patients to and from licensed rehabilitation facilities when the above conditions are present?**

I.

AN EMERGENCY MEDICAL SERVICE DISTRICT FORMED UNDER ARTICLE X, SECTION 9C OF THE OKLAHOMA CONSTITUTION MAY USE TAX LEVIES ONLY TO PROVIDE EMERGENCY AMBULANCE SERVICES.

Article X, Section 9C was added to the Oklahoma Constitution by State Question No. 522, by a vote of the people of Oklahoma on August 24, 1976.¹ Subsection (a) authorizing the formation of emergency medical service districts provides in pertinent part that:

- (a) The board of county commissioners, or boards if more than one county is involved, may call a special election to determine whether or not an ambulance service district shall be formed. . . . All registered voters in such area shall be entitled to vote, as to whether or not such district shall be formed, and at the same time and in the same question authorize a tax levy not to exceed three (3) mills for the purpose of providing funds for the purpose of support, organization, operation and maintenance of *district am-*

¹ Available at <https://www.sos.ok.gov/gov/questions.aspx>.

ambulance services, known as emergency medical service districts and hereinafter referred to as “districts.”²

Id. (emphasis added) (footnote added).

Significantly, the language of OKLA. CONST. art. X, § 9C uses the term “***district ambulance services***” interchangeably with “***emergency medical service districts***.” *Id.* (emphasis added). The later term is used multiple times throughout the section. Additionally, subsection (b) of Section 9C authorizes the issuance of bonds “for the purpose of acquiring ***emergency vehicles***” and subsection (e) refers to the “operation and maintenance of said ***emergency medical service***.” *Id.* (emphasis added).

It appears that the terms “***ambulance service***” and “***emergency service***” were both central concepts in adoption of this amendment and the intended purpose was to provide ambulance services for emergency situations (emergency ambulance services). “A constitutional amendment should be construed in consideration of its purpose and be given a practical interpretation to carry out the plainly manifested purpose of the people who adopted it.” *Smith v. State Bd. of Equalization*, 1981 OK 57, ¶ 9, 630 P.2d 1264, 1267. The terms “***ambulance***” and “***emergency***” are not defined in Section 9C and therefore, are to be understood in their ordinary sense except where a contrary intention plainly appears. See *Edmondson v. Pearce*, 2004 OK 23, ¶ 72, 91 P.3d 605, 635. The terms are defined in the Second College Edition of the *American Heritage Dictionary* to mean:

ambulance – “[a] vehicle specially equipped to transport the sick or wounded.”

emergency – “[a]n unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action.”

Id. at 101, 448.

Thus, the purpose of the constitutional provision is to provide ***specially equipped vehicles to transport sick or wounded persons when unexpected, sudden, serious, and/or urgent situations occur which demand immediate action***. The funds collected pursuant to a Section 9C tax levy must be used to meet this purpose.

In reaching this conclusion, we note that OKLA. CONST. art. X, § 9C(b) provides:

² This Opinion only addresses the use of funds collected pursuant to the tax levy established by Article X, Section 9C of the Oklahoma Constitution. There may be other methods established by law for the purpose of funding ambulance services and/or emergency services. This Opinion does not address whether it may be lawful to purchase or operate a wheelchair van using funds collected based upon any other funding mechanism.

Any district board of trustees may issue bonds, if approved by a majority vote at a special election for such purpose. All registered voters within the designated district shall have the right to vote in said election. Such bonds shall be issued for the purpose of acquiring emergency vehicles and *other equipment* and maintaining and housing the same.

Id. (emphasis added).

Thus, while tax levies may not be used to purchase non-emergency vehicles, bond money may be used for such purposes.

II.

WHEELCHAIR VANS MAY BE PURCHASED BY TAXES LEVIED PURSUANT TO ARTICLE X, SECTION 9C OF THE OKLAHOMA CONSTITUTION ONLY IF THEY ARE SPECIALLY EQUIPPED VEHICLES USED TO TRANSPORT SICK OR WOUNDED PERSONS FOR UNEXPECTED SITUATIONS OR SUDDEN OCCURRENCES, WHICH ARE SERIOUS AND URGENT IN NATURE, AND DEMAND IMMEDIATE ACTION.

Having determined that an emergency is required to use taxes levied under Section 9C we must determine whether a “wheelchair van” can be used for a constitutionally permissible purpose under Section 9C. The term “wheelchair van” is not used in OKLA. CONST. art. X, § 9C. The basic concept of a wheelchair van is a vehicle, which has been modified or equipped with either a ramp or lift for access by persons in wheelchairs. It is conceivable that a wheelchair van could be considered an “ambulance,” and that it could be suitable for use in an “emergency.” To the extent that both elements exist, that the wheelchair van is an ambulance and that it is used for emergencies, then Section 9C funds could be expended.

We note the language of your question, which inquires about the permissibility of using a wheelchair van “when the medical necessity for an ambulance is not met,” implies that the van would not qualify as an ambulance. Providing emergency medical service is a central purpose of OKLA. CONST. art. X, § 9C, thus some form of emergency medical necessity would be required for the use of funds levied under this provision.

We determine that funds collected pursuant to OKLA. CONST. art. X, § 9C may be used for situations requiring an ambulance (a vehicle specially equipped to transport the sick or wounded), which are also emergencies (unexpected situations or sudden occurrences of serious and urgent nature which demand

immediate action). Section 9C funds may be used to purchase and operate a wheelchair van for this purpose, but only when both components of this purpose are present.

III.

FUNDS COLLECTED PURSUANT ARTICLE X, SECTION 9C OF THE OKLAHOMA CONSTITUTION MAY NOT BE USED FOR TRANSPORTATION OF PATIENTS TO AND FROM LICENSED REHABILITATION FACILITIES.

As stated above, the purpose of OKLA. CONST. art. X, § 9C is to provide emergency ambulance services. The transportation of patients to and from rehabilitation facilities does not involve an emergency. Thus, a tax levy under this section may not be expended to transport to and from rehabilitation facilities.

IV.

THE CONCLUSIONS IN THIS OPINION REQUIRE THE WITHDRAWAL OF ATTORNEY GENERAL OPINION 83-300.

In arriving at this interpretation, we are aware of a previous Attorney General Opinion, which addressed similar issues. In A.G. Opin. 83-300, the issue was whether an ambulance service district established pursuant to Article X, Section 9C of the Oklahoma Constitution had the authority to use levied funds for nonemergency transportation of persons within the district. The Opinion focused upon the definition of “ambulance,” but did not acknowledge that providing “emergency” services is also a central purpose of OKLA. CONST. art. X, § 9C. The Opinion concluded that “[t]he district may also provide transportation for *sick* people who are not in need of immediate enroute [sic] medical care,” and that levied funds may be used to provide non-emergency transportation. A.G. Opin. 83-300, at 552. After conducting the analysis above, we see that the conclusion reached in A.G. Opin. 83-300 does not accurately reflect the purposes of this constitutional amendment. The language of the amendment expresses that Emergency Medical Service Districts are intended to provide “ambulance” services for “emergencies.” To the extent that A.G. Opin. 83-300 relies upon reasoning or reaches a conclusion that is in conflict with this Opinion, it is hereby withdrawn.

It is, therefore, the official Opinion of the Attorney General that:

- 1. An ambulance service district established pursuant to Article X, Section 9C of the Oklahoma Constitution may use taxes levied pursuant to that provision to purchase or operate wheelchair**

vans only if the intended use is to provide emergency ambulance services. Bonds may be issued under Section 9C(b) to acquire “other equipment” that could include a wheelchair van.

- 2. Funds collected pursuant to Article X, Section 9C of the Oklahoma Constitution may not be used for transportation of patients to and from licensed rehabilitation facilities as such transportation does not constitute an emergency.**
- 3. To the extent that A.G. Opin. 83-300 relies upon reasoning or reaches a conclusion that is in conflict with this Opinion, it is hereby withdrawn.**

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

ANASTASIA (STACY) PEDERSON

ASSISTANT ATTORNEY GENERAL

OPINION 2014-14

Chairman Troy L. Wilson
Workers' Compensation Commission

October 31, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. **If the Workers' Compensation Commission ("Commission"), in hearing appeals from judgments, decisions, or awards made by administrative law judges, arbitrators or appeals committees, is not subject to Article II of the Administrative Procedures Act, 75 O.S.2011 & Supp.2014, §§ 250 – 323, governing individual proceedings, may the Commission lawfully enter into executive session under the Open Meeting Act, 25 O.S.2011 & Supp.2014, §§ 301 – 314, to deliberate in order to render decisions on the appeals brought before them?**
2. **If the Commission is not permitted to enter into executive session under the Open Meeting Act, is the Commission permitted to deliberate regarding the appeals by virtue of the deliberative process privilege?**
3. **If the Commission is not permitted to deliberate outside of a public meeting under the Open Meeting Act or under the deliberative process privilege, is there another statutory provision or privilege permitting the Commission to maintain the confidentiality of the deliberative process?**

In 2013 the Oklahoma Legislature enacted a comprehensive overhaul of the Workers' Compensation System, in which they created a new statutory body named the Oklahoma Workers' Compensation Commission ("Commission"). 2013 Okla. Sess. Laws ch. 208. The legislation contains three separate acts: the Administrative Workers' Compensation Act, 85A O.S.Supp.2013, §§ 1 – 125, the Oklahoma Employee Injury Benefit Act, *id.* §§ 200 – 213, and the Workers' Compensation Arbitration Act, *id.* §§ 300 – 328. Part of the Administrative Workers' Compensation Act that you referenced in your letter,¹ *id.* § 19(F), provides that "[a]ll appeals or disputes arising from actions of the Commission shall be governed by provisions of this act and the Commission ***shall not be subject to the provisions of the Oklahoma Administrative Procedures Act***, except as provided in this act." *Id.* (emphasis added). In addition, the law requires that the Commission's hearings are to be open to the public. *Id.* § 72(B).

¹ Letter from Troy L. Wilson, Chairman, Workers' Compensation Commission, to E. Scott Pruitt, Attorney General, Oklahoma (Aug. 18, 2014) (on file with author).

The Commission is charged with three types of appeals. Under the new law a party may appeal a decision made by an administrative law judge to the Commission, and the Commission is authorized to reverse, modify, or affirm the trial judge's decision. *Id.* § 78(A). Second, the Commission is required to review adverse benefit determinations under the Oklahoma Employee Injury Benefit Act. This act provides that the Commission, sitting en banc, is to hear petitions for review on adverse benefit decisions made by appeal committees of an employer's benefit plan. *Id.* § 211(B)(5)-(6). Finally, the Commission is charged with hearing motions to confirm, modify, correct, or vacate an arbitrator's award. *Id.* § 322.

In light of all of these requirements, your questions relate to the ability of the Commission to confidentially deliberate during these appeal proceedings outside the presence of the parties and the public in executive session or outside of a public meeting.

**THE WORKERS' COMPENSATION COMMISSION
CANNOT DELIBERATE IN EXECUTIVE SESSION
UNDER THE OPEN MEETING ACT, 25 O.S.2011
& SUPP.2014, §§ 301 – 314, NOR OTHERWISE
CONFIDENTIALLY DELIBERATE PURSUANT
TO ANY OTHER STATUTORY PROVISION OR
PRIVILEGE.**

All agencies, unless exempted, are subject to the Oklahoma Administrative Procedures Act ("APA"), which provides specific statutory procedures that govern individual proceedings or hearings in Article II. 75 O.S.2011, § 250.1. The APA states, in relevant part, "[d]eliberations by administrative heads, hearing examiners, and other persons authorized by law may be held in executive session pursuant to paragraph 8 of subsection B of Section 307 of Title 25 of the Oklahoma Statutes." *Id.* § 309(D). The reciprocal provision is found in the Open Meeting Act's section authorizing executive sessions. 25 O.S.2011, § 307(B)(8). That provision authorizes public bodies to hold executive session for the purpose of "[e]ngaging in deliberations or rendering a final or intermediate decision in an individual proceeding pursuant to Article II of the Administrative Procedures Act[.]" *Id.* The Open Meeting Act, which governs

all statutorily defined meetings² of public bodies, restricts executive sessions³ to the specifically enumerated reasons listed in the act. *Id.* § 307(A).

The Legislature plainly expressed its intent in the Open Meeting Act that “[a]ll meetings of public bodies . . . shall be held at specified times and places which are convenient to the public and **shall be open to the public, except as herein-after specifically provided.**” *Id.* § 303 (emphasis added). In light of this clear expression of legislative intent, we turn to Oklahoma Supreme Court precedent that provides, “[a] court is required to apply a plain, direct reading to an examined statute. If a statute is plain, unambiguous and its meaning clear, and no occasion for the application of the rules of construction exist, a statute will be accorded the meaning expressed by the language used.” *Mangrum v. Fensco, Inc.*, 1999 OK 78, ¶ 12, 989 P.2d 461, 464. Further, “[t]he Court presumes that the Legislature expressed its intent and that it intended what it expressed. Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them.” *Ledbetter v. Howard*, 2012 OK 39, ¶ 12, 276 P.3d 1031, 1035 (footnotes omitted).

The statutes in question are clear in their meaning. Public bodies are permitted to engage in deliberations in an executive session for purposes of an individual proceeding, under both the APA and Open Meeting Act provisions, only when used in conjunction with the procedures found in Article II of the APA. By purposefully exempting the Commission from the APA, the Legislature removed the Commission’s ability to confidentially deliberate under this provision. As the statutory language is clear we can only conclude that the Commission cannot meet in executive session for the purposes of holding deliberations in an individual proceeding.

Finally, we are unable to locate any other statutory provisions or privileges directly applicable to the Commission that would authorize it to hold confidential deliberations.⁴ When the Legislature enacted the Open Meeting Act and its

² The Open Meeting Act defines meeting as:

“Meeting” means the 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 the public body when no business of the public body is discussed[.]

25 O.S.2011, § 304(2).

³ While not defined in the Open Meeting Act, “[a]n executive session, by definition, is closed to the public.” *Rabin v. Bartlesville Redevelopment Trust Auth.*, 2013 OK CIV APP 72, ¶ 10, 308 P.3d 191, 193.

⁴ Your second question refers to the deliberative process privilege. The issue of whether this privilege exists in Oklahoma is currently the subject of pending litigation before the Oklahoma Supreme Court. It is the longstanding policy of this office not to answer questions presently pending before any court, and thus we must decline to answer question two. A.G. Opin 79-216, at 346.

subsequent amendments, it intended to restrict the ability of agencies to confidentially deliberate because one of the public policies of the Open Meeting Act is that agencies “should not be allowed to deprive the public of its inalienable right to be present and heard at all deliberations wherein decisions affecting the public are being made.” *Haworth Bd. of Educ. v. Havens*, 1981 OK CIV APP 56, ¶ 9, 637 P.2d 902, 904 (quoting *Bd. of Pub. Instruction. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969)).

While we are aware that this conclusion may place the Commission in the unusual place of holding these deliberations in public, clear statutory language controls our analysis. We defer to the Legislature in making this public policy decision, and we must presume that the Legislature considered all of the consequences and determined that the public’s interest would best be served by the Commission holding its deliberations in public. *Cf. City of Anadarko v. Fraternal Order of Police*, 1997 OK 14, ¶ 11, 934 P.2d 328, 332 (recognizing that elected lawmakers are aware of the consequences inherent in legislation).

It is, therefore, the official Opinion of the Attorney General that:

The Legislature intentionally and expressly exempted the Workers’ Compensation Commission from Article II of the Administrative Procedures Act, 75 O.S.2011 & Supp.2014, §§ 250 – 323. This also excluded the Commission from using the individual proceeding deliberation provisions of the Open Meeting Act, 25 O.S.2011, § 307(B)(8), to engage in deliberations in executive session. As no other statutory provision or privilege permits the Commission to hold confidential deliberations in an individual proceeding, we conclude that the Commission must hold its deliberations in an open meeting. See *Haworth Bd. of Educ.*, 1981 OK CIV APP 56, ¶ 9, 637 P.2d 902, 904.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

MATTHEW LAFON
ASSISTANT ATTORNEY GENERAL

OPINION 2014-15

The Honorable Ron Justice
State Senator, District 23

October 31, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

In 1996 Canadian County voters approved a county sales tax for the purpose of financing, construction and equipping of a juvenile delinquents detention facility, and juvenile justice facilities, including design, construction, expenses, operations, equipment, and furnishings.

- 1. What type of activity constitutes the operations of a juvenile delinquents detention facility and a juvenile justice facility?**
- 2. What limitations exist, if any, on the type of programs that can be funded by this sales tax? May the proceeds be used to finance the operation of juvenile rehabilitation and education programs such as truancy enforcement, an alternative school for Canadian County students who have been suspended from their home school, drug screening for children, substance abuse treatment, drug court for families with children in the custody of the Department of Human Services and the supervision of visitation and child exchange between divorced parents?**
- 3. May the proceeds of the sales tax be used to pay salaries and expenses related to the operation of a juvenile bureau created pursuant to 10A O.S.2011 & Supp.2014, §§ 2-4-101 through 2-4-110?**
- 4. What are the responsibilities of the trustees of the public trust that owns the facilities, the members of the county excise board and the board of county commissioners with regard to how the proceeds from this sales tax are expended?**

I.

NO TAX LEVIED AND COLLECTED FOR ONE PURPOSE SHALL EVER BE DEVOTED TO ANOTHER PURPOSE.

The resolution for the particular sales tax about which you inquire reads as follows:

A RESOLUTION PROVIDING FOR FUNDS FOR CANADIAN COUNTY, OKLAHOMA; AUTHORIZING THE

CALLING OF A SALES TAX ELECTION LEVYING A .35 OF ONE CENT SALES TAX ON THE GROSS RECEIPTS OR PROCEEDS ON CERTAIN SALES FOR AN UNLIMITED PERIOD, SUCH TAX TO BE USED FOR CONSTRUCTION, FINANCING AND EQUIPPING OF A JUVENILE DELINQUENTS DETENTION FACILITY AND JUVENILE JUSTICE FACILITIES IN CANADIAN COUNTY, INCLUDING DESIGN, CONSTRUCTION, EXPENSES, OPERATIONS, EQUIPMENT AND FURNISHINGS; FIXING AN EFFECTIVE DATE, MAKING PROVISIONS SEPARABLE; AND DECLARING AN EMERGENCY.

Canadian Cnty. Comm'rs Res. No. 96-20.¹

Section 4 of the resolution, which was adopted by the Commissioners of Canadian County, further specified the purpose of the resolution as follows:

It is hereby declared to be the purpose of this Sales Tax Resolution to provide for a county sales tax of .35 of one cent. Such revenues shall be utilized for design, construction, financing, operations, equipment and furnishing of the Facilities to be located in Canadian County.

Canadian Cnty. Comm'rs Res. No. 96-20, § 4, p.2, on file with the Attorney General's Office.

The term "facilities" is defined in the commissioners' resolution to include the "Juvenile Delinquents Detention Facility and Juvenile Justice Facilities." *See id.* at p.1, first recital.² Section 5 of the commissioners' resolution also places the following restrictions on the use of the project described in Section 4.

The abovedescribed [sic] Project to be financed with such Sales Tax is subject to certain restrictions, as follows:

- (1) The Project is to be implemented for the development of the Facilities approved by the County Commissioners;
- (2) The Facilities are to be owned by the Canadian County Public Facilities Authority, subject to the direction of the Canadian County Commissioners to the Trustees of the Canadian County Public Facilities Authority.

¹ A photocopy of the Canadian County Commissioners' Resolution is on file in the Oklahoma Attorney General's office.

² Pursuant to 10A O.S.2011, § 2-3-103(C)(2), "[t]he board of county commissioners of every county shall provide for the temporary detention of a child who is or who may be subject to secure detention and may construct a building or rent space for such purpose." *Id.*

Canadian Cnty. Comm'rs Res. No. 96-20, § 5, p.2. The resolution does not specify whether the proceeds from the sales tax are to be deposited in the county's general revenue fund or a dedicated sales tax revolving fund. We understand from information provided by Canadian County that the sales tax proceeds are deposited into a revolving fund and intermingled with other revenue generated from contracts with schools and state agencies.

The principal restrictions on a county's use of sales tax funds are imposed by the Oklahoma Constitution at Article X, Section 19.

Every act enacted by the Legislature, and ***every ordinance and resolution passed by any county***, city, town, or municipal board or local legislative body, ***levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.***

Id. (emphasis added). The Oklahoma Supreme Court has held Section 19 contains two distinct commands. The first is that every resolution levying a tax must specify distinctly the tax's purpose and the second is that the funds from a tax once collected for a distinct purpose shall not be used for any other purpose. *State ex rel. Bd. of County Comm'rs v. Okla. Tax Comm'n*, 1942 OK 266, ¶ 8, 127 P.2d 1052, 1054; *see also Black v. Okla. Funding Bond Comm'n*, 1943 OK 270 ¶ 6, 140 P.2d 740, 743 (holding that the purpose of Article X, Section 19, is to prohibit the improper use of a tax levy after it has been pledged for a certain purpose).³

In addition to Article X, Section 19, the Legislature has provided a statutory grant of authority to counties to levy sales taxes.

Any county of this state may levy a sales tax of not to exceed two percent (2%) upon the gross proceeds or gross receipts derived from all sales or services in the county upon which a consumer's sales tax is levied by this state. Before a sales tax may be levied by the county, the imposition of the tax shall first be approved by a majority of the registered voters of the county voting thereon at a special election called by the board of county commissioners or by initiative petition signed by not less than five percent (5%) of the registered voters of the county who were registered at the time of the last general election.

³ *See also* A.G. Opin. 2012-16, at 147, 149.

68 O.S.2011, § 1370(A). Subsection E of Section 1370 also echoes the two primary commands of the constitutional provision and gives counties two options for the deposit of the proceeds.

The county shall identify the purpose of the sales tax when it is presented to the voters pursuant to the provisions of subsection A of this section. . . . [T]he proceeds of any sales tax levied by a county shall be deposited in the general revenue or sales tax revolving fund of the county and shall be used only for the purpose for which such sales tax was designated.

Id. Your first three questions require an analysis of the stated purpose of the sales tax approved by the voters and set forth in Canadian County Commissioners' Resolution 96-20. The purpose of the Canadian County sales tax at issue is stated in both the resolution itself and the commissioners' statement of purpose which are quoted above. Because it was the voters of Canadian County who approved the sales tax, it is the voters' intent that we must attempt to discern when determining the purpose of the tax. Oklahoma law requires that ballot title measures must explain the purpose in basic words, which can be easily found in dictionaries of general usage and shall not contain any words that have a special meaning for a particular profession not commonly known to the citizens of Oklahoma. 19 O.S.2011, § 388(B); 34 O.S.2011, § 9(B). Therefore, when analyzing the meaning of the language in a ballot measure we look to the ordinary meaning of the words used.

1. The meaning of the term “operations” in the context of a juvenile delinquents detention facility and juvenile justice facility

The first question in your request focuses specifically on the meaning of the term “operations” as used in the ballot measure and resolution, and asks for an interpretation of that term in the context of a juvenile delinquents detention facility and a juvenile justice facility. The ordinary meaning of the words “juvenile delinquents detention facility” is a physical building used for confining non-adult young persons characterized by antisocial behavior in violation of the law and subject to legal action.⁴ While the dictionary contains several definitions of the word “facility” it is clear from the resolution's inclusion of the words “design” and “construction” that the definition describing a physical building is the appropriate one. This meaning is consistent with the statutory definition of

⁴ The ordinary meaning of “juvenile” is a “young person” or “CHILD,” (WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1229 (3d ed. 1993)); the meaning of “juvenile delinquent” is a “person adjudged to be a delinquent under an age fixed by law,” *id.*; the meaning of “juvenile delinquency” is a “status in a juvenile characterized by antisocial behavior” in “violation of the law” and “subject to legal action,” *Id.*; the meaning of “detention” is “the state of being confined,” *id.* at 616; and the meaning of “facility” is “something . . . built” or “constructed” to “perform some particular function.” *Id.* at 812-13.

a juvenile detention facility found in the Oklahoma Juvenile Code. “‘Juvenile detention facility’ means a facility which is secured by locked rooms, buildings and fences, and meets the certification standards of the Office [of Juvenile Affairs] and which is entirely separate from any prison, jail, adult lockup, or other adult facility, for the temporary care of children.” 10A O.S.Supp.2014, § 2-1-103(21).

The ordinary meaning of the term “juvenile justice facility” is a physical building used for the administration and determination of the rights of non-adult young persons characterized by antisocial behavior in violation of the law and subject to legal action according to juvenile delinquency laws.⁵ Under this meaning a juvenile justice facility could include a juvenile delinquency court building.

The ordinary meaning of the word “operation” in the context of a physical building means those activities which give the building itself the quality or state of being put to work, becoming active and functional, being ready for action for the purpose for which it was constructed.⁶ Therefore, the operation of a physical facility includes the activities that make the facility or building itself functional for its purpose but would not include the activities that make the people who use and occupy the facility functional for their purpose. The people who use and occupy the facility are not *the facility*.

As a general matter, in order for any physical facility or building to be active and functional, it would need at a minimum to satisfy the applicable construction codes and any other requirements, which are a prerequisite to occupancy and use. It would also need to provide the appropriate physical spaces, accessibility accommodations, elevators, safety features, climate system, plumbing system, electrical system, communication system and any other system particular to the purpose of the building. It would also include the necessary staff to provide those operational activities that support the function of the physical building. For example, the activities of a janitor who makes sure the building is sanitary supports the function of the physical facility itself but the activities of a guard who escorts a juvenile detainee from a living room to the cafeteria is supporting the function of those who occupy the facility. A person who makes sure the facility’s kitchen is in working order serves the physical building itself, but a cook who prepares food for the juveniles serves the people who use and occupy the building.

⁵ See footnote 1 for the definition of “juvenile,” “juvenile delinquent,” “juvenile delinquency,” and “facility.” The ordinary meaning of “justice” is “administration of law: the establishment or determination of rights according to the rules of law or equity. *Id.* at 1228.

⁶ The meaning of “operate” is to “put to work, be active,” the meaning of “operation” is the “quality or state of being functional,” and the meaning of “operational” is the state of being “ready for or in condition to undertake a destined function . . . in readiness for action.” WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1580-81 (3d ed. 1993).

Therefore, to answer your first question, the type of activities that constitute the operations of a juvenile delinquents detention facility and a juvenile justice facility are the operational activities that make the physical building functional for *its* purpose but not those activities that make the people who use and occupy the building functional for *their* purpose. This analysis applies to both types of facilities.

2. The funding of programs with the sales tax proceeds

Your second question inquires about limitations on the types of programs that may be funded with the sales tax proceeds. As noted above, neither the ballot measure, the resolution title nor the statement of purpose mentions the word “programs.” The sales tax is to be used for the purpose of the financing, construction, equipping, design, expenses, furnishing and operation of two types of physical facilities. Under Oklahoma law, funds from a tax once collected for a distinct purpose shall not be used for any other purpose. OKLA. CONST. art. X, § 19. Therefore, the proceeds may not be used to finance programs such as juvenile rehabilitation and education programs, truancy enforcement, an alternative school for Canadian County students who have been suspended from their home school, drug screening for children, substance abuse treatment, drug court for families with children in the custody of the Department of Human Services⁷ and the supervision of visitation and child exchange between divorced parents.

3. The funding of a juvenile bureau with the sales tax proceeds

Your third question inquires about using the sales tax proceeds to pay the salaries and expenses related to the operation of a juvenile bureau. Under the Oklahoma Juvenile Code, juvenile bureaus are categorized as one of the agencies and programs comprising the juvenile justice system.

1. “*Agencies and programs* comprising the juvenile justice system” means:
 - a. the courts, the District Attorneys Council and offices of the district attorneys, state and local law enforcement agencies, *juvenile bureaus*, the Department of Human Services, the Office of Juvenile Affairs, the Oklahoma Commission on Children and Youth, the Department of Corrections, the Oklahoma State Bureau of Investigation, any other state agency responsible for the care, custody or supervision of youth alleged or adjudicated to be delinquent

10A O.S.2011, § 2-7-902 (emphasis added). Juvenile bureaus are authorized to exist in certain counties having a population of eighty thousand or more on or

⁷ Family drug courts are authorized under the Oklahoma Children’s Code and are not, therefore, juvenile delinquency courts. See 10A O.S.2011, § 1-4-712(A).

before January 1, 2005. *See* 10A O.S.Supp.2014, § 2-4-101. In 2014, Section 2-4-101 was amended to include an extensive list of juvenile justice services and programs a juvenile bureau is authorized to provide to children, youth and families located within its county. *See* 2014 Okla. Sess. Laws ch. 335, § 1. Those services and programs include a wide variety of activities designed to divert children and youth from the juvenile justice system and to alleviate conditions in the family and home that may lead to juvenile delinquency. *See id.* The county is responsible for the expenses of a juvenile bureau including the salaries and expenses of the employees. “All expenses incurred in complying with the provisions of this article [on juvenile bureaus] shall be a county charge **or funded by a special sales tax dedicated to juvenile programs and expenses**[.]” 10A O.S.Supp.2013, § 2-4-107(D)(1) (emphasis added). The bolded language regarding a special sales tax dedicated to programs and expenses was added during the 2013 legislative session. 2013 Okla. Sess. Laws ch. 404, § 17(D)(1). However, it is not applicable to your questions even if it had been law in 1996, because, as discussed above, the sales tax about which you inquire is not dedicated to funding juvenile programs and expenses.

Therefore, as a general matter, the proceeds from the Canadian County sales tax dedicated for the financing, construction, equipping, design, expenses, furnishing and operation of juvenile delinquents detention and justice facilities may not be used to pay the salaries and expenses related to the operation of a juvenile bureau, or its services or programs as a juvenile bureau is an agency of the county and not a facility.

4. The responsibilities of the Canadian County Public Facilities Authority, the Canadian County Excise Board and the Canadian County Board of County Commissioners

Your fourth and final question asks about the responsibilities of the trustees of the Canadian County Public Facilities Authority, the members of the county excise board and the board of county commissioners with regard to the expenditure of the sales tax proceeds. The Canadian County Public Facilities Authority (“CCPFA”) is a public trust created for the benefit of Canadian County pursuant to 60 O.S.2011, §§ 176 – 180.4. The CCPFA was created in 1984 to hold and manage such property on behalf of Canadian County as is conveyed or assigned to it.⁸ The three Trustees of the CCPFA are the incumbent members of the Board of Canadian County Commissioners, with their successors in office, and their general duties pursuant to the Declaration of Trust are to carry out the purpose of the trust.⁹ With regard to the juvenile delinquents detention facility and juvenile justice facilities, those facilities are to be owned by the CCPFA subject to the direction of the Canadian County Commissioners to the Trustees who

⁸ *See* Declaration of Trust, on file with the Attorney General’s Office.

⁹ *See id.*

are the same individuals.¹⁰ Therefore, the responsibility of the CCPFA Trustees with regard to the facilities and sales tax proceeds about which you inquire is to follow the direction of the Canadian County Board of Commissioners.

You also inquire about the duties of the county excise board. You have noted in your request letter that Canadian County has not elected to come under the Budget Board Act. The county excise board is comprised of three members appointed one each by the Oklahoma Tax Commission, the Canadian County Board of County Commissioners and the district judge. 68 O.S.2011, §§ 2861(B), 3005.1(A). The powers and duties of a county excise board in a non-budget board county are set forth at 68 O.S.Supp.2013, § 3006 and 68 O.S.2011, § 3007.

In its functionings it is hereby declared an agency of the state, as a part of the system of checks and balances required by the Constitution, and as such it is empowered to require adequate and accurate reporting of finances and expenditures for all budget and supplemental purposes, charged with the duty of requiring adequate provision for performance of mandatory constitutional and statutory governmental functions within the means available, but it shall have no authority thereafter to deny any appropriation for a lawful purpose if within the income and revenue provided.

Id. § 3006(B). Subsection (2) of Section 3007 provides the following with regard to the excise board's budgetary duties:

Examine specifically the several items and amounts stated in the estimate of needs, and ***if any be contained therein not authorized by law or that may be contrary to law***, or in excess of needs, as determined by the excise board, ***said item shall be ordered stricken and disregarded***. If the amount as to any lawful item exceeds the amount authorized by law, it shall be ordered reduced to that extent; otherwise, the excise board joins in responsibility therefor.

Id. (emphasis added). Accordingly, the excise board's responsibilities, in its role as an agency of the state and as a part of the system of checks and balances required by the Constitution, include striking items from the county budget estimate that are not authorized by law or which are contrary to law. In addition, as a general matter, the final approval of the appropriation of funding for county offices is the responsibility of the county excise board. 19 O.S.Supp.2013, § 180.65(D).

You have inquired specifically about the excise board's responsibilities in the context of the sales tax proceeds for the juvenile facilities in Canadian County.

¹⁰ See Canadian Cnty. Comm'rs Res. 96-20, at § 5.

In that regard, it is the voters of Canadian County who have already voted to appropriate those proceeds for a specific purpose. Pursuant to Article X, Section 19, of the Oklahoma Constitution and 68 O.S.2011, § 1370, those proceeds can only be used for the purpose specified in the ballot measure and resolution and as such the county excise board has no discretion to appropriate those funds for any other purpose. Therefore, the county excise board's responsibility with regard to the sales tax proceeds for the design, construction, equipment, furnishing, expenses and operation of a juvenile delinquents detention center and juvenile justice facilities is to ensure that those proceeds are appropriated for only those budget items that are within the distinct purpose of the ballot measure and resolution.

You also inquire about the responsibilities of the Canadian County Board of County Commissioners. A board of county commissioners has the express power to audit the accounts of all officers responsible for the collection and disbursement of county money. 19 O.S.Supp.2013, § 339(A)(2). County commissioners shall superintend the fiscal concerns of the county and keep an account of the receipts and expenditures of the county. 19 O.S.2011, § 345. "[T]he board of county commissioners is the fiscal agent of the county. It has general control over the property and finances of the county." *Cavin v. Bd. of County Comm'rs*, 1934 OK 245 ¶ 11, 33 P.2d 477, 479. As the fiscal agent responsible for superintending the funds of Canadian County, the board of county commissioners is responsible for ensuring that the sales tax proceeds are accounted for and spent in a manner consistent with the law.

Section 1370(E) of Title 68 gives counties two options for the deposit of the sales tax proceeds. They shall be deposited in either the general revenue fund or in a separate revolving fund specifically dedicated to sales tax. *Id.* "[C]ounties, . . . have no inherent power or authority, but possess, and can exercise, only those powers granted in express words or necessarily or fairly implied or incidental to the powers expressly granted." *Shipp v Se. Okla. Indus. Auth.*, 1972 OK 98 ¶ 15, 498 P.2d 1395, 1398. Therefore, there is no authority for Canadian County to deposit the sales tax proceeds into a revolving fund not specifically dedicated to sales tax where the proceeds are intermingled with other revenues. Accordingly, to ensure that the sales tax funds are not intermingled with other county revenues and spent only for the authorized purpose, the board of county commissioners could direct that the proceeds from the juvenile facilities sales tax be deposited in a separate revolving fund. As the fiscal agent responsible for superintending the funds of Canadian County, the board of county commissioners is responsible to ensure that the sales tax proceeds are not intermingled and are used exclusively for the purpose expressed in the ballot measure and resolution.

It is, therefore, the official Opinion of the Attorney General that:

- 1. The proceeds of the Canadian County sales tax shall only be used for the distinct and specific purpose of the financing, construction and equipping of a juvenile delinquents detention facility, and juvenile justice facilities, including design, construction, expenses, operations, equipment, and furnishings approved by the voters and set forth in the resolution. OKLA. CONST. art. X, § 19; 68 O.S.2011, § 1370.**
 - A. Under Oklahoma law the language of ballot title measures must contain basic words without special meaning, and when analyzing the meaning of the language in a ballot measure we look to the ordinary meaning as found in dictionaries of general usage. 19 O.S.2011, § 388(B)(2); 34 O.S.2011, § 9(B)(2).**
 - B. The ordinary meaning of the words “juvenile delinquents detention facility” is a physical building, including the necessary equipment and furnishings, used for confining non-adult young persons characterized by antisocial behavior in violation of the law and subject to legal action.**
 - C. The ordinary meaning of the words “juvenile justice facility” is a physical building, including the necessary equipment and furnishings, used for the administration and determination of the rights of non-adult young persons characterized by antisocial behavior in violation of the law and subject to legal action according to juvenile delinquency laws. The county juvenile justice facility would include a juvenile delinquency courthouse.**
 - D. The ordinary meaning of the word “operation” in the context of a physical building means those activities which give the building itself the quality or state of being put to work, becoming active and functional, being ready for action for the purpose for which it was constructed.**
 - E. The type of activities that constitute the operations of a juvenile delinquents detention facility and juvenile justice facility are those activities that make the physical facility itself functional for *its* purpose but would not include the activities that make the people who use and occupy the facility functional for *their* purpose.**
- 2. The sales tax resolution does not authorize the funding of programs. The sales tax proceeds may not be used to finance the**

operation of juvenile rehabilitation and education programs such as truancy enforcement, an alternative school for Canadian County students who have been suspended from their home school, drug screening for children, substance abuse treatment, drug court for families with children in the custody of the Department of Human Services and the supervision of visitation and child exchange between divorced parents. OKLA. CONST. art. X, § 19; 68 O.S.2011, § 1370.

- 3. As a general matter the proceeds from the Canadian County sales tax dedicated for the financing, construction, equipping, design, expenses, furnishing and operation of juvenile delinquents detention and justice facilities may not be used to pay the salaries and expenses related to the operation of a juvenile bureau as a juvenile bureau is an agency of the county and not a facility. 10A O.S.2011, § 2-7-902(A)(1).**
- 4. The responsibilities of the trustees of the Canadian County Public Facilities Authority (“CCPFA”), which owns the facilities, the members of the county excise board, and the board of county commissioners with regard to how the proceeds from the sales tax are as follows:**
 - A. Pursuant to the terms of the resolution, the juvenile delinquents detention facility and juvenile justice facilities are to be owned by the CCPFA, and the Trustees must act subject to the direction of the board of county commissioners who are the same individuals. Therefore, the responsibility of the CCPFA Trustees, with regard to the facilities and sales tax proceeds about which you inquire, are to follow the direction of the board of county commissioners.**
 - B. The county excise board’s responsibility, with regard to the sales tax proceeds for the financing, construction, equipping, design, expenses, furnishing and operation of a juvenile delinquents detention center and juvenile justice facilities, is to ensure that those proceeds are appropriated for only those budget items that are within the distinct purpose of the ballot measure and resolution. OKLA. CONST. art. X, § 19; 68 O.S.2011, § 3007.**
 - C. As the fiscal agent responsible for superintending the funds of Canadian County, the board of county commissioners is responsible to ensure that the sales tax proceeds are not intermingled and are used exclusively for the purpose expressed in the ballot measure and resolution. The board**

can direct that the funds be deposited in a dedicated revolving fund and not intermingled with other revenues. OKLA. CONST. art. X, § 19; 68 O.S.2011, § 1370; 19 O.S.Supp.2013, § 339; 19 O.S.2011, § 345; *Cavin v. Bd. of County Comm'rs*, 1934 OK 245 ¶ 11, 33 P.2d 477, 479.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

RICHARD D. OLDERBAK

ASSISTANT ATTORNEY GENERAL

OPINION 2014-16

The Workers' Compensation Commission
Chair Troy Wilson, Commissioner Denise Engle
Commissioner Robert Gilliland

November 18, 2014

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Is the purpose of the tax levied in 85A O.S.Supp.2013, § 122(B) solely to provide funds for the Workers' Compensation Fund?**
- 2. If so, did the Legislature violate Article X, Section 19 of the Oklahoma Constitution by appropriating proceeds of that tax in a manner inconsistent with that purpose?**

I.

INTRODUCTION

In your request, you state that 85A O.S.Supp.2013, § 122(A) levied certain tax assessments to provide funds for the Workers' Compensation Fund—a fund created in 85A O.S.Supp.2013, § 28. Further, you state that use of these proceeds for any “other purpose” must be consistent with this primary purpose—providing funds for the Fund. You believe that use of these tax proceeds for general revenue purposes—and not for the use or benefit or at the direction of the Workers' Compensation Commission—violates Article X, Section 19 of the Oklahoma Constitution.¹

On May 1, 2013, the Legislature approved Senate Bill (“SB”) 1062—a bill designed to transition the old, adversarial workers' compensation court system into an administrative system for resolving workers' compensation claims. On May 6, 2013, Governor Mary Fallin signed SB 1062 into law and it is now codified as Title 85A. *See* 2013 Okla. Sess. Laws ch. 208.

Title 85A is comprised of three inter-related acts: the Administrative Workers' Compensation Act (“Act”), the Oklahoma Employee Injury Benefit Act, and the Workers' Compensation Arbitration Act. 85A O.S.Supp.2013, §§ 1, 200, 300. Section 19 of Title 85A places with the Workers' Compensation Commission (“Commission”) the exclusive responsibility and duty of carrying out the provisions of the first act: the Administrative Workers' Compensation Act. *Id.* § 19(A).

Your questions relate to two sections of the Administrative Worker's Compensation Act: Section 122 and Section 28, which is cross-referenced in Section 122. Section 122 of Title 85A states, in relevant part:

¹ Letter from Workers' Compensation Comm'n to E. Scott Pruitt, Attorney General of Oklahoma (June. 13, 2014) (on file with author).

- A. The Workers' Compensation Fund established by Section 28 of this act ***shall be used for the costs of administering this act and for other purposes pursuant to legislative appropriation.***
- B. ***For the purpose of providing funds for the Workers' Compensation Fund,*** each mutual or interinsurance association, stock company, CompSource Oklahoma or other insurance carrier writing workers' compensation insurance in this state shall pay to the Oklahoma Tax Commission an assessment at a rate of one percent (1%) of all gross direct premiums written during each quarter of the calendar year for workers' compensation insurance on risks located in this state after deducting [certain expenses]. . . .
- C. When an employer is authorized to become a self-insurer, the Commission shall so notify the Tax Commission, giving the effective date of such authorization. The Tax Commission shall then assess and collect from the employers carrying their own risk an assessment at the rate of two percent (2%) of the total compensation for permanent total disability awards, permanent partial disability awards and death benefits paid out during each quarter of the calendar year by the employers. Such assessment shall be payable by the employers and collected by the Tax Commission
- D. It shall be the duty of the Tax Commission to collect the payments provided for in this act. . . .
- E. ***The Tax Commission shall pay monthly to the State Treasurer to the credit of the General Revenue Fund all monies collected under the provisions of this section.***

Id.

Section 28, in turn, establishes the Workers' Compensation Fund ("Fund") within the Office of the State Treasurer, *id.* § 28(A)(1). Section 28 states in relevant part:

- B. Except as provided [for an unrelated fund], no money shall be appropriated from these funds for any purpose except for the ***use and benefit, or at the direction, of the Oklahoma Workers' Compensation Commission.***
- C. Except as provided [for an unrelated fund], all funds established under this section shall be administered, disbursed, and invested under the direction of the Commission and the State Treasurer.

. . . .

- H. The Workers' Compensation Fund shall be used to fund the activities of the Commission in administering the Administrative Workers' Compensation Act and for any other purposes related to the Administrative Workers' Compensation Act that the Commission deems appropriate, subject to the provisions of Section 122 of this title.
- I. Unless provided otherwise in the Administrative Workers' Compensation Act, all fines and penalties assessed under the . . . Act shall be deposited into the Workers' Compensation Fund.

Id. § 28. Because these sections cross-reference each other, they must be read together.

II. STANDARDS

Article X, Section 19 of the Oklahoma Constitution states that “[e]very act enacted by the Legislature . . . levying a tax shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.” OKLA. CONST. art. X, § 19. “[S]ection 19 contains two distinct commands (1) that every act . . . levying a tax specify distinctly the purpose for which the tax is levied, and (2) that the tax when so levied and collected for one purpose shall never be devoted to another purpose.” *State ex. rel. Bd. of Comm’rs v. Okla. Tax Comm’n*, 127 P.2d 1052, 1054 (Okla. 1942).

When called upon to interpret statutes, we apply rules of statutory interpretation. Those rules provide that, in the case of clear, unambiguous statutes, we must presume “that the Legislature expressed its intent and intended what it expressed.” *Estes v. ConocoPhillips Co.*, 184 P.3d 518, 525 (Okla. 2008). “When possible, different provisions must be construed together to effect an harmonious whole.” *Villines v. Szczepanski*, 122 P.3d 466, 471 (Okla. 2005). That is, the goal “is always to construe apparently conflicting legislative enactments dealing with the same subject together as a harmonious whole so as to give effect to each provision.” *McNeill v. City of Tulsa*, 953 P.2d 329, 332 (Okla. 1998).

III.

THE TAX IDENTIFIED IN 85A O.S.SUPP.2013, § 122 IS LEVIED FOR THE PURPOSE OF PRO- VIDING PROCEEDS FOR THE WORKERS' COM- PENSATION FUND.

Turning to the first Article X, Section 19 command, the Constitution “is satisfied by a ‘general statement of the purposes’” of the act. *Howard v. Crawford*, 16 P.3d 473, 477 (Okla. Civ. App. 2000) (quoting *Sublett v. City of Tulsa*, 405 P.2d 185, 197 (Okla. 1965)); see also A.G. Opin. 2004-32, at 213 (stating that “[t]he word ‘purpose’ is used broadly in the constitution and in statutes requiring that the purpose of a tax must be stated”). That is, the purpose of a tax need not be linked to a specifically identified project, but passes constitutional muster so long as it is generally stated. See *Howard*, 16 P.3d at 477.

Here, Section 122 clearly states that the specified taxes are levied “[f]or the purpose of providing funds for the Workers’ Compensation Fund.” 85A O.S.Supp.2013, § 122(B). That is the only stated purpose for the collection of these tax proceeds. This purpose is sufficiently distinct.

Section 122 clarifies, however, that these tax proceeds must be appropriated by the Legislature. Section 122(E) states that “[t]he Tax Commission shall pay monthly to the State Treasurer *to the credit of the General Revenue* Fund all monies collected under the provisions of this section.” *Id.* § 122(E) (emphasis added). That these tax proceeds are paid to the credit of the General Revenue Fund indicates that the Legislature must appropriate them to the Fund. The statute does not state that the Legislature must appropriate all such proceeds in each fiscal year, but when it does appropriate these tax proceeds, the appropriation must be for the only purpose given for this tax levy—providing proceeds for the Fund. See *id.* § 122(B). Section 122, therefore, limits the Legislature’s ability to appropriate these proceeds.

In addition to this limitation, Sections 122 and 28 limit the use of these tax proceeds once the Legislature appropriates them to the Fund. That is, Section 122(A) states that Section 28 creates the Fund. See *id.* § 122(A). Turning to that statute, Section 28 states that no money *in the Fund* may be appropriated *from the Fund* for any purpose “except for the use and benefit, or at the direction, of the Oklahoma Workers’ Compensation Commission.” *Id.* § 28(B). Indeed, Section 28(H) reiterates that the Fund “shall be used” to fund the Commission’s activities in administering the Act “and for any other purposes *related to* the Administrative Workers’ Compensation Act that the Commission deems appropriate.” *Id.* § 28(H) (emphasis added). Additionally, subsection 28(H) clarifies that even when used for “other purposes” as deemed appropriate by the Commission these “other purposes” are “subject to the provisions of Section 122.” *Id.*

Reviewing Section 122, we see that it contains two limits on the use of proceeds in the Fund. The Fund may only be used “for the costs of administering th[e] act” and “for other purposes pursuant to legislative appropriation.” *Id.* § 122(A). We do not read this latter limitation as permitting open-ended use of monies in the Fund. Rather, we read that limitation consistently in light of Section 28(B)’s requirement that any subsequent appropriation of these proceeds must be “for the use and benefit, or at the direction, of the Oklahoma Workers’ Compensation Commission.” *Id.* § 28(B). Reading Sections 122 and 28 together,² we conclude that limitation on use of the Fund “for other purposes pursuant to legislative appropriation” (*id.* § 122(A)) must comply with Section 28(B)’s command that the monies in the Fund be for “the use and benefit, or at the direction, of the . . . Commission.” *Id.*

In sum, while it is the Legislature that appropriates these tax proceeds to the Fund pursuant to Section 122, such appropriation is limited and must be for the purpose of providing proceeds for the Fund. The funds once appropriated are further limited as set forth in Section 28. In so concluding, we provide effect to both Sections 122 and 28, giving these otherwise conflicting provisions a harmonious reading. In short, the sole purpose of this tax is to provide tax proceeds for the Workers’ Compensation Fund, and any appropriation must be consistent with this purpose.

IV.

BECAUSE THESE PROCEEDS CAN ONLY BE USED FOR THE USE AND BENEFIT OF THE COMMISSION AND AT THE DIRECTION OF THE COMMISSION, APPROPRIATION OF THESE PROCEEDS FOR AN UNRELATED PURPOSE, VIOLATES ARTICLE X, SECTION 19 OF THE OKLAHOMA CONSTITUTION.

The second command of Article X, Section 19 “is a limitation on the use of the revenue collected under any law, state or municipal, enacted thereunder.” *State ex. rel. Bd. of Cnty. Comm’rs*, 127 P.2d at 1054. Article X, Section 19 historically stands for the proposition that tax proceeds collected for one purpose cannot be diverted for other purposes. *See Ward v. State*, 56 P.2d 136, 137 (Okla. 1936); *In re State of Okla. Bldg. Bonds Comm’n*, 214 P.2d 934, 938 (Okla. 1950).

For Fiscal Year 2015, the Board of Equalization certified that this tax would generate approximately \$11 million.³ The Legislature appropriated a total of

² Rules of construction require that statutes must be construed to harmonize with each other to determine the purpose and intent of the Legislature. *McNeil*, 953 P.2d at 332.

³ *See* proposed Fiscal Year 2015 revenue verification of December 19, 2013, on file with the author.

\$5.5 million to the Workers' Compensation Commission and the Workers' Compensation Court of Existing Claims. 2014 Okla. Sess. Laws ch. 420, §§ 131, 132. All or some of the remainder of the \$11 million was appropriated in Fiscal Year 2015 for purposes other than the use and benefit of the Commission.

You ask whether appropriating the taxes for other purposes violates Article X, Section 19. We conclude that an appropriation for purposes other than to provide proceeds for the Workers' Compensation Fund violates Article X, Section 19 of the Oklahoma Constitution.

It is, therefore, the Opinion of the Attorney General that:

- 1. The tax identified in 85A O.S.Supp.2013, § 122 was levied for the sole purpose of providing proceeds for the Workers' Compensation Fund. Sections 122 and 28 of Title 85A provide limitations on appropriation and use of these tax proceeds: the Legislature may only appropriate them to the Fund, and once appropriated into the Fund, they can only be used for the use and benefit, or at the direction, of the Commission.**
- 2. The appropriation of tax proceeds for purposes other than providing proceeds for the Workers' Compensation Fund violates OKLA. CONST. art. X, § 19.**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

CARA N. RODRIQUEZ
ASSISTANT SOLICITOR GENERAL

OPINION 2014-17

The Honorable Mike Shelton
Assistant Democratic Floor Leader

November 18, 2014

This office has received your request for an Attorney General Opinion in which you ask, in effect, the following question:

Under Section 162 of Senate Bill 2127, the Oklahoma Legislature transferred some \$5 million from the Trauma Care Assistance Revolving Fund to be appropriated for other uses. Does that transfer violate Article X, Section 19 of the Oklahoma Constitution, which provides that a tax raised for one purpose shall never be devoted to another purpose?

I.

THE TRAUMA CARE ASSISTANCE REVOLVING FUND

The Oklahoma Legislature created the Trauma Care Assistance Revolving Fund (“Fund”) in 1999. *See* 1999 Okla. Sess. Laws ch. 278, § 1. This first iteration of the Fund primarily served to reimburse uncompensated trauma facilities like hospitals as well as ambulance services with a small set aside for the State Department of Health to achieve other goals under the Act. *Id.*

The Legislature altered the Fund’s scope in 2004 when it passed the Oklahoma Trauma Systems Improvement and Development Act. *See* 2004 Okla. Sess. Laws ch. 459. In that Act, the Legislature provided several mechanisms for improving trauma care in Oklahoma, including an expansion of the lawful expenditures of the Fund to include the reimbursement of doctors for uncompensated treatment. *See id.* § 10. Although some of the Act’s provisions have since been repealed, *see* 2013 Okla. Sess. Laws ch. 229, § 99, the Fund continues to operate and reimburse various trauma-related expenses according to the terms of its authorizing statute, which states that the Fund “shall be a continuing fund, not subject to fiscal year limitations” and that “[a]ll monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Department” 63 O.S.Supp.2013, § 1-2530.9(A). The Legislature made several notable findings in the Act:

1. Traumatic injury is the leading cause of death for persons under forty (40) years of age, and the third leading cause of death overall for persons of all ages. Traumatic injury is the leading cause of lost years of potential life for Oklahomans sixty-five (65) years of age and younger;
2. In addition to the physical and emotional losses that result from traumatic injury, the economic costs of such injuries

. . . far exceed losses for other diseases such as cancer, heart disease, stroke and diabetes;

3. Trauma systems dramatically reduce morbidity and mortality from major injuries; and
4. Development and improvement of trauma systems is beneficial to all citizens.

63 O.S.Supp.2013, § 1-2530.1(A).

Currently, the Fund pays 90% of all monies collected by it to reimburse “trauma facilities, licensed ambulance service providers and physicians.” 63 O.S.Supp.2013, § 1-2530.9(A)(1). The State Department of Health reports that these expenditures have, on average, come to about \$12 million per six-month period since October 2010, much of which has reimbursed hospitals at only about 60% of the amount originally billed.¹ The Fund’s ability to make these payments arises from several different sources specified in Oklahoma’s statutes. These revenue sources include special assessments, fines, court costs, fees, and taxes; many of these funding sources are closely related to motor vehicles and conduct that makes motor vehicle travel more dangerous.

First, many criminal violations of Oklahoma law, irrespective of any sentence imposed, come with a special assessment of \$100 to be deposited into the Fund. Many of these crimes involve the use of controlled dangerous substances. 21 O.S.2011, § 1220(B) (imposing special assessment for open container of alcohol crimes); 63 O.S.2011 & Supp.2013, §§ 2-401(I), 2-402(D), 2-404(D), 2-405(F), 2-406(D), 2-407(F), 2-407.1(F), 2-415(E) (imposing special assessment for controlled dangerous substance and other drug-related crimes). Additionally, Oklahoma law requires that drivers pay a special assessment of \$200 when requesting that a driver’s license be reinstated after having been revoked or suspended for certain reasons. 47 O.S.Supp.2013, § 6-212(C)(2)(b)(1).

Second, certain crimes related to the operation of vehicles may be punished with fines, and in the event that a fine is imposed for those crimes, either one half or all of such fines are deposited into the Fund. 47 O.S.2011, § 6-303(H) (requiring all fines collected for certain driving with suspended or revoked license crimes be deposited into Fund); *id.* §§ 17-101(F), 17-102(C) (requiring one-half of fines collected from Uniform Vehicle Code violations be deposited into Fund). Third, Oklahoma’s district courts deposit some court costs collected from convicted criminal defendants into the Fund. 28 O.S.2011, § 153(J)(5). Fourth, certain fees related to motor vehicles, including drivers’ license fees and a special fee collected during vehicle registration, are deposited into the Fund.

¹ Oklahoma State Department of Health, Trauma Fund Distribution Report: 2014 April p.1, available at <http://www.ok.gov/health2/documents/RecipientList08142014.pdf> (last visited Nov. 13, 2014).

47 O.S.Supp.2013, § 6-101(I)(1); 63 O.S.2011, § 4021(I). Lastly, a portion of Oklahoma's cigarette and tobacco product excise taxes flows into the Fund. 68 O.S.2011, §§ 302-5(B)(3), (D)(3); 402-3(B)(3), (C)(3).²

On June 3, 2014, the Governor signed Senate Bill 2127 ("SB 2127"). Senate Bill 2127 transferred \$5 million from the Trauma Care Assistance Revolving Fund to the Special Cash Fund of the State Treasury to be appropriated for other uses. 2014 Okla. Sess. Laws ch. 420, § 162. The Special Cash Fund is a special fund available for appropriation or transfer by the Legislature. 62 O.S.2011, § 253. Under SB 2127, the Legislature appropriated monies from the Special Cash Fund for a variety of purposes such as the operations of the Oklahoma House of Representatives. 2014 Okla. Sess. Laws ch. 420, § 142.

The Legislature has thus diverted \$5 million from the Fund to be appropriated for uses other than the purposes for which the Fund has been authorized. You ask whether this diversion violates Article X, Section 19 of the Oklahoma Constitution. We conclude that it does.

II.

ARTICLE X, SECTION 19 OF THE OKLAHOMA CONSTITUTION

The Oklahoma Constitution contains several limitations on the Legislature's taxing and spending powers, including the taxpayer protection provision at issue in Article X, Section 19. That section provides the following:

Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied, and ***no tax levied and collected for one purpose shall ever be devoted to another purpose.***

OKLA. CONST. art. X, § 19 (emphasis added).

The Oklahoma Supreme Court has articulated the overarching principles that govern interpretation of the Oklahoma Constitution. In *South Tulsa Citizens Coalition, L.L.C. v. Arkansas River Bridge Authority*, 176 P.3d 1217 (Okla. 2008), the Supreme Court stated the following:

In construing and applying constitutional provisions, the intent of the framers and the people adopting it must be given effect. Absent an ambiguity, the intent is settled by the language of

² Many of these criminal fines, costs, and special assessments flow through the Oklahoma district courts that collect them. Oklahoma law provides that some of these amounts are to be retained by the district courts to defray their collection expenses. 19 O.S.Supp.2013, § 220.

the provision itself, and the courts are not at liberty to search beyond the instrument for meaning.

Id. at 1220 (footnote omitted); *see also Okla. Elec. Co-op., Inc. v. Okla. Gas & Elec. Co.*, 982 P.2d 512, 514 (Okla. 1999) (noting the controlling importance of intent and plain text when construing the Oklahoma Constitution); *Draper v. State*, 621 P.2d 1142, 1145-46 (Okla. 1980) (same); *Latting v. Cordell*, 172 P.2d 397, 401 (Okla. 1946) (same); *Shaw v. Grumbine*, 278 P. 311, 315 (Okla. 1929) (same).

Employing these principles, a plain reading of Article X, Section 19 of the Oklahoma Constitution reveals two relatively simple requirements. First, as applied to the Legislature, all statutes levying a tax must identify the purpose for which the tax is raised. Second, after announcing the tax's purpose, the Legislature may not devote any monies collected under that tax to any other purpose.³ However, the Oklahoma Supreme Court has created two exceptions with respect to the second requirement of Article X, Section 19.

First, as was recognized in early case law, surplus monies may be used for new purposes. As the court put it in *Black v. Oklahoma Funding Bond Commission*, 140 P.2d 740 (Okla. 1943), the bar of Article X, Section 19 was “designed to prevent the concealment of the purpose of a tax levy and to prohibit the improper use of a fund after it has already been pledged” for a certain purpose. *Id.* at 743. A “surplus” is “not the result of deliberation” but accrues “only incidentally.” *Id.* Hence, where the “actual purposes and obligations for which the taxes were levied” have been “met, fully paid and therefore no longer exist,” the monies may be used for other purposes because the purpose of Article X, Section 19 would already have been “fully served.” *Id.* This exception is obviously not applicable here as the purpose of the trauma fund—primarily to reimburse trauma facilities—continues to exist. Indeed, given the continuing nature of revolving funds and their ongoing purposes, monies pledged to such funds would generally not result in a surplus satisfying this exception.

Second, the court has held that Article X, Section 23 of the Oklahoma Constitution partly amended Article X, Section 19 to allow in certain instances for the Legislature to use tax revenues for different purposes than that for which the tax was levied. Article X, Section 23 creates a system under which the State's Board of Equalization certifies to the Legislature a forecast of the State's revenues; this certification provides a basis for the Legislature's maximum appropriations for each fiscal year. OKLA. CONST. art. X, § 23(1)-(2). Section 23 of Article X also

³ By using such a broad word as “devote” rather than more narrow words such as “appropriate,” “spend,” “transfer,” or otherwise, the provision's drafters clearly intended to cover a multitude of uses of money. Any use the Legislature would make of any tax money must conform to the original purpose stated in the tax statute.

allows the Legislature to attempt to raise additional revenues, make certain new appropriations, and—most important for our purposes here—to make certain transfers of existing state funds:

All appropriations made in excess of [the Board of Equalization's] certification shall be null and void; ***provided, however, that the Legislature may . . . enact laws . . . transferring the existing revenues or unappropriated cash on hand from one fund to another***

OKLA. CONST. art. X, § 23(2) (emphasis added). Because the question here involves the transfer of cash on hand in the Trauma Care Assistance Revolving Fund, we will consider only that portion of Section 23 and how it interacts with Section 19 of the Oklahoma Constitution.

Looking to the principles articulated above that the “intent of the framers” must be controlling in construing a constitutional provision and that the “intent is settled by the language of the provision itself,” the effect of Article X, Section 23 becomes clearer. It is entirely possible that tax revenues raised for one purpose will become cash on hand in one fund or another without having already been appropriated. In these circumstances, the Legislature may transfer monies and use them for purposes not authorized in the relevant taxing statute. *See State ex rel. Hawkins v. Okla. Tax Comm’n*, 462 P.2d 536, 541 (Okla. 1969) (noting that OKLA. CONST. art. X, § 23 modifies OKLA. CONST. art. X, § 19).

Some might argue that prior Oklahoma Supreme Court decisions could be read as endorsing a near-limitless transfer power that renders Article X, Section 19 all but a dead letter as a limitation on the Legislature’s power to repurpose tax revenues. We disagree. One recent such decision, *Calvey v. Daxon*, 997 P.2d 164 (Okla. 2000), raised the question of whether bills authorizing transfers from various ***fee-generated funds*** to the Special Cash Fund constituted revenue-raising bills and hence violated the relevant constitutional provisions governing such bills. *Id.* at 166. Although the court observed that Article X, Section 23 authorizes transfers from the funds there in support of its overall holding that such transfers from ***fee-generated funds*** did not constitute new revenues, *id.* at 171-72, the court had no occasion to address the tax provision of Article X, Section 19 because no tax revenues were transferred—only fee-generated revenues.

In *City of Sand Springs v. Department of Public Welfare*, 608 P.2d 1139 (Okla. 1980), the court allowed sales tax revenues to be used to construct a facility for delinquent children, despite petitioners’ claim that the use violated Article X, Section 19. *See City of Sand Springs*, 608 P.2d at 1143. The case, however, turned on facts that are not present here. First, the majority of the tax revenues at issue had been collected pursuant to a 1965 statute that authorized the levy for ***broad purposes***, including “the support of functions of State government” and to provide services to “delinquent children.” *Id.* at 1147-48 (quoting 68

O.S.Supp.1965, § 1303). Thus, OKLA. CONST. art. X, § 19 was clearly not violated with regard to most of the tax revenues at issue, as building a juvenile delinquent facility was squarely within the purposes for which the tax was collected. The Article X, Section 19 issue related solely to tax revenues remaining in the fund that had been collected *prior* to the 1965 statute, pursuant to the 1963 version of the Sales Tax Code, which included slightly narrower purposes, including the aid of “needy dependent children, crippled children, . . . providing services to homeless and neglected children” and a few other categories. *Id.* at 1147 (quoting 68 O.S.Supp.1963, § 1303). And while the fund where the sales tax revenues resided was an appropriated fund controlled by the Department of Public Welfare, *see* 56 O.S.Supp.1965, §§ 179, 181a, the Supreme Court interpreted Article X, Section 23 as allowing the transfer. In so concluding, however, the Supreme Court was relying on the pre-1975 version of Article X, Section 23, which did not contain the “*unappropriated* cash on hand” language contained in the current version. *Compare* S.J. Res. No. 6, S.Q. No. 506, Leg. Refer. No. 206, (July 22, 1975) *available* at <https://www.sos.ok.gov/gov/questions.aspx> (last visited Sept. 12, 2014), *with Sand Springs*, 608 P.2d at 1147-48 (quoting the pre-1975 version).

In short, the Supreme Court decided *Sand Springs* to address a dispute from the late 1970s raising concerns about the mere possibility that revenues collected in a two-year window during the early 1960s could prevent spending on a related but admittedly different purpose in 1980. To the extent that the case stands for the proposition that the Legislature has *carte blanche* to transfer fully appropriated tax money in one fund to the Special Cash Fund for spending on unrelated purposes, the case would be inconsistent with the intent of the Oklahoma voters who approved Article X, Section 23 and with the principles of constitutional interpretation articulated by the Supreme Court.

If *Sand Springs* were thought to have such breadth, the case would reduce Article X, Section 19 to a practical nullity with respect to the Oklahoma Legislature. It strains credulity to believe that the voters who approved the budget balancing amendment creating Article X, Section 23’s broad system would have intended this result, particularly given that Section 19, at its core, is a taxpayer protection provision. *See Hawkins*, 462 P.2d at 540 (discussing the context surrounding the amendment’s passage). Understanding *Sand Springs* to authorize a broad transfer power would thus violate the foundational principle of effectuating the framers’ intent as well as the principle that constitutional provisions should be interpreted “in such a way that they harmonize with each other.” *See Movants to Quash Grand Jury Subpoenas Issued in Multicounty Grand Jury Case No. CJ-92-4110*, 839 P.2d 655, 656 (Okla. 1992).

We thus interpret Article X, Section 23 in line with its own text to authorize the transfer of “unappropriated cash on hand.” Article X, Section 19 “has been

modified to that extent.” *Hawkins*, 462 P.2d at 541. Article X, Section 23 does not allow the transfer and use of appropriated tax monies for purposes other than those for which they were originally collected and appropriated.

Hence, we conclude that Article X, Section 19 by its own text imposes two requirements. First, every statute imposing a tax must state a purpose for that tax. Second, all tax money collected pursuant to that tax may only be used for the purpose stated in the tax’s authorizing statute. This second requirement has two exceptions. First, a “surplus” may be transferred and used for other purposes after the original purposes for the tax have already been completely met and exhausted. Second, Article X, Section 23 creates a “transfer” exception allowing only the Legislature to transfer tax money that has not already been appropriated.

III.

THE LEGISLATURE’S TRANSFER OF TAX MONIES FROM THE TRAUMA CARE ASSISTANCE REVOLVING FUND TO THE SPECIAL CASH FUND AND SUBSEQUENT APPROPRIATION OF SUCH MONIES TO OTHER USES VIOLATES ARTICLE X, SECTION 19 OF THE OKLAHOMA CONSTITUTION.

The Trauma Care Assistance Revolving Fund and SB 2127, as described above, have three salient features. First, some of the money accruing to the Fund arises from cigarette and tobacco taxes. 68 O.S.2011, §§ 302-5(B)(3), (D)(3); 402-3(B)(3), (C)(3). Second, all money paid into the Fund is “appropriated and may be budgeted and expended by the Department.” 63 O.S.Supp.2013, § 1-2530.9(A). Third, the money has been used for purposes other than those involving trauma care. *See* 2014 Okla. Sess. Laws ch. 420, §§ 133–135, 142–143.

Applying Article X, Section 19 to the Fund, we look to whether the purpose requirement was met as well as what purpose was stated. The cigarette and tobacco tax statutes mandate that revenues generated by the taxes be apportioned between various funds, including the Trauma Care Assistance Revolving Fund. *See* 68 O.S.2011, §§ 302-5, 402-3. The portion of these taxes directed to the Fund are thus purposed to be used for the Fund and the uses for which that Fund was created. The tax thus meets the first requirement of Article X, Section 19, and unless one of the two exceptions to Article X, Section 19 applies, the tax revenues in the Fund must be used for the Fund’s purposes.

There is no hint that the “surplus” exception would be relevant. The Fund continues to operate and pay out money to hospitals, ambulance services, and

doctors. The “transfer” exception also cannot apply because all of the money in the Fund has been appropriated per the Fund’s statute. 63 O.S.Supp.2013, § 1-2530.9. Hence, any use of the tax revenues for purposes other than trauma care purposes would violate Article X, Section 19 of the Oklahoma Constitution.

Senate Bill 2127 does just that. The bill diverted some \$5 million from the Fund to the Special Cash Fund. 2014 Okla. Sess. Laws ch. 420, § 162. The bill then appropriated money from the Special Cash Fund for a variety of purposes. Senate Bill 2127 thus violated Article X, Section 19 of the Oklahoma Constitution by transferring fully appropriated tax revenues for purposes other than those for which the taxes were levied. We recognize that it is likely that not all of the transferred money arose from tax revenues because the Fund’s sources include fees, assessments, fines, and taxes.⁴ Thus, to the extent it is possible to accurately account for the sources of the transferred money, that portion of the transferred money derived from the cigarette and tobacco taxes must be considered transferred in violation of Article X, Section 19.

It is, therefore, the official Opinion of the Attorney General that:

- 1. Article X, Section 19 of the Oklahoma Constitution imposes two requirements: statutes levying taxes must state a purpose for those taxes, and all tax money collected pursuant to such statutes may only be used for those purposes stated in the authorizing statute.**
- 2. Article X, Section 19’s second requirement has a “surplus” exception. *Black v. Okla. Funding Bond Comm’n*, 140 P.2d 740, 743 (Okla. 1943). Tax money may be used for purposes different from those stated in the authorizing statute when the original purpose has already been completely met and exhausted. Given the continuing nature of revolving funds and their ongoing purposes, monies pledged to such funds would generally not result in a surplus satisfying this exception.**
- 3. Article X, Section 19’s second requirement also has a “transfer” exception. Article X, Section 23 of the Oklahoma Constitution has amended Article X, Section 19 to authorize the Legislature to transfer tax money that has not already been appropriated to be spent on purposes other than those stated in the tax’s authorizing statute. However, tax money that has been appropriated cannot be so transferred and used because of Article X, Section 19’s second requirement.**

⁴ We offer no opinion on whether the transfer of non-tax funds was proper except to state that each source of funds must be considered individually in light of applicable constitutional provisions.

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- 4. The Legislature's transfer of tax revenues from the Trauma Care Assistance Revolving Fund to the Special Cash Fund to be used for purposes other than trauma care under SB 2127 violated Article X, Section 19 of the Oklahoma Constitution.**

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

JARED HAINES
ASSISTANT SOLICITOR GENERAL

APPENDICES

RULEMAKING UNDER THE OKLAHOMA ADMINISTRATIVE PROCEDURES ACT

Updated by Sandra D. Rinehart, Senior Assistant Attorney General*

INTRODUCTION

“Rulemaking Under the Oklahoma Administrative Procedures Act” is not a topic often found in the headlines, but with the publication of the Oklahoma Administrative Code, the role of administrative rulemaking has become more public and prominent. For those engaged in the day-to-day business of state government, the rulemaking provisions of the Administrative Procedures Act, 75 O.S.2011, & Supp.2014, §§ 250 – 308.2, play an important and crucial role.

State government could not function without the operations of the hundreds of existing State agencies, boards and commissions. For those entities to operate legally and effectively, they must do so pursuant to rules – and those rules must be promulgated in accordance with the Administrative Procedures Act (“APA”).

After having created the comprehensive, complex and sometimes confusing agency rulemaking scheme found in Article I¹ of the APA, the Legislature makes important changes routinely. Consequently, those who must cope with the rulemaking requirements of the APA – whether seasoned veterans or neophytes – must return to the language of the statutes over and over. Nothing can instill an immediate familiarity with the numerous requirements and deadlines, and those who think they have mastered the process and proceed on statutes which have been amended may find the product of their labors being declared invalid.

These materials provide an overview of the major features and requirements of the APA, highlighting some of the common problem areas. We cannot stress enough the importance of readers’ acquiring the Administrative Rules on Rulemaking and the rulemaking checklists developed by the Secretary of State’s Office of Administrative Rules. These provide invaluable guidance for day-to-day rulemaking and an “at a glance” overview of the entire process. The documents are available at <https://www.sos.ok.gov/oar/info.aspx>.

* We gratefully acknowledge former Assistant Attorney General Rebecca Rhodes for her work in writing the original article in 1990.

¹ Article I of the APA deals with rulemaking. Article II deals with hearings conducted under the APA, and is not covered in these materials.

I. SCOPE OF THE APA

Who is bound by the rulemaking requirements of the APA? With exceptions, the answer is straightforward: Article I applies to every “agency” that is not specifically exempted. An “agency” is defined in 75 O.S.Supp.2014, § 250.3(3). It “includes but is not limited to any constitutionally or statutorily created state board, bureau, commission, office, authority, public trust in which the state is a beneficiary, or interstate commission.” *Id.*

It is not clear what the inclusion of “includes but is not limited to” is meant to do for the definition. Presumably, the Legislature intended that any public entity, regardless of its title or means of creation, that performs the functions of what would otherwise be an “agency” should be included in the definition. Section 250.3(3) also specifically exempts “the Legislature or any branch, committee or officer thereof” and “the courts.” Exemptions to the compliance requirement are found in Section 250.4. Despite this list, most divisions of State government are bound by Article I’s requirements.

II. WHAT IS A RULE?

This is one of the most fundamental and yet most difficult questions contained in the APA. Obviously, the first place to look for guidance is the definition provided in the APA.

A. DEFINITIONS

“Rule” means any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term “rule” includes the amendment or revocation of an effective rule

75 O.S.Supp.2014, § 250.3(17). Based on this language, then, the critical characteristics of a rule are (1) ***general applicability***; (2) ***future effect***; (3) ***implementation, interpretation, or prescription of law of policy***; or (4) ***description of procedure or practice requirements***.

As helpful as this list of characteristics may be in some instances, there will be numerous occasions in which an intended agency action may appear to fall somewhere between the delineations of this definition. Perhaps in recognition of precisely this problem, the Legislature did not stop with a catalog of “rule” traits; it went on to list explicit agency actions which are ***not*** included within the definition of “rule” under the APA, and has amended the list as it deems necessary to clarify the definition. Often, careful comparison of an intended

agency action to this list of “non-rules” can be more helpful than an evaluation in light of the general definition. The rulemaking requirements of the APA as listed in Section 250.3 of Title 75 will not apply to:

- a. the issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license,
- b. the approval, disapproval or prescription of rates. For purposes of this subparagraph, the term “rates” shall not include fees or charges fixed by an agency for services provided by that agency including but not limited to fees charged for licensing, permitting, inspections or publications,
- c. statements and memoranda concerning only the internal management of an agency and not affecting private rights or procedures available to the public,
- d. declaratory rulings issued pursuant to Section 307 of this title,
- e. orders by an agency, or
- f. press releases or “agency news releases”, provided such releases are not for the purpose of interpreting, implementing or prescribing law or agency policy[.]

Id.

This list of “non-rules” appears primarily to define clear exclusions; still, there has been a great deal of largely unresolved debate focusing on just what is meant by “not affecting private rights or procedures available to the public” in Section 250.3(17)(c). The question of whether prison inmates are members of the “public” for purposes of some administrative rules has been discussed in an Attorney General Opinion. In A.G. Opin. 99-56, the Attorney General held that the formula used by the Board of Corrections for calculating the prison system population under the Prison Overcrowding Emergency Powers Act is not subject to the notice and filing requirements of Section I of the APA. In A.G. Opin. 99-51, the Attorney General held that statements and memoranda which concern the duties, scope of employment and parameters of actions by parole officers do not affect the private rights of prisoners or procedures available to the public; instead, they are “housekeeping” functions prescribing the conduct of its staff, and are therefore not rules to be promulgated under the APA. The full text of Attorney General Opinions is available at <http://www.oscn.net>.

The Oklahoma Supreme Court has also discussed what constitutes a rule. In *Lockett v. Evans*, 330 P.3d 488, 492 (Okla. 2014), the Court found that the Department of Corrections’ protocol is not a rule under the APA because it

falls within the exclusion of “statements and memoranda concerning only the internal management of an agency and not affecting private rights or procedures available to the public.” *Id.*

Many questions remain about the scope of the phrase “not affecting private rights or procedures available to the public.” Not yet specifically answered are questions such as what constitutes the “public.” Does it include the public in a general sense, or only the “regulated public?” It is generally thought that for the rules to have any meaningful effect, the term must include both the general public and the agency’s regulated public. These questions will likely remain unresolved. However, as with all other aspects of rulemaking under the APA, if a doubt exists as to whether the statements and memoranda fall under the definition of “rule,” the safest course is to assume they do and promulgate them in accordance with the APA. This statement is not intended to encourage an unnecessary, shotgun approach to rulemaking; rather, if there exists a *legitimate* doubt as to whether something is a rule, it should be promulgated pursuant to the APA.

B. FEES VS. RATES

The distinction between rates and fees merits some attention. One of the “non-rule” exceptions to the definition in Section 250.3 explicitly provides that “the approval, disapproval or prescription of rates” shall be exempt from the rulemaking requirement of the APA. As Section 250.3(17)(b) makes clear, this exemption does not extend to fee schedules. This is because fee schedules customarily apply to the general public or a group of licensees as a whole; consequently, they are of “general applicability” and, in effect, will likely constitute a “practice requirement” (remember the Section 250.3 characteristics). *Cf.* A.G. Opin. 01-5 (differentiating a statutorily authorized “administrative penalty,” which need not be promulgated pursuant to the Administrative Procedures Act, from a “fee,” which must be so promulgated).

On the other hand, the term “rates” used in this context refers to the end result of a ratemaking process specifically geared to the determination of rates applicable to a particular person or entity, or a narrow class of people or entities. Generally, rates approved by an administrative agency will be rates which a regulated entity or industry is then authorized to charge its customers. Perhaps the clearest example can be found in the utility or insurance fields, in which the regulating body has other elaborate hearing processes and formulas established to determine and set specific rates that specific companies or groups of companies are then permitted to charge their consumers.

Another point: when attempting to distinguish fees from rates, it is important to keep in mind the defining characteristics of a “rule.” If an agency has developed a list of “charges,” it does not matter whether those charges are labeled rates or

fees; if those charges apply generally, customarily they must be promulgated under the APA.

One final point concerning fees: even those agencies that are exempted from the rulemaking provisions of the APA are restricted when it comes to raising fees. In Title 74, the title specifically dealing with State government, the Legislature has inserted a provision which prohibits any “agency, constitutionally or statutorily created state board, bureau, commission, office, authority, public trust in which the state is a beneficiary, or interstate commission, except an institutional governing board within The Oklahoma State System of Higher Education” from establishing or increasing any fee except when the Legislature is in session. The only exception to this prohibition is when the Legislature itself or federal legislation has mandated the increase, or when a failure to establish or increase fees would conflict with an order issued by a court of law. *See* 74 O.S.2011, § 3117. The provision requires the agency seeking to raise fees to notify both the executive and legislative branches of government in much the same way as is required under the APA itself.

C. SECTION 302 REQUIRED RULES

In addition to any agency action that meets the definition of “rule” under Section 250.3, each agency with rulemaking authority must also promulgate rules in accordance with Section 302. Although Section 302 rules are mandatory under the APA, they have in the past been too often overlooked.

Section 302 rules are of tremendous significance, because they essentially establish the organizational and procedural framework of the agency. They also provide the necessary channels through which the public can gain information about the agency and its functions.

Section 302 applies to each agency that has rulemaking authority. The section mandates that each agency promulgate a rule providing a description of the agency’s organization, the general course and method of its operations, and information on how the public can obtain information or make submissions or requests.

These required rules should include an agency’s rules of practice and should describe both informal and formal procedures and a description of any forms or instructions for use by the public. These rules should also provide for public access to agency rules and should provide for public inspection of all final orders, decisions, and opinions of the agency, pursuant to the Open Records Act.

It is particularly important that the public have access to prior orders, opinions and decisions of an agency. Section 302(C) requires that each agency “that issues precedent-setting orders” shall be required to maintain and index all its orders that the agency intends to rely upon as precedent. If an order is not maintained and indexed for public review, it cannot be relied upon to the detriment of any person. The reason for this is clear; the Legislature is seeking consistency in an agency’s application of its rules and orders “to each person subject to the jurisdiction of the agency.” *Id.* § 302(C)(3).

III. NECESSARY BACKGROUND

The APA requires every agency with rulemaking authority to file its rules as a precondition to the validity of those rules. The specific consequences for failure to properly file rules are discussed below.

A. THE ROLE OF THE SECRETARY OF STATE

The Secretary of State plays the central role in the administration of the APA. The Secretary of State, and more specifically the Office of Administrative Rules within the Secretary of State’s office, serves as a kind of coordinating agency for the purposes of the APA. The Office of Administrative Rules (OAR) has developed and promulgated an extensive set of Administrative Rules on Rule-making (“ARR”) which govern the specific details of rulemaking under the APA; it publishes *The Oklahoma Register* (“*Register*”), the publication vehicle for administrative rules in Oklahoma; and oversees the publication and distribution of the Oklahoma Administrative Code. Among the oversight powers granted to the Secretary of State by the Legislature is the power to refuse to accept for publication any document that does not substantially conform to the ARR. 75 O.S.2011, § 251(C).

The website of the Secretary of State, www.sos.ok.gov, is a valuable resource for those engaged in the rulemaking process. The website contains a number of documents designed to offer assistance to those engaged in the rulemaking process.

The Secretary of State has created the State Online Filing System at <http://www.ok.gov/state/filings>. Pursuant to 74 O.S.2011, § 464, agencies are required to submit proposed rules electronically to the Governor, Speaker of the House and President Pro Tempore of the Senate. The State Online Filing System was created as a one-stop filing location to receive these filings and route them to the appropriate parties.

B. PREPARATION OF RULES

1. RULEMAKING AUTHORITY

Although the nature of agency rulemaking authority is a basic, threshold issue, it is one which is too often overlooked and consequently, too often the source of agency rulemaking problems. Questions have been posed about what exactly it takes to confer rulemaking authority upon a subdivision of State government: does it require the magic words “rulemaking authority,” or is some lesser designation sufficient?

While these questions are interesting in the abstract, in reality the problems arise not from a lack of rulemaking authority, but from agency attempts to promulgate rules outside the scope of their authority or failing to promulgate policies as rules.

Agency rulemaking authority is conferred by the Legislature, whether by express words or by broader implication. These grants of power are most often found in an agency’s enabling act, the statutes which establish and define the specific agency, its duties, and functions. It is important to note, however, that other important grants of rulemaking authority may be conferred by the Legislature in wholly separate statutes. An agency’s rulemaking authority is, by its nature, limited to the regulatory areas within that agency’s purview as defined in the enabling act and other specifically relevant statutes.

Administrative rulemaking is, in essence, lawmaking within a limited area of expertise. Under the APA, at Section 308.2(C), administrative rules which have been promulgated in accordance with the APA have the force and effect of law. Any agency rules that stray beyond the agency’s scope of expertise and exceed the legislative grant of rulemaking authority, however, will be void and of no effect.

2. STATUTORY LANGUAGE

Rule drafting is the most important part of the rule development process, yet many agencies yield to the temptation to avoid the important duty to interpret the statutes and to explain agency implementation of statutes in favor of simply promulgating statutory language. Section 251(B)(2)(a) clearly requires that an agency preparing rules for promulgation shall prepare its rules in plain language which can be easily understood. This directive alone might seem to rule out the use of what is often cumbersome statutory language, but even more explicitly, Section 251(B)(2)(b) requires that agency rules:

[S]hall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to effectively convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language

which is statutory and the portion which is the agency's amplification or interpretation of that language

Id.

Obviously, this prohibition itself contains the recognition that sometimes, and perhaps even often, a rule must refer directly to an agency's enabling act or to other relevant statutes. Neither Section 251(B) nor the Administrative Rules on Rulemaking, however, envision or permit the kind of statutory echo which is present in so many agency rules.

Whenever possible, agencies should try to avoid this tendency simply to parrot statutory language. Rules which are little more than carbon copies of an agency's enabling act do very little to provide meaningful additional guidance to agency personnel, nor do they better inform the public about an agency's operations. Although it is difficult to imagine quite how a challenge to rules on this ground might be formulated, the APA does specifically prohibit the mere repetition of statutory language.

3. INCORPORATION BY REFERENCE

Section 251(D) provides that an agency may incorporate by reference the published standards established by organizations and technical societies of recognized national standing, other State agencies, or federal agencies. The Legislature provided for incorporation by reference "[i]n order to avoid unnecessary expense," and incorporation by reference can be useful in a variety of contexts. *Id.* Incorporation by reference is not, however, a substitute for the thoughtful formulation of specific rules by an agency, and using incorporation by reference brings with it a host of new problems.

First, and seemingly most common among these problems, is the tendency of agencies to incorporate by reference prospectively. Professor Arthur Earl Bonfield, a noted authority on administrative law, has aptly described the multitude of dangers inherent with prospective incorporation. He explains that:

Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or additions. This is not an inconsiderable loss. It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference²

² ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING 325 (1986).

Additionally, Professor Bonfield notes that prospective incorporation by reference involves an inappropriate delegation of power by the Legislature and the involved agency. When an agency incorporates a technical society's rules "as they are now and as they may be amended in the future," that agency effectively denies the Legislature and Governor any control over the future content of the rules.

Incorporation by reference can be a useful tool, and in many cases it is not only appropriate, but also prudent and cost effective. Agencies should take care, however, to avoid an open-ended endorsement of the rules of some other body, particularly if it is a private organization. Prospective incorporation is, at the very least, a violation of the principles of prior approval and public input which lie at the heart of the APA; at worst, prospective incorporation may constitute an unconstitutional delegation of power. In the realm in between, it is quite possible that rules which incorporate by reference prospectively will not be enforced by Oklahoma courts.

IV. PROCEDURAL REQUIREMENTS

It would be foolish to deny that the series of hoops established by the APA through which agencies must properly jump to effectively formulate administrative rules can be somewhat intimidating. As numerous as the procedural requirements are, and as cumbersome as they may appear to be, when they are broken down into their simple components, they are much less daunting.

To help calm the rulemaking anxiety generated by the APA procedural requirements and to help assure compliance with those requirements, the Office of Administrative Rules has developed checklists for both permanent and emergency rulemaking actions. These checklists (referred to earlier) help break down the cumbersome statutory and administrative requirements into their component parts and are valuable resources for agencies going through the rulemaking process. These checklists can serve as both a guide through the process and as an easy reference point in the rulemaking record.

While there is certainly something appealing about the streamlined brevity of these checklists, there are, nevertheless, some aspects of the procedural requirements for rulemaking which deserve greater attention here. For that reason, the procedural steps for both permanent and emergency rulemaking will be examined in more detail. The following is a general discussion and agencies should refer to the Administrative Rules on Rulemaking for a specific guide to rulemaking.

A. PERMANENT RULEMAKING

1. THE RULEMAKING RECORD

Section 302(B) of Title 75 requires that each agency maintain a rulemaking record for each proposed rule or promulgated rule. The first step toward promulgating a rule under the APA is opening the official agency rulemaking record. Section 302(B)(2) sets out in detail the specific required contents of the rulemaking record. There are nine types of documents that the APA requires be included in the record. As warned up front, one must refer, and keep referring, to the statutes.

The agency rulemaking record is more than a necessary evil under the APA; it can sometimes prove to be a tremendous asset to the promulgating agency. The rulemaking record can provide specific documentary evidence necessary to defend a challenge that a rule was not promulgated in substantial compliance with the APA. The agency rulemaking record compiled under Section 302, while not the exclusive basis for judicial review, will constitute the official rulemaking record.

2. NOTICE OF RULEMAKING INTENT

Section 303(A)-(C) provides that before adopting, amending, or repealing any rule, an agency shall prepare a notice of rulemaking intent to be published in the *Register*. It cannot be emphasized strongly enough how important it is to plan for the publication of this notice. Submission deadlines for publication in the *Register* are available from the OAR's website and appear elsewhere in this book. These deadlines must be considered when establishing a rulemaking schedule to ensure sufficient time for the necessary comment period and adoption by the agency in time to make the April 1st submission deadline. The Administrative Rules on Rulemaking ("ARR") establish the format for this notice; both paper copies and a compact disc must be filed with the Office of Administrative Rules for publication in the *Register*.

The APA and the ARR contain the general requirements that a notice of rulemaking intent identify the proposed rules (the ARR does specify that a chapter number and heading be included, at a minimum) and provide a summary of the effect of the proposed rule changes, including the circumstances which create the need for the rule change. The vague nature of these requirements leaves the question of what exactly is an adequate notice. The two important issues in determining the adequacy of an agency rulemaking notice are whether the agency has been specific enough in citing the affected or proposed rules and whether the agency's summary or description of the intended action is sufficient.

When determining with what degree of specificity to describe the affected rules, an agency must walk a tightrope between the problems created by too great a

degree of specificity and the possibility that the rules will be challenged or disapproved if the description of the rulemaking action is too broad or imprecise. If the rules are described too specifically, say section by section, there is the increased likelihood that individual rules may be inadvertently omitted in the gubernatorial approval, especially when an agency rulemaking action affects a large number of sections. Too broad a description, like citing the chapters and headings only, however, may mislead the public or make it impossible to determine the real nature of the rulemaking action, thereby inviting challenge or disapproval. The same problems may arise if an agency's summary of the rulemaking action is too broad. Yet, if an agency is too specific in its summary the danger arises that the notice will not be broad enough to encompass changes to the rules which may become necessary as a result of the rulemaking process, a common problem in rulemaking.

The rule of thumb to keep in mind – both when formulating the original notice of rulemaking intent and when determining if subsequent notice is necessary because of changes made during the process – is that the public must be able to determine from the notice the contents of the proposed rule change and the possible effects on their interests, so they can decide how to proceed. An agency should keep in mind that an evaluation of the extent of any changes made to rules during the rulemaking process and the effects of those changes must also be conducted when deciding whether an original notice is sufficient to encompass significant deviations from the originally proposed rules. For more information regarding the scope of the notice of rulemaking intent see BONFIELD, at 169–79.

The notice of rulemaking intent must also contain a provision for a comment period of at least 30 days from the date of the publication of the notice of rulemaking intent in the *Register*. Additionally, if an agency is scheduling a hearing on its own accord (see further discussion below), the hearing must be scheduled for a date which is also at least 30 days following the date of the publication of the notice in the *Register*. If an agency decides not to schedule a hearing of its own accord, but decides to await written request for a hearing, that agency must announce the time, place, and manner in which persons may demand a hearing on the proposed rulemaking action (Section 303(B)(9)).

Section 303 also requires that an agency must mail a copy of the notice of rulemaking intent and a copy of the rule impact statement (if available) to all persons who have made a timely request for advance notice of rulemaking proceedings by that agency; this notice must go out to these parties prior to or within three days after the notice of rulemaking intent is published in the *Register* (Section 303(B)(10)). In lieu of mailing copies, an agency may electronically notify interested persons that a copy of the proposed rule and the rule impact statement, if available, may be viewed on the agency's website. *Id.*

The Legislature has also added a requirement that an agency that determines a rule affects business entities must solicit comments from the business entities as to how the rule will affect direct costs such as fees, and indirect costs such as “reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs expected to be incurred” by the particular entity if the rule is promulgated. 75 O.S.Supp.2014, § 303(B)(6). These notice requirements are summarized in A.G. Opin. 00-27, where the Attorney General determined that Section 303 requires publication of the notice in the *Register* containing a brief summary of the proposed rule, its proposed effect and the legal basis for its adoption. The Opinion also held the agency must notify business entities if it determines the proposed rule will affect those entities, and must request that the entities give an estimate of the cost of compliance. Additionally, the Opinion states that if the notice does not provide for a public hearing, it must set forth how a hearing can be requested.

On September 10, 2013, Governor Fallin issued Executive Order 2013-34 requiring that, effective November 1, 2013, every agency, simultaneously with filing a Notice of Rulemaking Intent shall provide one electronic copy of the complete text of all proposed *permanent* rules to the Governor and the appropriate Cabinet Secretary. Under the Executive Order, the Governor and the Cabinet Secretary may disapprove a proposed rule. Emergency rules are not affected by the Executive Order.

3. *RULE IMPACT STATEMENT*

Section 303(D) requires that an agency issue a rule impact statement of a proposed rule prior to or within fifteen (15) days after the date of publication of the notice of proposed rule adoption. The rule impact statement requirement at Section 303(D) is seen by many agencies as the most cumbersome part of the process for promulgation of permanent rules under the APA; increasingly it is also seen by the Legislature as the most important part of the rule document submitted to it. The significance attached to the rule impact statement by the Legislature is reflected by additional requirements added to it over the years. Now, the rule impact statement must reflect not only things such as a description of the purpose of the proposed rule and a description of the classes of persons who will most likely be affected; it must also reflect information on cost impacts received by the agency from any private or public entities, probable benefits to the agency if the rule is promulgated, an explanation of the measures the agency has taken to minimize compliance costs, and a determination of the effect of the proposed rule on public health, safety and the environment.

The requirement for a rule impact statement may be waived in limited circumstances, but only if the agency obtains a written waiver from the Governor *before it publishes its notice of rulemaking intent*. A rule impact statement may be waived only if the rule impact statement is unnecessary or contrary

to the public interest, *see* 75 O.S.Supp.2014, § 303(D)(3), or if the agency is merely implementing statutory or federal requirements without interpreting or describing those requirements.

Section 303(D) sets out the eleven required elements of the rule impact statement; essentially these requirements together constitute a cost-benefit analysis on the proposed rule. Here again, those dealing with rulemaking should refer to this section regularly, as the requirements are amended often by the Legislature.

As daunting a task as the preparation of the statement may be for some rule-making actions, detailed and thoughtful analysis at this planning stage often will serve an agency well. There are potential rewards for the preparation of a thorough statement. Perhaps in recognition of the often herculean nature of the task, the Legislature has specifically provided in Section 303(D)(4) that the inadequacies of a rule impact statement are not grounds for invalidating a rule. However, inadequacies in the rule impact statement may be grounds for legislative or gubernatorial disapproval or for a request that an agency withdraw its rules (as an alternative to outright disapproval).

In addition, if the agency determines in the rule impact statement that the proposed rule will have an economic impact on any political subdivisions or require their cooperation in implementing or enforcing a proposed permanent rule, a copy of the proposed rule and the rule report are required to be filed, within ten (10) days after adoption of a permanent rule, with the Oklahoma Advisory Committee on Intergovernmental Relations for its review. *Id.* § 303.1(B). While advisory only, the Committee may communicate any recommendations to the Governor, the Speaker of the House of Representatives and President Pro Tempore of the Senate during the period the rules are being reviewed.

4. PUBLIC COMMENT AND HEARING

a. Public Comment

Section 303(A)(2) provides for a comment period of at least 30 days during which all interested parties may submit data, views or arguments, either orally or in writing to the agency. The agency shall consider fully all written and oral comments concerning a proposed rule. In addition, an agency must consider the effect of its action upon any affected business and governmental entities (Section 303(A)(4)) and the potential impact on various types of consumer groups (Section 303(A)(5)).

Agency consideration of any public response concerning the potential impact of a proposed rule is obviously a fundamental aspect of the APA. Agency rulemaking action is, in effect, legislative action. Because agency heads are, for the most part, appointed and not elected, public response to ill-advised agency rulemaking is not as certain or swift as action taken by the Legislature; however, this cannot justify inattention to public response. Agencies should

not be cowed by negative public reaction to a necessary and valid rulemaking action, but agencies are without the vast information gathering resources of the Legislature, and often legitimate and unforeseen problems with proposed rules may be raised first in the context of public comment.

b. The Hearing

As previously referenced, a public hearing is not required under the APA unless, within 30 days after the published notice of rulemaking intent, a written request for a hearing is submitted by: (1) at least 10 persons; (2) a political subdivision; (3) an agency; or (4) an association having not less than 25 members; (Section 303(C)(1)). Notwithstanding, the majority of agencies contemplating permanent rulemaking action hold a public hearing. Not only does a hearing guarantee a forum for the rulemaking agency to gather information about the potential impact of its intended action, the reality is that most agency rulemaking actions, especially ones dealing with matters of substance, will ultimately draw a request for a hearing. Agencies seem to prefer simply to schedule a hearing at the time the notice of rulemaking intent is filed; this provides an agency with the opportunity for advance scheduling.

5. ADOPTION OF THE PROPOSED RULE

Sometime after the completion of the comment period and after the hearing (the hearing and adoption may occur on the same day), the rulemaking authority must meet to adopt the proposed rules. Obviously, the extent to which other steps need to be taken in a particular instance will depend upon an agency's reaction to public comment. It may be that, in light of the public comment that has been received, an agency will decide to forego the rulemaking action entirely or to so alter the intended action that new public comment should or must be sought. As discussed briefly above, when significant changes are made to proposed rules during the rulemaking process, a question arises regarding the sufficiency of the original notice of rulemaking intent. In some instances it may well prove necessary to publish a second notice that reflects significant changes to allow the public to reevaluate whether their interests are affected and whether they want to participate.

Assuming the agency decides to proceed with the promulgation of its proposed rules, the rulemaking authority must meet to adopt the rules. Although there is no time period specified for how soon after the end of a comment period the adoption must come, it is important for agencies to remember that they will have only **10 days** from the adoption of the rules until those rules **must** be submitted to the Governor and the Legislature. *Id.* § 303.1(A). This is a common problem area. If an agency's rulemaking action is significant with broad-ranging implications, 10 days may not prove sufficient time to assemble the agency rule report

which must be submitted with the rules; the majority of the work on this report must therefore, realistically, be completed before adoption. In fact, in the face of a tremendous public response and a contested public hearing, 10 days may not be enough time to fully respond. Therefore, the date of adoption must be chosen carefully with the 10-day deadline in mind.

6. SUBMISSION FOR REVIEW

As has been noted, within 10 days of the adoption of a rule or set of rules, an agency must submit two copies of the regulatory text of its rules to the Governor along with an agency rule report, the contents of which are set out in Section 303.1(E). This provision was amended, effective November, 2011, to require that the citation to any federal or state law, court ruling or any other authority requiring the rule be included in the report. Within this same 10-day period, the agency must also submit two copies of the regulatory text of its rules and two copies of the agency rule report to both the Speaker of the House of Representatives and the President Pro Tempore of the Senate. The agency must also prepare a Statement of Submission for Gubernatorial and Legislative Review to the Office of Administrative Rules for publication in the *Register*. The agency must submit one paper copy and one compact disc to the Office of Administrative Rules.

7. LEGISLATIVE REVIEW

Substantial changes were made to the APA in 2013 modifying the responsibilities of the Legislature and the Governor with regard to approval or disapproval of agency rules.

The significance of the amendments is that the Legislature now actively approves or disapproves permanent rules. Those approval methods will be discussed below. The Legislature has now reserved for itself, among other rights:

4. The right to approve or disapprove any adopted rule by joint resolution; and
5. The right to disapprove a proposed permanent, promulgated or emergency rule at any time if the Legislature determines such rule to be an imminent harm to the health, safety or welfare of the public or the state or if the Legislature determines that a rule is not consistent with legislative intent.

75 O.S.Supp.2014, § 250.2(B).

If the rules are received on or before April 1, the Legislature has until the last day of the regular legislative session of the year to review the rules. 75 O.S.Supp.2014, § 308(A)(1). If the rules are received after April 1, the Legis-

lature has until the last day of the regular legislative session of the *next* year to review such rules (Section 308(A)(2)). This review, consisting of approval or disapproval of any rules, is done by the adoption of a joint resolution during the review period specified above. This joint resolution must be signed by the Governor.

Under Section 308, as amended, whenever a rule is disapproved, the agency adopting the rule has the authority to resubmit an identical rule, except during the first sixty (60) days of the next regular legislative session. Upon enactment of any joint resolution disapproving a rule, the agency shall file notice of such legislative disapproval with the Secretary of State for publication in the *Register*.

The 2013 amendments also allow for an omnibus joint resolution prepared for consideration each session. 75 O.S.Supp.2014, § 308.3. A proposed permanent rule may be disapproved, in whole or in part, in the omnibus joint resolution. Section 308.3 prescribes the form for the omnibus joint resolution as: “All proposed permanent rules of Oklahoma State agencies filed on or before April 1 are hereby approved except for the following[.]” (Section 308.3(B)).

8. GUBERNATORIAL APPROVAL

The law allows for gubernatorial approval providing that if an agency believes a rule has not been approved by the Legislature and should be adopted, the agency may seek the Governor’s declaration approving the rule. Section 308.3(D)(2) provides the process for seeking gubernatorial approval requiring that a petition be submitted stating the rule is necessary and citing to the source of authority to make the rule. If the Governor finds a necessity exists and the agency has authority, the Governor may declare the rule to be approved and adopted by publishing that declaration in the *Register* on or before July 17.

The Governor has the authority to declare all rules to be approved and adopted if the omnibus resolution fails or is defective. The Governor may do so by publishing a declaration in the *Register* on or before July 17. This declaration does not have to meet the requirement of a declaration resulting from the petition discussed above. If the Governor finds the omnibus resolution has a technical legal defect, the Governor must make that finding in writing and submit it to the Legislature (Section 308.3(D)(4)).

Further, as APA rules have encompassed significant policy issues, the Governor, one or both houses of the Legislature or a small business, may request an agency to review its rules for amendment, repeal or redrafting of any existing rules. The agency is required to respond to such requests within 90 calendar days. 75 O.S.Supp.2014, § 250.10.

9. WITHDRAWAL OF AGENCY RULE

An agency may withdraw a permanent rule prior to its final adoption. Notice of such withdrawal must be given to the Governor, the Speaker of the House of Representatives, the President Pro Tempore of the Senate and the Secretary of State for publication in the *Register*. (Section 308(F)). The ARR establishes requirements for the Notice of Withdrawn Rules.

When an agency discovers an error in a filing that has been submitted on the State Online Filing System (“System”), the System allows the agency to resubmit that filing within 10 calendar days after the rules were adopted. The agency must first withdraw the original submission in the System.

When an agency withdraws and resubmits a filing on the State Online Filing System within 10 days after the rules were adopted, the agency shall not submit a copy of the Notice of Withdrawn Rules to the OAR.

10. FINAL ADOPTION, PROMULGATION AND EFFECTIVENESS

There are essentially five circumstances under which a rule shall be deemed to be finally adopted:

- (1) approval by a joint resolution of the Legislature during regular session signed by the Governor;
- (2) approval by the Governor by declaration after the filing of a petition seeking approval;
- (3) approval by the Legislature by an omnibus joint resolution signed by the Governor;
- (4) disapproval by a joint resolution which has been vetoed by the Governor and the veto has not been overridden; or
- (5) approval by Governor’s declaration if the Legislature fails to pass an omnibus joint resolution or if an omnibus resolution is defective.

Id. § 308(E). *See also* 75 O.S.Supp.2014, § 250.3(5).

At this point an agency may no longer withdraw from the rulemaking process and must prepare a permanent rule document pursuant to the Administrative Rules on Rulemaking. Upon final adoption, the agency is to submit the rule to the Secretary at State for filing. The text of the rule submitted for publication shall be the same as the text of the rule that has been finally adopted. Upon acceptance by the OAR and publication in the *Register*, a rule is considered promulgated and may become effective as soon as 10 days after publication.

B. EMERGENCY RULEMAKING

For an agency to properly promulgate rules on an emergency basis, Section 253(A)(1) requires that the agency must first make that determination and submit substantial evidence to the Governor that the rule is necessary as an emergency measure based on the following criteria:

- protect the public health, safety or welfare;
- comply with deadlines in amendments to an agency's governing law or federal programs;
- avoid violation of federal laws and regulations, or other state laws;
- avoid imminent reduction to the agency's budget; or
- avoid serious prejudice to the public interest.

An emergency rule that is effective before the first day of a legislative session will not expire with adjournment of the session but will now expire on September 15th following the end of the session.

Agencies should note that Section 253(H)(3)(b) categorically prohibits an agency from “piggy-backing” emergency rules. Once an emergency rule has expired and become void, no new emergency rule of similar scope or intent will be entertained by the Governor, unless authorized by the Legislature. This places responsibility upon the agency to ensure that emergency rules of an enduring nature will be superseded by permanent rules.

1. RULEMAKING RECORD

Next the agency must open the rulemaking record: *See* (A)(1) above. A rule impact statement unique to emergency rules is found at Section 253(B)(2)(b). Also, the Governor can waive an impact statement.

2. OPTIONAL STEPS

The notice of rulemaking intent, the comment period, and the public hearing are all optional steps during the emergency rulemaking process. Obviously the same justifications for public comment and for conducting a public hearing apply in the emergency context. Given the nature of emergency rules, however, it is common that the demands of a situation simply will not permit the delay necessitated by such procedures; whenever possible, however, it seems a prudent course for an agency to avail itself of these procedures.

3. *ADOPTION*

The process of rule adoption is governed by Section 253. That statute should be reviewed and followed by agencies adopting emergency rules. Agencies should also refer to the Checklist for Emergency Rulemaking prepared by the Secretary of State.

4. *SUBMISSION TO THE GOVERNOR AND LEGISLATURE*

After adoption of the emergency rules the agency must, within 10 days, prepare an emergency rule document and rule impact statement and file electronically with the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate. 74 O.S.2011, § 464. The Administrative Rules on Rulemaking dictate the format of this emergency rule document. The basic requirements are (1) a document heading; (2) preamble; (3) enacting clause; (4) the regulatory text of the rules (if over 75 pages a summary must be included); and (5) an attestation.

5. *WITHDRAWAL OF EMERGENCY RULES*

An agency may withdraw an emergency rule prior to its approval by the Governor. When an agency withdraws an emergency rule, after its submission to the Governor but prior to approval, the agency must submit a Notice of Withdrawn Rules. The same rule applicable to permanent rules applies to situations when an agency discovers an error in a filing submitted on the State Online Filing System.

6. *GUBERNATORIAL ACTION*

The Governor has 45 days in which to act upon emergency rules. Failure to act during this time will constitute disapproval of the emergency rules. The Governor may, of course, also disapprove in writing before the expiration of the 45 days. *Id.* § 253(D). Additionally, upon approval by the Governor, the agency submits copies of the approval and copies of the emergency rules document to the Office of Administrative Rules for publication in the *Register*. Any gubernatorial approval of emergency rules must be written. Emergency rules are subject to legislative review pursuant to Section 308.

7. *PROMULGATION AND EFFECTIVENESS*

Upon approval by the Governor, emergency rules shall be considered promulgated and shall be in force immediately or upon some later date if an agency has so specified in the preamble of the rule document. Generally an emergency rule remains in full force and effect through the first day of the next succeeding regular session of the Legislature following promulgation of the rule until September 14 following that session.

8. NOTIFICATION TO THE LEGISLATURE AND PUBLICATION

Upon approval of an emergency rule, the Governor shall make written notification of that approval to the Speaker of the House of Representatives, the President Pro Tempore of the Senate and the Office of Administrative Rules. Publication in the *Register* will be handled by the Office of Administrative Rules after the agency submits a paper copy and compact disc of the emergency rules.

9. INITIATION OF PERMANENT RULEMAKING AND EXPIRATION OR TERMINATION OF EMERGENCY RULES

If emergency rules are of a continuing nature, the agency must initiate proceedings for the promulgation of permanent rules in effect on the first day of the session to supersede the emergency rules. This is a critical step because emergency rules will be effective only until September 15th following the regular legislative session, or some earlier date if specified by the agency, unless the emergency rules are superseded by permanent rules. Emergency rules may also be superseded by the agency replacing the emergency rules itself or by the Legislature disapproving the rules or any permanent rules based upon them. As discussed above, the inability of an agency to replace emergency rules with new emergency rules of the same or similar scope or intent makes initiating superseding permanent rules all the more important.

V.

CONCLUSION

CONSEQUENCES OF FAILING TO FOLLOW THE RULEMAKING REQUIREMENTS OF THE APA

Section 308.2(A) sets out the general penalty for failure to promulgate rules in accordance with the requirements of the APA. The general penalty is a harsh one; rules which are not promulgated as required in the APA are not valid or effective against any person or party, nor may such rules be invoked by the agency for any purpose. This penalty has in fact been applied when an agency has made no attempt to comply with the provisions of the APA nor even attempted to promulgate policies as rules.

The penalty provisions which seem to draw the greatest attention from agencies and aggrieved parties, however, are those contained in Sections 252 and 303. In Section 252, the Legislature simply states that any rule enacted after the passage of the APA may, in fact, be held void and of no effect by the courts or the Legislature pursuant to Sections 306 and 307. Section 303(E) reiterates that failure of an agency to adopt rules “in substantial compliance” with the specific procedural requirements of that section renders those rules invalid.

These sections make it clear the Legislature meant the penalties under the APA to represent a serious threat to ensure compliance. As with so many other aspects of the APA, there has been little or no opportunity for Oklahoma courts to give effect to these penalty provisions. True, failure even to attempt promulgation has been rewarded with the penalty of nullity, but the extent to which this severe penalty will be applied for less flagrant violations of the APA is unknown.

Although it is unclear how the courts will handle future challenges to rulemaking deficiencies, it is likely that the frequency of these challenges will increase in coming years, made easier by the publication of the *Oklahoma Administrative Code*. Inclusion in the Code or its supplements is a precondition to the validity and effectiveness of a rule. Even a properly promulgated rule cannot be effective if it is either intentionally or inadvertently omitted from the Code.

With the increased visibility and accessibility of agency rules, and the explicit requirement that a rule must be included in the Code to be valid, the inadvertent failure or unwillingness of an agency to promulgate its policies as rules will certainly become much more apparent. In addition, the increased accessibility of rules is likely to create a greater general awareness of agency rules and of the requirements of the APA. As more people become aware of the rulemaking requirements of the APA, it is likely that the number of challenges to agency actions for failure to comply with those requirements will increase. Suddenly the seemingly obscure and technical requirements of the APA will be cast into the daylight.

No agency wants to be the test case for the APA penalties. To avoid all of the dangerous uncertainties inherent in sloppy rulemaking under the APA or, worse still, no attempt at formal rulemaking at all, the best and safest course will always be to promulgate what one reasonably believes to be rules under the APA definition, to take the process of public comment seriously, and to enact rules carefully and in compliance with the requirements of the APA and the Secretary of State's Administrative Rules on Rulemaking.

OAC RULES CITED IN 2014 OPINIONS

<i>OAC Rule</i>	<i>Opinion</i>	<i>Page</i>
OAC 230:15-5-84	10	63
OAC 365:10, app. DD	2	10
OAC 365:10-5-40 – 10-5-56	2	6
OAC 365:10-5-44	2	10
OAC 365:10-5-47.1	2	9
OAC 390:35-5-2	3	15
OAC 390:35-5-8	3	19
OAC 390:35-13-1	3	23
OAC 780:15-3-5	4	25

Rulemaking Checklists

FOR

OKLAHOMA'S RULEMAKING PROCESS

FOR USE WITH THE SECRETARY OF STATE'S

ADMINISTRATIVE RULES ON RULEMAKING [OAC 655:10]

HAVE BEEN PREPARED BY

AND ARE AVAILABLE FROM THE

OFFICE OF ADMINISTRATIVE RULES (OAR)

SECRETARY OF STATE

IA OR HAND DELIVERY: 220 WILL ROGERS BUILDING,

2401 NORTH LINCOLN BOULEVARD

POSTAL: 2300 NORTH LINCOLN BOULEVARD, STE 101

OKLAHOMA CITY, OK 73105

405-521-4911

Note: The permanent and emergency rulemaking checklists are available on the web at https://www.sos.ok.gov/forms/oar/checklist_per.pdf and https://www.sos.ok.gov/forms/oar/checklist_eme.pdf.

**ALL FILINGS EXCEPT PERMANENT RULE DOCUMENTS
THE OKLAHOMA REGISTER**

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[SEPTEMBER 15, 2014 THROUGH SEPTEMBER 14, 2015]

FILING DEADLINES

<u>PUBLICATION DATE</u>	<u>Submission by¹</u>	<u>Acceptance by²</u>
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October 15, 2014	September 25, 2014	October 1, 2014
November 3, 2014	October 8, 2014	October 15, 2014
November 17, 2014	October 24, 2014	October 31, 2014
December 1, 2014	November 7, 2014	November 14, 2014
December 15, 2014	November 25, 2014	December 1, 2014
January 2, 2015	December 8, 2014	December 15, 2014
January 15, 2015	December 24, 2014	December 31, 2014
February 2, 2015	January 8, 2015	January 15, 2015
February 17, 2015	January 23, 2015	January 30, 2015
March 2, 2015	February 6, 2015	February 13, 2015
March 16, 2015	February 25, 2015	February 27, 2015
April 1, 2015	March 6, 2015	March 13, 2015
April 15, 2015	March 25, 2015	April 1, 2015
May 1, 2015	April 8, 2015	April 15, 2015
May 15, 2015	April 24, 2015	May 1, 2015
June 1, 2015	May 8, 2015	May 15, 2015
June 15, 2015	May 22, 2015	June 1, 2015
July 1, 2015	June 8, 2015	June 15, 2015
July 15, 2015	June 25, 2015	July 1, 2015
August 3, 2015	July 8, 2015	July 15, 2015
August 17, 2015	July 24, 2015	July 31, 2015
September 1, 2015	August 7, 2015	August 17, 2015

¹ To allow for the OAR's 6-calendar-day review period, as set forth in 655:10-11-1, documents must be submitted to the OAR no later than 4:30 p.m. on this deadline date.

² Pursuant to 655:10-9-3, documents must be accepted by the Office of Administrative Rules (OAR) no later than 4:30 p.m. on this deadline date.

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REGISTER PUBLICATION DATES AND FILING DEADLINES

**PERMANENT RULE DOCUMENTS
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¹ Pursuant to HB 2055 (2013), the Office of Administrative Rules is authorized to establish separate filing deadlines and review periods for finally adopted permanent rules.

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OKLAHOMA'S OPEN MEETING ACT

Updated by Sandra D. Rinehart, Senior Assistant Attorney General*

“The invisible government,” wrote Walter Lippman, “is malign.” “What is dangerous about it is that we do not see it, cannot use it, and are compelled to submit to it.” WALTER LIPPMAN, A PREFACE TO POLITICS (1914). That critique of invisible government underlies Oklahoma’s Open Meeting Act, a series of statutes enacted “to encourage and facilitate an informed citizenry’s understanding of the governmental processes and governmental problems.” 25 O.S.2011, § 302.

In pursuit of this democratic aim, the Open Meeting Act (“Act”), codified at Sections 301 through 314 of Title 25 of the Oklahoma Statutes, imposes a number of requirements on public bodies holding meetings. Among other things, it requires public bodies to: (1) provide advance notice of the date, time, and place of meetings and of matters to be considered at those meetings; (2) hold open meetings at times and places that are convenient and accessible to the public; (3) record individual members’ votes on matters considered; (4) take minutes of meetings; (5) hold executive sessions (inaccessible to the public) only for certain specific purposes; and (6) refrain from holding informal gatherings of a majority of board members in which public business is conducted or discussed.

The Act also provides that actions of any public body taken in willful violation of any of its requirements are void. As a result, familiarity with the Act is essential to any public body that seeks to operate effectively.

This section will outline the requirements of the Open Meeting Act, focusing on four general areas:

1. When the requirements of the Act are triggered;
2. What actions must be taken before meetings;
3. What procedures must be followed during meetings; and
4. What consequences may ensue from violations of the Act.

Before addressing these matters, two approaches to interpreting and applying the Act will be briefly discussed.

* We gratefully acknowledge former Assistant Attorney General Rabindranath Ramana for his work in writing the original article in 1990.

I.

TWO VIEWS OF THE ACT: BROAD AND TECHNICAL

The Act's provisions, case law, and Attorney General Opinions suggest two complementary ways of viewing the Act. For different reasons, each view is important.

The first way of viewing the Act is as an embodiment of the policy of encouraging citizen understanding and involvement in government. *See* 25 O.S. 2011, § 302. This view is reflected in an Oklahoma Supreme Court case that states, “[t]he Open Meeting Law, because it is enacted for the public’s benefit, is to be construed liberally in favor of the public.” *Int’l Ass’n of Firefighters, Local 2479 v. Thorpe*, 632 P.2d 408, 411 (Okla. 1981). The Act does not create any type of implied contract between employees and public bodies for certain procedural rights but exists for the public’s benefit. *Trant v. Oklahoma*, 754 F.3d 1158, 1174 (10th Cir. 2014). This broad, policy-based view is important because the Act itself is quite brief and contains a number of general provisions that are difficult to interpret unless one has some idea of the policy underlying the Act as a whole. For example, although the Act requires public bodies to post agendas prior to meetings and to take minutes during those meetings, neither the Act nor judicial interpretations of it provide specific guidelines as to how to prepare agendas and minutes. In the absence of such guidelines, consideration of the policy underlying the Act becomes quite useful.

The second way of viewing the Act is as a set of technical rules with which public bodies must strictly comply. This view of the Act is important because, as will become apparent, a public body’s failure to comply with any one of the Act’s requirements may render an entire action invalid.

II.

WHEN THE ACT IS TRIGGERED: PUBLIC BODIES AND MEETINGS

As a general rule, the Open Meeting Act applies to public bodies holding meetings. Both the term “public body” and the term “meeting” are specifically defined in the Act, and an analysis of these definitions is essential to determining when the Act is triggered.

A. PUBLIC BODIES

Under Section 304(1) of the Act, the following constitute public bodies to which the requirements of the Act apply:

1. Governing bodies of all municipalities;
2. Boards of county commissioners;

3. Boards of public and higher education;
4. All boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts or any entity created by a public trust, task forces or study groups that are:
 - a. supported in whole or in part by public funds;
 - b. entrusted with the expending of public funds; or
 - c. administering public property;
5. Committees and subcommittees of any public body.

This definition is broad enough to include entities not usually considered to be governmental bodies. For example, under this definition, the board of directors of a non-profit corporation may constitute a public body if that board is supported by public funds. A.G. Opins. 80-215; 02-37. Similarly, student government associations may fit the statutory definition of a public body. A.G. Opin. 79-134.

In addition, some entities' constitutions subject them to the Open Meeting Act. For instance, the constitution of the Oklahoma Secondary Schools Activities Association specifies that its meetings shall be conducted pursuant to the Open Meeting Act. *See Scott v. Okla. Secondary Sch. Activities Ass'n*, 313 P.3d 891 (Okla. 2013).

Nevertheless, the Act's definition of a public body does exclude certain entities. For instance, although Section 304 specifically states that the Act applies to committees and subcommittees, case law has established that such committees and subcommittees will be considered public bodies only if they exercise actual or *de facto* decision-making authority on behalf of the public body itself. *Andrews v. Indep. Sch. Dist. No. 29*, 737 P.2d 929 (Okla. 1987); *Int'l Ass'n of Firefighters v. Thorpe*, 632 P.2d 408 (Okla. 1981); *Sanders v. Benton*, 579 P.2d 815 (1978). If the committee or subcommittee does not exercise such authority, but instead is "purely fact finding, informational, recommendatory, or advisory," then the committee or subcommittee does not constitute a public body and is not required to comply with the requirements of the Act. *Andrews*, 737 P.2d at 931. This "decision-making" test for committees and subcommittees has been applied by courts and the Attorney General in several contexts. A committee established by a school board to prepare guidelines for participation in extracurricular activities has been held not to exercise decision-making authority since it only presented recommendations that the school board remained free to accept or reject. *Andrews*, 737 P.2d at 931. For the same reason, a citizens' advisory committee recommending a site for a community treatment center to the Board of Corrections has been held not to exercise decision-making authority and thus to be exempt from the Act's requirements. *Sanders*, 579 P.2d at 819-21. In Attorney General Opinion 02-5, the Governor's Security and Preparedness

Executive Panel was found not to be a public body as it was not supported by public funds and had no authority to act on any recommendations it may make.

In contrast, a committee that eliminated bids on contracts from consideration by the public body that it served has been held to exercise decision-making authority such that it was subject to the Act. A.G. Opin. 84-53.

A case-by-case approach is required to determine whether a particular committee or subcommittee exercises the decision-making authority that triggers the Act.

In addition to the exception for committees and subcommittees not exercising actual or *de facto* decision-making authority, there are several statutory exceptions to the definition of “public body” under the Act. These statutory exceptions, found at 25 O.S.2011, § 304(1), include, but are not limited to:

1. The State Legislature,
2. The State Judiciary,
3. The Council on Judicial Complaints when conducting, discussing, or deliberating any matter relating to a complaint received or filed with the Council, and
4. Administrative staffs of public bodies.

B. WHAT IS A MEETING?

The second general element necessary to trigger the Act is that the public body in question hold a meeting. The Act defines the term “meeting” as “the conduct of business of a public body by a majority of its members being personally together,” or when authorized by the Act, “together pursuant to a videoconference.” 25 O.S.2011, § 304(2).

The Act’s definition of a “meeting” is sufficiently broad to include not only an officially scheduled, formally convened gathering of a public body, but also an informal gathering where a majority of the body’s members are personally present and conducting official business. The Act does not define “conduct of business,” but Attorney General Opinions have given meaning to the term. A public body is said to engage in the “conduct of business” when “a majority of the members are considering discrete proposals or specific matters that are within the agency’s jurisdiction.” A.G. Opin. 12-24. In such circumstances, “conduct of business” includes not only taking official action but the entire decision-making process in which the public body is engaged, including discussion and deliberation when no final action is taken. A.G. Opin. 82-212.

As a result, an informal gathering of a majority of members of a public body may trigger the requirements of the Act if a majority of the members are

considering discrete proposals or specific matters that are within the public body's jurisdiction.

The definition of the term "meeting" has one very practical effect on the formation of committees and subcommittees by public bodies. As noted above, a committee or subcommittee does not constitute a public body under the Act if it does not have decision-making authority for the board that created it. Nevertheless, a committee or subcommittee that is composed of a majority of board members will trigger the requirements of the Act regardless of the authority it has. This conclusion follows from the Act's definition of the term "meeting," for if a majority of board members come together as a part of a committee they may consider discrete proposals or specific matters within the body's jurisdiction. By coming together and conducting business, the majority of the members will have held a meeting and as a result, the Act's requirements will apply. Accordingly, a public body seeking to create a committee or subcommittee that is exempt from the requirements of the Open Meeting Act should not give that committee decision-making authority and should not appoint a majority of its member to that committee.

III.

BEFORE THE MEETING: NOTICE AND AGENDA REQUIREMENTS

The Open Meeting Act imposes two general requirements upon public bodies prior to holding public meetings. First, the public body must provide to specific public record keepers notice of the times, places, and dates that its meetings will be held. This notice must be provided within specified time periods and must contain certain information.

Second, a public body must post the date, time, place and agenda for particular meetings. Both of these requirements are at the very heart of the Open Meeting Act.

A. NOTICE TO PUBLIC RECORD KEEPERS

The notice required by the Act depends upon two factors: (1) the kind of public body, and (2) the kind of meeting held.

The first factor, the kind of public body, determines which particular record-keeping official should receive notice of meetings. Section 311(A) sets those out as follows:

- 1. State public bodies** – notice to the Secretary of State;
- 2. County public bodies** – notice to the County Clerk of the county in which the body is principally located;

3. **Municipal public bodies** – notice to the Municipal Clerk;
4. **Multi-county public bodies** – notice to the County Clerk where the body is principally located or, if the body has no central office, notice to the county clerks of all the counties served by the body;
5. **Governing bodies of institutions of higher learning** – notice to the Secretary of State; and
6. **Public bodies under the auspices of an institution of higher learning that do not have a majority of members who also serve on the institution's governing body** – notice to the County Clerk of the body's principal location.

The second factor, the kind of meeting, determines when notice must be given. In this context, the Act creates four (4) kinds of meetings and requires notice within different time periods for each kind of meeting. The kinds of meetings and the notice requirement for each kind of meeting are as follows:

1. Regularly scheduled meetings – These are meetings in which the usual business of the public body is conducted. For these kinds of meetings, written notice of the date, time and place of the meeting must be filed with the proper record-keeping official by December 15 of the preceding year. (*E.g.*, for all regularly scheduled meetings planned for 2015, notice must be filed by December 15, 2014). The Act allows the date, place, or time of a regularly scheduled meeting to be changed after December 15. However, written notice of the change must be filed with the appropriate record-keeping official not less than ten (10) days prior to the change.

2. Emergency meetings – Under the Act, an emergency meeting is defined as any meeting called to deal with “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.” 25 O.S.2011, § 304(5). For these kinds of meetings, a public body must give only the advance public notice that is reasonable under the circumstances, in person or by telephone or electronic means. *Id.* § 311(A)(12). Although there is no absolute requirement of any kind of notice for an emergency meeting, giving some notice should be attempted if at all possible.

3. Special meetings – Under the Act, a special meeting is “any meeting of a public body other than a regularly scheduled meeting or emergency meeting[.]” 25 O.S.2011, § 304(4). For these kinds of meetings, notice of the date, time and place of the meeting must be given either in writing, in person, or by telephone to the proper record-keeping official not less than forty-eight (48) hours prior to the meeting. *Id.* § 311(A)(11).

4. Continued or Reconvened Meetings – these are meetings conducted “for the purpose of finishing business appearing on an agenda of a previous meeting.” 25 O.S.2011, § 304(6). For these kinds of meetings, notice of the date, time and place of the reconvened or continued meeting must be announced at the original meeting. *Id.* § 311(A)(10).

B. NOTICE TO THE PUBLIC

The Open Meeting Act also requires that, for all kinds of meetings other than emergency meetings, the date, time and place of the meeting and the agenda for the meeting must be posted at least twenty-four (24) hours before the meeting. This notice and agenda must be posted “in prominent public view at the principal office of the public body or at the location of said meeting if no office exists.” 25 O.S.2011, § 311(A)(9). The Attorney General has interpreted this provision to require that the notice and agenda be conspicuously posted in a location which is accessible and convenient to the public at any time during this 24-hour period. A.G. Opin. 97-98. The 24-hour time period excludes Saturdays, Sundays and legal holidays. As a result, notice and agenda for a regularly scheduled meeting at 10:00 a.m. on Monday must be posted by 10:00 a.m. on the preceding Friday.

The Legislature has imposed another requirement on public bodies that have Internet websites. The statute, codified at 74 O.S.2011, § 3106.2 (not in the Open Meeting Act), mandates that within six months after the public body establishes an Internet website, it must make available on its website (or a general website if the public body uses a general website) a schedule and information about regularly scheduled meetings. The website must contain the date, time, place and agenda of each meeting; and the public body must post the date, time, place and agenda of any special or emergency meeting “when reasonably possible.” *Id.* § 3106.2(A). This requirement “shall not be construed to amend or alter the requirements of the Open Meeting Act.” *Id.* § 3106.2(B). Presumably, this means that a public body that posts in accordance with this law is not excused from the posting requirements found in the Open Meeting Act itself. What is less clear from this language is the corrective action which must be taken if a public body fails to comply with this section. For example, is the action void if the public body complies with the notification requirements contained in the Open Meeting Act but does not comply with this Internet posting requirement? Perhaps the answers to this and other questions will become clearer as the law is implemented and tested.

C. AGENDAS

While no statutory or case law sets forth precisely what information must be contained in an agenda, some guidelines for preparing agendas have emerged. As a general rule, agendas must be “worded in plain language, directly stating

the purpose of a meeting,” and “the language used should be simple, direct and comprehensible to a person of ordinary education and intelligence.” *Andrews*, 737 P.2d at 931.

Aside from these general considerations, the best guide for writing a proper agenda item is to prepare it so that an ordinary citizen with no specialized knowledge of a particular board's prior actions or deliberations will be able to understand from the agenda what the public body will be doing at the meeting.

Public bodies often ignore this rule by preparing overly brief, topical agenda items such as “contracts,” “personnel actions,” or “warrants and claims.” Although such agenda items may appear clear to a board member or staff person who has enough background information to know what particular contract, warrant or personnel matter is at issue, a citizen without any such background information will not be able to glean the precise nature of the proposed board action from reading such topical items. More specific agenda items that focus on the particular actions contemplated by the board are required. (*E.g.*, “Discussion and vote whether to approve employment contract for Teacher X,” “Discussion and vote whether to approve warrants 1-10,” “Discussion and vote whether to demote Mr. Y.”)

Although specific agenda items usually convey more information to the public, there are instances in which such specific items also may not comply with the Act. For example, in *Haworth Board of Education v. Havens*, 637 P.2d 902 (Okla. Ct. App. 1981), a local school board posted an agenda which stated that the purpose of the meeting was to; (1) appoint a new board member, (2) interview new administrators, and (3) hire a principal. At the meeting, the board hired a new school superintendent. *Haworth* found that the board's hiring of the superintendent was invalid under the Open Meeting Act. It reasoned that the distinction between “interviewing” and “hiring” in agenda items two and three could have reasonably led a citizen to conclude that, at the subject meeting, the board would interview only administrators and hire only a principal. By failing to follow its posted agenda, the board rendered its action invalid.

An action by the Oklahoma State Textbook Committee provides another example of a state agency's failing to comply with the Act. The Committee is responsible for selecting textbooks used in Oklahoma's public schools. In one instance, the Attorney General concluded the Textbook Committee violated the Act when it sought to require publishers to include disclaimers pertaining to evolution in their textbooks, because the Committee failed to provide sufficient notice of its intended action in its meeting agenda. *See* A.G. Opin. 00-7.

In *Wilson v. City of Tecumseh*, 194 P.3d 140 (Okla. Ct. App. 2008), the court found that the City Council and its Utility Authority, in their respective meeting agendas, did not give the public sufficient notice of their intended actions concerning the outgoing city manager. The agendas merely stated that

the city manager's "employment" would be considered, when the two entities were actually proposing to give him bonus payments totaling \$30,000. The court found that the agendas were deceptively vague and likely to mislead the public and thus violated the Open Meeting Act, rendering the bonus payments null and void. Further, the court held that the entities' subsequent attempts to "ratify" the payments at later meetings did not cure the violations caused by the lack of proper notice in the agendas.

Finally, in *Okmulgee County Rural Water District No. 2 v. Beggs Public Works Authority*, 211 P.3d 225 (Okla. Civ. App. 2009), a contract was found to be invalid because the posted agenda for the meeting where the contract was approved did not list the contract as an item for consideration.

These specific instances illustrate the problems that can occur if agendas are not prepared carefully. Close attention is needed to ensure that agendas clearly communicate the contemplated board actions to the average citizen.

IV. DURING THE MEETING

The Open Meeting Act also requires certain procedures to be followed during meetings of public bodies. The Act's requirements address the places where meetings may be held, the manner in which votes must be cast and recorded, the manner in which executive sessions may be used, the way in which items of new business may be discussed, and the way in which meetings may be continued or reconvened. While enacted to encourage and facilitate an informed citizenry's understanding of government, the Act does not guarantee a citizen the right to participate in the discussion or decision-making process at an open meeting. *See* A.G. Opins. 98-45; 02-26.

A. PLACES AND TIMES FOR MEETINGS

Section 303 of the Act requires meetings to be held at places and times that are convenient to the public. In one court decision, a county excise board holding a meeting in a locked courthouse on a public holiday was found to have violated this provision of the Act. *See Rogers v. Excise Bd.*, 701 P.2d 754 (Okla. 1984).

As a general rule, the places and times that are convenient and accessible to the public are matters that public bodies may determine by exercising common sense and good judgment.

B. VOTING

Section 305 of the Act provides that "[i]n all meetings of public bodies, the vote of each member must be publicly cast and recorded." Section 306 provides that "[n]o informal gathering or any electronic or telephonic communications,

except teleconferences authorized by [Section 307.1], among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter.”

Together, these two sections forbid taking board action by means other than a publicly cast and recorded vote. Thus, members of a public body may not submit votes by mail. A.G. Opin. 80-144. Similarly, one member of a public body may not delegate his or her vote to another member by proxy. A.G. Opin. 82-7. Also, one board member may not meet individually with other members to obtain their signatures on a document that could be used to take board action that would otherwise require the vote of a majority of members. A.G. Opins. 81-69, 81-315. In the words of A.G. Opin. 81-69, “[p]ermitting a single member of the governing body to obtain a consensus or vote of that body by privately meeting alone with each member, would be to condone decision-making by public bodies in secret, which is the very evil against which the Open Meeting Act is directed.”

The Supreme Court of Oklahoma has held that the Act's provision requiring public casting and recording of votes applies to the initiation of legal actions by public bodies. In *Berry v. Board of Governors*, 611 P.2d 628 (Okla. 1980), the State Dental Board initiated a legal proceeding by filing a petition signed by a board member and the board's attorney. The Supreme Court found this procedure insufficient under Sections 305 and 306 of the Act, explaining that when the board decided to file suit the votes of individual board members in support of that decision should have been publicly cast and recorded. The board's failure to do so voided the entire legal proceeding.

C. EXECUTIVE SESSIONS

The Open Meeting Act allows public bodies to conduct executive sessions under limited circumstances. Although not expressly defined in the Act, an executive session generally denotes a proceeding that is properly closed to the public. Such executive sessions may be attended only by board members and individuals who are invited by the board because their presence is necessary to the business at hand.

Considerable misunderstanding surrounds the proper use of executive sessions by public bodies, some of it due perhaps to Watergate-era usage of the term “executive privilege” to describe a right of public officials to keep certain matters confidential. Under the Open Meeting Act, executive sessions are not justified by any such personal privilege. As the Attorney General opined in A.G. Opin. 82-114: “Executive sessions are not permitted under the law because the matters to be taken up are in the private domain of public officials. Such matters *are* the business of the public. Executive sessions exist only for the purpose of compromising equally important policy commitments which come into conflict[.]”

Section 307(A) of the Act expressly states that “[n]o public body shall hold executive sessions unless otherwise specifically provided in this section.” Those reasons as stated in section 307(B) are:

1. Discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee;¹
2. Discussing negotiations concerning employees and representatives of employee groups;
3. Discussing the purchase or appraisal of real property;
4. Confidential communications between a public body and its attorney concerning a pending investigation, claim, or action [but only] if the public body, with the advice of its attorney, determines that disclosure will seriously impair the ability of the public body to process the claim or conduct a pending investigation, litigation or proceeding in the public interest;
5. Permitting district boards of education to hear evidence and discuss the expulsion or suspension of a student when requested by the student involved or the student's parent, attorney, or legal guardian;
6. Discussing matters involving a specific handicapped child;
7. Discussing any matter where disclosure of information would violate confidentiality requirements of state or federal law;
8. Engaging in deliberations or rendering a final or intermediate decision in an individual proceeding pursuant to Article II of the Administrative Procedures Act; or
9. Discussing the following:
 - a. the investigation of a plan or scheme to commit an act of terrorism,
 - b. assessments of the vulnerability of government facilities or public improvements to an act of terrorism,

¹ The Attorney General has construed the term “employment” to include continued employment and conditions of employment such as place of employment, salary, duties to be performed and evaluations. Thus, a public body could convene in executive session for the purpose of discussing the salary of “any individual salaried public officer or employee.” A.G. Opin. 96-40 (withdraws A.G. Opin. 78-201).

- c. plans for deterrence or prevention of or protection from an act of terrorism,
- d. plans for response or remediation after an act of terrorism,
- e. information technology of the public body but only if the discussion specifically identifies:
 - (1) design or functional schematics that demonstrate the relationship or connections between devices or systems,
 - (2) system configuration information,
 - (3) security monitoring and response equipment placement and configuration,
 - (4) specific location or placement of systems, components or devices,
 - (5) system identification numbers, names, or connecting circuits,
 - (6) business continuity and disaster planning, or response plans, or
 - (7) investigation information directly related to security penetrations or denial of services, or
- f. the investigation of an act of terrorism that has already been committed. For the purposes of this subsection, the term "terrorism" means any act encompassed by the definitions set forth in Section 1268.1 of Title 21 of the Oklahoma Statutes.

Id.

In some instances the Legislature has expressly provided various public bodies with specific executive session authority. Public bodies should consult their statutes accordingly.²

² See, e.g., 10 O.S.2011, § 1116.2(E) (executive sessions for Oklahoma Commission on Children and Youth - Review Boards); 59 O.S.2011, § 1609(B) (executive sessions for Board of Examiners for Speech-Language Pathology and Audiology); 63 O.S.2011, § 2-104.1(E)(2)(b) (executive sessions for Oklahoma State Bureau of Narcotics and Dangerous Drugs Control Commission); 70 O.S.2011, § 5-118 (executive sessions for boards of education); 74 O.S.2011, § 150.4(2)(b) (executive sessions for State Bureau of Investigation Commission); 74 O.S.2011, § 5060.7(C) (executive sessions for Board of Directors of the Oklahoma Center for the Advancement of Science and Technology); 74 O.S.2011, § 5062.6(G) (executive sessions for Oklahoma Development Finance Authority); 74 O.S.2011, § 5085.6(C) (executive sessions for Oklahoma Capital Investment Board).

In light of the Act's strict requirements for executive sessions, these statutory justifications must be read narrowly.³ Thus, the first reason set forth above authorizes executive sessions not for all employment matters, but rather only for matters concerning individual salaried employees. Similarly, the fourth reason authorizes executive sessions not for all legal matters, but only for legal matters that a board attorney advises should be kept confidential and that the public body itself determines will be impaired if handled in an open meeting.

More importantly, each of the statutory justifications for an executive session involves only the discussion of particular matters. As a result, no action may be taken in an executive session. Actions arising out of executive session must be taken in an open meeting at which the proper procedures for publicly casting and recording votes are followed.

Section 307(E)(2) also provides that no executive session may be held unless authorized by a majority (recorded) vote of a quorum of members present at an open meeting. As a result, neither the staff of a public body, nor an individual member may determine that an executive session will be held. That decision must be made by the public body itself at an open meeting.

The Act's agenda requirements apply to matters discussed in executive session. However, as a 1982 Attorney General Opinion explains, "[u]ntil a motion is made and a vote taken in public meeting, there can be nothing but a *proposal* to have an executive session." A.G. Opin. 82-114. As a result, an agenda item regarding an executive session should state that an executive session will be proposed. The item should also contain sufficient information to allow a citizen to determine from the agenda what matters will be discussed at the proposed executive session. For purposes of discussing personnel matters involving an individual salaried public officer or employee, the Attorney General has determined that the proposed executive session agenda item must identify the officer or employee by name, or by position if the position held by the officer or employee is so unique as to allow adequate identification. A.G. Opin. 97-61. See also the discussion of the *Haworth* case at III.C., above.

Moreover, the Open Meeting Act requires that agenda items announcing that an executive session will be proposed must "state specifically the provision of Section 307 . . . authorizing the executive session." 25 O.S.2011, § 311(B)(2)(c). The Legislature also provided that a willful violation of the Act's executive session requirements "shall: (1) Subject each member of the public body to criminal sanctions . . . ; and (2) Cause the minutes and all other records of the

³ Despite the presumption against executive sessions, the Court of Civil Appeals opined that the Open Meeting Act provisions permitting executive sessions were a matter of statewide concern, thereby superseding a city ordinance that would have abolished executive sessions altogether. *City of Kingfisher v. State*, 958 P.2d 170, 173 (Okla. Ct. App. 1998), *overruling* A.G. Opin. 80-218.

executive session, including tape recordings, to be immediately made public.” 25 O.S.2011, § 307(F).

As a simple illustration of these principles regarding executive sessions, consider a board that must decide whether to demote an employee, “Jane Doe.” Under the Open Meeting Act, such a board could proceed in the following manner:

1. The posting of an agenda referring to a “proposed executive session to discuss the possible demotion of Jane Doe,” and citing 25 O.S.2011, § 307(B)(1) as the statutory authority for this executive session;
2. A majority vote in an open meeting by a quorum of board members to hold the proposed executive session;
3. An executive session that conforms to the description set forth in the agenda (*i.e.*, a discussion regarding the matter referred to in the agenda);
4. A vote in an open meeting regarding Jane Doe’s demotion.

Courts have also spoken to who may attend executive sessions. In *Lafalier v. the Lead-Impacted Communities Relocation Assistance Trust*, 237 P.3d 181 (Okla. 2010), the Oklahoma Supreme Court found the trust violated the Open Meeting Act by allowing the Secretary of the Environment and an appraiser’s representatives attend its executive sessions held for the purpose of discussing appraisals and purchases of real property pursuant to Section 307(D), which limits attendance in executive session for these purposes.

Under Section 307 the public body that is authorized to conduct an executive session may not exclude a non-voting ex officio member at the public body from being physically present during the executive session. *See* A.G. Opin. 09-26.

D. MINUTES

Section 312(A) of the Act requires written minutes of public bodies to be kept by a designated individual and to be made available for public inspection. Section 312(A) further states that these minutes shall be “an official summary of the proceedings” and shall contain: (1) the manner and time that notice was given of the particular meeting; (2) the members present and absent; (3) all matters considered by the public body; and (4) all actions taken by the public body.

In addition, for emergency meetings, the nature of the emergency and the reasons for calling an emergency meeting must be set forth in the minutes. 25 O.S.2011, § 312(B).

Section 312 leaves public bodies with a great deal of latitude as to the specificity of minutes kept. Neither a court reporter's untranscribed verbatim notes nor transcripts of discussions at open meetings meet the requirements of Section 312. A.G. Opin. 2012-24. A transcript does not "briefly and concisely restate the main points of a public meeting." *Id.* Conversely, nothing in Section 312 requires or forbids minutes to contain only a brief summary of board proceedings – so long as the minutes record "matters considered" and "actions taken."

Nevertheless, there is some risk in keeping minutes that are too vague. Although there are no reported Oklahoma decisions on the sufficiency of board minutes, a court assessing the sufficiency of particular board minutes might well adopt the same standard that has been applied in assessing agenda items: Would an average citizen have been misled by the minutes in question? *See Haworth*, 637 P.2d at 904.

Under this standard, minutes that, for whatever reason, are likely to mislead a citizen about matters considered and actions taken by a board would not comply with the Act. As a result, a prudent board should err on the side of specificity rather than generality in keeping minutes.

One common deficiency in board minutes concerns the manner in which votes of public bodies are recorded. In light of the Act's requirement that such votes be individually cast and recorded, minute entries stating "Motion carried" and "Motion passed 3-2" are not sufficient to comply with the Act. Instead, the minutes must record the way each member voted. Of course, if a particular motion carries unanimously and if the minutes contain the required information regarding which board members were present at the meeting, an entry stating "Motion passed 5-0" or "Motion passed unanimously" is sufficient. In the latter instance, a person reading the minutes would be able to determine that all board members present voted in favor of the particular motion.

The Act's provisions regarding minutes apply to executive sessions as well as to open meetings. This conclusion is based on the language of Section 312 and an Oklahoma Supreme Court decision. As to the statutory language, Section 312 refers generally to the keeping of minutes of "proceedings"; it does not distinguish between proceedings held in an open meeting and proceedings held in executive session. In addition, in *Berry*, 611 P.2d at 632, the court expressly stated that the Act's allowance for executive sessions "does not abrogate the statutory requirement that minutes be kept and recorded."

Nevertheless, there is one significant difference between minutes of open meetings and minutes of executive sessions: Under the Oklahoma Open Records Act, minutes of executive sessions may be kept confidential. 51 O.S.2011, § 24A.5(1)(b). However, should a court find that a public body has willfully violated Section 307 of the Open Meeting Act regarding executive sessions, the

“minutes and all other records of the executive session, including tape recordings,” will “be immediately made public.” 25 O.S.2011, § 307(F)(2).

The Act does not contain a time limit for providing minutes after a meeting nor does it require a public body to approve the minutes of its meetings. However, best practice is for public officials to prepare and approve minutes within a reasonable amount of time after the adjournment of the meeting. A.G. Opin. 2012-24. A member of the public body who does not attend the meeting must become familiar with the events that occurred at the meeting in order to vote to approve the minutes. *Id.*

E. NEW BUSINESS

The Act allows public bodies to consider “new business” at regularly scheduled meetings. “New business” is defined as “any matter not known about or which could not have been reasonably foreseen prior to the time of posting [the agenda].” 25 O.S.2011, § 311(A)(9). All that is necessary to allow the consideration of such matters is the timely posting of an agenda containing an item called “new business.”

In some instances, the use of the “new business” item may be very useful. For example, the inclusion of a new business item on a Friday-posted agenda for a Monday meeting allows a board to consider matters occurring over the weekend at the Monday meeting.

Nevertheless, the use of the “new business” item should be approached cautiously. The problem with such an item is that it provides the reader of an agenda with no information whatsoever as to matters that will be considered. Although depriving citizens of such information is justifiable when the public body itself has no knowledge of a particular matter, it is certainly not justifiable when the public body does have such information. Thus, if a public body posts an agenda containing a new business item some time more than 24 hours before the meeting will be held and subsequently learns of a particular matter that it wishes to discuss at the scheduled meeting, the public body should post an amended agenda explaining what matter will be discussed. The new business item should be reserved for matters that the public body did not know about or could not have known about until less than 24 hours before the regularly scheduled meeting.

F. CONTINUING OR RECONVENING A MEETING

Under the Act, meetings may be continued or reconvened by using the following procedure: At the original meeting, the date, time and place of the continued or reconvened meeting must be announced. At the continued or reconvened meeting, only matters on the agenda of the previously scheduled meeting may be discussed. 25 O.S.2011, § 311(A)(10).

G. RECORDING MEETINGS

The Act provides that “[a]ny person attending a public meeting may record the proceedings of said meeting by videotape, audiotape, or by any other method” However, this right to record meetings is limited in that “such recording shall not interfere with the conduct of the meeting.” 25 O.S.2011, § 312(C).

H. VIDEOCONFERENCE

The Legislature has provided for public bodies to conduct meetings by videoconference under 25 O.S.2011, § 307.1. Under this provision, no less than a quorum of the public body shall be present in person at the posted meeting cite. *Id.* § 307.1(A)(1). “‘Videoconference’ means a conference among members of a public body remote from one another who are linked by interactive telecommunication devices permitting both visual and auditory communication between and among members of the public body and members of the public.” 25 O.S.2011, § 304(7). During any videoconference both the visual and the auditory communications functions of the device shall be used. *Id.*

Because of their unique difference to other public meetings, videoconference meetings pose additional challenges in fulfilling the requirements and spirit of the Open Meeting Act. However, the unique nature of videoconference meetings does not exempt them from meeting the same requirements as other meetings under the Open Meeting Act.

Such meetings still must provide some means for public attendance and interaction, provide for proper posting of agendas, and provide for the public’s right to record the meeting. In addition, executive sessions cannot be conducted by videoconference. As with any meeting, the agency holding a videoconference meeting should strive to meet not only the requirements of the Open Meeting Act, but also its spirit.

V. PENALTIES

Section 313 of the Act states that “[a]ny action taken in willful violation of this act shall be invalid.” To establish a willful violation under this section, it is not necessary to show bad faith, malice or wantonness. Instead, either a “conscious, purposeful violation” or a “blatant or deliberate disregard of the law by one who knew or should have known of the requirements of the Act” is sufficient. *Rogers*, 701 P.2d at 761; *Matter of Order Declaring Annexation*, 637 P.2d 1270, 1275 (Okla. Ct. App. 1981). In determining what constitutes a willful violation, at least one Oklahoma court has dispensed with any consideration of the mental state of the public officials in question. According to the

Haworth court, a willful violation occurs when a particular matter required by the Act (e.g., an agenda, notice, or minute item) is likely to mislead the average reader. *Haworth*, 637 P.2d at 904. However, in light of the state Supreme Court's post-*Haworth* decision (*Rogers*), this definition of "willful" may need to be taken with a grain of salt. See *Rogers*, 701 P.2d at 761 (court found excise board wilfully violated the Open Meeting Act, but found board's action in finalizing budget was moot because the fiscal year had lapsed by the time the appeal was decided).

Section 314 establishes a criminal penalty for willful violations of the Act. It states that anyone who willfully violates the Act and is convicted of that violation shall be punished by a fine up to \$500 and/or imprisonment in the county jail for up to one year.

As the public policy of the Act is to educate and inform the public, private parties who have been affected may bring a private cause of action to enforce the remedies provided for in the Act. *Rabin v. Bartlesville Redev. Trust Auth.*, 308 P.3d 191, 195-96 (Okla. Civ. App. 2013).

In 2014, the Oklahoma Legislature amended the Act to specifically provide that following a violation of the Act, "any person: 1. May bring a civil suit for declarative or injunctive relief, or both; and 2. If successful, shall be entitled to reasonable attorney fees." 25 O.S.Supp.2014, § 314(B). If a public body successfully defends a civil suit and the court finds the suit was frivolous the public body is entitled to attorney fees. *Id.* § 314(C).

The lesson to be drawn from the broad way in which the phrase "willful violation" has been defined is that any violation of the Act, no matter how technical it may seem, may lead to the voiding of actions taken by public bodies and, possibly, to criminal prosecution.

If a public body discovers that it has violated the Act, corrective action is possible. The proper procedure is to begin the entire Open Meeting Act process over again, from filing notice to the posting of an agenda, holding an open meeting at which votes are publicly cast and recorded, and so on.

For example, if a school board discovers that votes regarding its decision to hire a principal were not publicly cast and recorded, it should place the matter of the principal's hiring on the agenda for a subsequent meeting, provide proper notice of the meeting, and proceed with the proposed action in the proper way (i.e., by publicly casting and recording votes on the matter). Nothing in the Open Meeting Act prevents a board from so retracing its steps and following proper procedures. A.G. Opin. 81-214.

VI. CONCLUSION

Oklahoma's Open Meeting Act deserves close study by all public bodies that seek to act legally and effectively and to avoid challenges to actions taken. Public officials should acquire an understanding of the kinds of situations that trigger the Act, a knowledge of the Act's technical requirements, and an appreciation of its democratic aim.

ATTORNEY GENERAL OPINIONS REGARDING THE OPEN MEETING ACT

A.G. OPIN. 02-5:

The Governor's Security and Preparedness Executive Panel, created by Executive Order 2001-36, is not subject to the Open Meeting Act, 25 O.S.2001, §§ 301 – 314, because the Panel is not a "public body" as defined in the Act.

A.G. OPIN. 02-26:

Neither the Open Meeting Act nor the First Amendment to the United States Constitution requires public bodies to allow citizens to express their views on issues being considered by the public bodies; however, public bodies may allow such comments if they so choose, and may impose time limitations on speakers. An agenda item titled "public comments" is sufficient to notify citizens that their comments will be allowed.

A.G. OPIN. 02-37:

Private organizations (either for-profit or non-profit) are not "supported in whole or in part by public funds" and therefore are not subject to the Open Meeting Act if they receive public funds under a reimbursement contract for goods provided and services rendered. However, private organizations which receive a direct allocation of public funds without being required to provide goods or render services in return may be "supported" by public funds and subject to the Open Meeting Act.

A.G. OPIN. 02-42:

The Silver Haired Legislature is subject to the Open Meeting Act, 25 O.S. 2001, §§ 301 – 314, because it is supported in part by publicly funded state agencies, thereby making it a public body under the Act.

A.G. OPIN. 02-44:

Although an agency, like the Grand River Dam Authority, is not required to allow public comment at its meetings, if the agency chooses to allow comment it cannot impose unreasonable restrictions on speech. Further, the Grand River Dam Authority Lakes Advisory Commission is a public body as defined in the Open Meeting Act, 25 O.S.2001, §§ 301 – 314, and is therefore subject to the Act.

A.G. OPIN. 05-29:

Under 25 O.S.Supp.2005, § 307(B)(1), a public body may not use an executive session to discuss awarding a contract for professional services when the recipient will be an independent contractor, rather than a public officer or employee of the public body. In addition a public body may convene in executive session to discuss a “pending” claim if doing so openly would seriously impair the public body’s ability to address the claim in the public interest, but cannot close a meeting merely to get general legal advice from its attorney.

A.G. OPIN. 06-17:

Executive sessions are not permitted to discuss a job opening for a public officer or employee when no particular individual is indicated for the position.

A.G. OPIN. 07-32:

A public body may meet in executive session to discuss the purchase or appraisal of real property, but the Open Meeting Act contains no authority to meet in executive session to discuss the sale of real property.

A.G. OPIN. 09-26:

Unless some provision of law provides otherwise, a public body may not exclude a nonvoting ex officio member from being physically present during an executive session.

A.G. OPIN. 2010-1:

Trusts for the benefit of the State, a county, or a municipality, created under Trusts for Furtherance of Public Functions (60 O.S.2001 & Supp.2009, §§ 176 – 180.4), must comply with the Open Meeting Act.

A.G. OPIN. 2011-22:

City councils and public trusts may hold executive sessions for the purpose of conferring on certain matters pertaining to economic development pursuant to 25 O.S.2011, § 307(C)(10).

A.G. OPIN. 2012-24:

When a majority of the Oklahoma Corporation Commission attends public utility hearings on a legislative matter conducted by an administrative law judge, the hearing is subject to the Open Meeting Act. The Commissioners are engaged in the “conduct of business” because they are considering discrete proposals or specific matters that are within their jurisdiction.

Neither a court reporter’s untranscribed verbatim notes nor a transcript of the proceedings is sufficient to constitute a summary of the proceedings as required for the minutes. The Open Meeting Act does not require that minutes be approved. The best practice is to prepare and approve minutes within a reasonable time after the meeting. The Commissioners do not have to agree on the contents of minutes, but if a Commissioner who was not in attendance votes to approve the minutes, the Commissioner must become familiar with the events that occurred.

A.G. OPIN. 2014-14

Where the Legislature specifically excluded the Workers’ Compensation Commission from Article II of the Administrative Procedures Act, the Commission may not rely on the individual proceeding deliberation provisions of the Open Meeting Act to deliberate in executive session. As no other exception permits the commission to hold confidential communications in an individual proceeding, the Commission must hold its deliberation in an open meeting.

PUBLIC RECORDS IN OKLAHOMA

Updated by Sandra D. Rinehart, Senior Assistant Attorney General*

During World War II, Winston Churchill made one of his many trips to the United States to visit the President at the White House. Desiring to speak with the Prime Minister, President Roosevelt wheeled himself into the room in which Mr. Churchill was staying. He found Churchill emerging naked from the bathtub. Embarrassed, the President apologized profusely but Churchill halted his apologies by stating, “the Prime Minister of Great Britain has nothing to hide from the President of the United States.”

Public perception of those of us in government is that we do have much to hide from the people we serve. Public demand for access to government information has grown remarkably in the years since Watergate. Recognizing this and in an effort to curb such cynicism, the Oklahoma Legislature in 1985 enacted comprehensive open records legislation. The stated purpose of the legislation is to “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.” 51 O.S.2011, § 24A.2. The legislation is codified as the Open Records Act, 51 O.S.2011 & Supp.2014, §§ 24A.1 to 24A.29, hereinafter referred to as the “ORA” or “Act.”

The intent of this article is to provide an overview of the basic principles and requirements of the ORA and to offer a guide to the proper analysis for its application. Although the ORA has been broadly drafted and its language is fairly straightforward, great difficulty arises when seeking to apply the Act to everyday record requests.

IS THE ENTITY A PUBLIC BODY?

The first step in determining whether a duty exists to disclose information under the ORA is to ask whether the entity is a public body. Under the definition provided by the ORA at Section 24A.3(2), a public body may take various forms ranging from an agency or commission to a task force or even a study group. The central issue for determining whether an entity is a public body is to determine whether the entity is “***supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property . . .***” 51 O.S.Supp.2014, § 24A.3(2) (emphasis added); *see* A.G. Opin. 2012-1. However, merely doing business with the State is not ordinarily considered sufficient to turn a private entity into a public body.

* We gratefully acknowledge former Assistant Attorney General Rachel Lawrence-Mor for her work in writing the original article in 1990, and former Assistant Attorney General Victor N. Bird for his work in writing the update in 1991.

Questions arise as to whether a private physician must disclose a patient's medical record or whether an attorney has a duty to provide a client with a litigation file pursuant to the Open Records Act. Because these are private corporations or individuals who are not supported in whole or in part by public funds, no duty exists to release the records pursuant to the Open Records Act. Although the Act includes almost every conceivable type of public entity, the ORA specifically excludes the Legislature, legislators, judges, justices, and the Council on Judicial Complaints. *See* 51 O.S.Supp.2014, § 24A.3(2). However, every public body and public official must keep and maintain records of the receipt and expenditure of public funds. 51 O.S.2011, § 24A.4.

IS THE INFORMATION A RECORD?

If the entity fits the description of a public body, the second important question is whether the information sought is a public record. Again, a record may take many forms, from specific paper documents, electronic communications or photographic materials to video or other types of film or sound recordings. To rise to the level of a public record, the information sought must have been "created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives . . ." 51 O.S.Supp.2014, § 24A.3(1). The statute requires all public bodies and officials to keep and maintain all business and financial transactions conducted by a public body. *See* 51 O.S.2011, § 24A.4. The issue of custody or control of a record has also been addressed in Section 24A.20, which provides, "[a]ccess 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." So, even if a public body has transferred possession of its records, it is still deemed to be in "control and possession" of the records for ORA disclosure purposes. *See Saxon v. Macy*, 795 P.2d 101 (Okla. 1990).

The next step is to determine whether the information sought, in whatever form, has to do with the "***transaction of public business, the expenditure of public funds or the administering of public property.***" 51 O.S.Supp.2014, § 24A.3(1) (emphasis added). In a case construing portions of the ORA, the Oklahoma Supreme Court stated, "[t]he Act includes a definitional section of sufficient breadth to encompass virtually every governmental body and record." *Milton v. Hayes*, 770 P.2d 14, 15 (Okla. 1989). For example, e-mails, text messages, and other electronic communications may constitute records as defined in the ORA, regardless of whether they are created or received on publicly or privately owned equipment. *See* A.G. Opin. 09-12.

However, nongovernmental personal effects or personal financial statements submitted to a public body for the purpose of obtaining a license or becoming

qualified to contract with a public body are not records, unless the law otherwise requires disclosure. 51 O.S.Supp.2014, § 24A.3(1). The language defining what is “not” a record has been amended several times, most recently in 2006 to include records in connection with a Motor Vehicle Report, personal information within driver records, and audio or video recordings of the Department of Public Safety. *Id.* § 24A.3(1)(h).

WHAT RECORDS MUST BE DISCLOSED?

Having determined that the entity is a public body and the information sought is a public record, the next question is whether the record is open to the public. This question is specifically addressed in Section 24A.5 of Title 51, which provides that “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, and/or mechanical reproduction” *Id.*

The only exception occurs when the ORA, or other State or federal statute, or case law provides a confidential privilege so far as a particular record is concerned. *See id.* § 24A.2. The burden to establish that the record may be kept confidential is upon the person or public body wanting to keep the record confidential. *See id.*

If a record contains both confidential and nonconfidential information the record must be redacted to disclose the required information. “Any reasonably segregable portion of a record containing exempt material shall be provided after deletion of the exempt portions” *Id.* § 24A.5(2).

EXEMPTIONS TO DISCLOSURE UNDER THE ACT

1. *Privileged Information*

Section 24A.5(1) lists, in part, records that are to be kept confidential. The section commences with the general statement that *all* records must be disclosed, but further provides:

The Oklahoma Open Records Act . . . does not apply to records specifically required by law to be kept confidential including:

- a. records protected by a state evidentiary privilege such as the attorney-client privilege, the work product immunity from discovery and the identity of informer privileges, or
- b. records of what transpired during meetings of a public body lawfully closed to the public such as executive sessions authorized under the Oklahoma Open Meeting Act, Section 301 et seq. of Title 25 of the Oklahoma Statutes,

- c. personal information within driver records as defined by the Driver's Privacy Protection Act, 18 United States Code, Sections 2721 through 2725, or
- d. information in the files of the Board of Medicolegal Investigations obtained pursuant to Sections 940 and 941 of Title 63 of the Oklahoma Statutes that may be hearsay, preliminary unsubstantiated investigation-related findings, or confidential medical information.

Id. The evidentiary privileges can be found through case law and at 12 O.S.2011 & Supp.2014, §§ 2501 to 2513. It is important to note that the attorney-client privilege for the government client is more limited than for a private client.

2. *Personnel Records*

There are certain personnel records that may be kept confidential at the discretion of the public body. Section 24A.7(A) of Title 51 provides that records may be kept confidential:

1. Which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or
2. Where disclosure would constitute a ***clearly unwarranted invasion of personal privacy*** such as employee evaluations, payroll deductions, employment applications submitted by persons ***not*** hired by the public body

Id. (emphasis added.)

For example, under these provisions a potential employer may be unable to obtain records regarding a public employee's evaluation, certain disciplinary actions, promotion or resignation. If a person applied for a job with a State agency but was ***not*** hired, the employment application submitted, although in the public body's possession, may be kept confidential. The United States Supreme Court has said an "unwarranted invasion" occurs when disclosure of private information does not further the core purpose of letting citizens know what their government is up to. *See United States Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

Other personnel records not specifically listed in Section 24A.7(A) of Title 51 must be made available for public inspection. The types of personnel records which must be disclosed are the employment applications of those who become public officials or employees, gross receipts of public funds, dates of employment, title and position and any final disciplinary action which results in the loss of pay, demotion, suspension or termination. *See id.* § 24A.7(B).

The Oklahoma Personnel Act provides that current and former State employee home addresses, telephone numbers, social security numbers and information related to personal electronic communication devices shall not be open to public inspection or disclosure without a court order. *See* 74 O.S.2011, § 840-2.11. The ORA also requires that the home addresses, telephone numbers, and social security numbers of current or former employees of public bodies must be kept confidential. *See* 51 O.S.Supp.2014, § 24A.7(D).

In 2014 the Legislature amended Section 24A.7 to provide that, except as provided in 70 O.S.2011, § 6-101.16, public bodies shall keep confidential all records created pursuant to the Oklahoma Teacher and Leader Effectiveness Evaluation System (“TLE”) that identify a current or former public employee and contain any evaluation, observation or other TLE record of such employee.

3. Law Enforcement Records

A law enforcement agency is defined in the Act as “any public body charged with enforcing state or local criminal laws and initiating criminal prosecutions” 51 O.S.Supp.2014, § 24A.3(5). In this area the Act provides a specific laundry list of law enforcement information which must be provided to the public. *See id.* § 24A.8(A). The public may access a chronological list of all incidents, arrestee descriptions, facts concerning arrests, conviction information, disposition of all warrants, departmental crime summaries, radio logs and jail registers. *See id.* § 24A.8(A). Mug shots of adult arrestees are included in this list as they constitute arrestee descriptions. A.G. Opin. 2012-22. Law enforcement information not specifically listed in subsection A of Section 24A.8 may be kept confidential by the law enforcement agency *unless* a court finds that the public interest or the interest of an individual outweighs the reason for denial. *See id.* § 24A.8(B). However, Section 24A.8 specifically limits this privilege to “law enforcement records.” Other records of a law enforcement agency would be subject to inspection and disclosure pursuant to the ORA.

Prior to November 1, 2014, audio or video recordings of the Department of Public Safety were excluded from the definition of “record” in Section 24A.3. The Legislature deleted this exception and amended Section 24A.8 so that, as of November 1, 2014, audio and video recordings from recording equipment attached to law enforcement vehicles (dash cams) or the person of a law enforcement officer are to be made available for inspection and copying. Before releasing, the law enforcement agency may redact or obscure specific portions that depict the death of a person, a dead body, one who is nude, or one that identifies minors under 16 years of age. Law enforcement agencies may also redact recordings that reveal the identity of law enforcement officers who become subject to internal investigations until those investigations are concluded.

As to how courts have interpreted this section, see *Transportation Information Services, Inc. v. State ex rel. Department of Corrections*, 970 P.2d 166 (Okla. 1998) (holding that the commercial corporation was entitled to seven years of public offender records without having to supply individual inmates' names); *Cummings & Associates v. Oklahoma City*, 849 P.2d 1087, 1089 (Okla. 1993) (finding that traffic collision reports are not within one of the eight categories of law enforcement records in Section 24A.8(A) that must be made available to the public, and may, therefore, be kept confidential unless a court pursuant to Section 24A.8(B) finds that the public interest or interest of the individual outweighs the reason for denial); *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1511 (10th Cir. 1992) (holding that duty to produce records under the Act is that of law enforcement agency, not police officer).

4. Personal Notes and Materials

Section 24A.9 of the ORA states generally that “[p]rior to taking action, including making a recommendation or issuing a report, a public official may keep confidential his or her personal notes and personally created materials.” It can be difficult, however, to determine whether a document is an official’s or employee’s personal material, rather than a public body’s record.

In the only Oklahoma case construing Section 24A.9, the Court of Civil Appeals ignored the “prior to taking action” language and held that a public body must disclose a draft audit report. Focusing on the “totality of the circumstances surrounding the creation, maintenance, and use of the document,” the court noted that the draft report was not an individual’s personal material because the public body possessed, controlled, and used it to prepare for a hearing; the report was therefore subject to disclosure under the ORA regardless of its status as “preliminary” or “final.” *Int’l Union of Police Ass’ns v. City of Lawton*, 227 P.3d 164, 168 (Okla. Civ. App. 2009).

While this case is persuasive authority rather than precedential, the court’s narrow definition of what is “personal” indicates that materials originally created to aid one official or employee, when circulated and used within a public body, may become subject to disclosure even if they are not intended to be a final product.

5. Proprietary Information

A public body may keep confidential information relating to bid specifications, contents of sealed bids, or computer programs or software, if such disclosure would give an unfair advantage to competitors or bidders. See 51 O.S.2011, § 24A.10(B). Also, a public body may refrain from disclosing real estate appraisals prior to awarding a contract, as well as the prospective location of a private business or industry prior to public disclosure. See *id.* § 24A.10(B)(4), (5). Further, subsection C protects from disclosure information submitted by persons

or entities seeking economic advice from the Departments of Commerce and Career and Technology Education, the technology center school districts, and the Oklahoma Film and Music Office. *See id.* § 24A.10(C). Similarly, the Department of Agriculture may not individually identify the providers of confidential crop and livestock reports. *See id.* § 24A.15. The Oklahoma Medical Center may keep confidential its market research data. *See id.* § 24A.10a.

6. Donor Privacy

A public body may keep confidential any information that would reveal the identity of an individual who lawfully makes a donation to or on behalf of a public body. *See id.* § 24A.11(A); A.G. Opin. 02-27. If the donation consists of tax-deductible library, archive, or museum materials, the date of the donation, its appraised value and a general description of the gift may be released. *See* 51 O.S.2011, § 24A.11(B). Agencies and institutions of the Oklahoma State System of Higher Education may keep all information pertaining to donors and prospective donors confidential. *Id.* § 24A.16a.

7. Citizen Complaints

The Act protects the confidentiality of citizen complaints. Public officials may keep confidential personal communications which are received from persons exercising rights secured by the Federal and/or State Constitution. However, if a public official responds in writing to this personal communication, the public official's response may be kept confidential only to the extent needed to protect the identity of the person making the original communication. *See id.* § 24A.14; A.G. Opins. 88-87; 88-79.

8. Educational Information

The Act provides for the confidentiality of individual student records, teacher lesson plans, tests and other teaching materials, and personal communications concerning individual students of public educational institutions. *See* 51 O.S.2011, § 24A.16(A). "If kept, statistical information not identified with a particular student and directory information shall be open for inspection and copying." *Id.* § 24A.16(B). "Directory information" may include a student's name, address, telephone listing, date and place of birth, major field of study, participation in school activities, dates of attendance, degrees received, and most recent previous educational institution attended. Students and parents must be provided a reasonable opportunity to object to disclosure of directory information before it may be released. *See id.*; A.G. Opins. 88-33; 86-152; 85-167.

For an analysis of a question concerning student records to be complete, 20 U.S.C. § 1232g, commonly referred to as the Buckley Amendment and known as the Family Educational Rights and Privacy Act of 1974, must be consulted.

9. Investigation and Litigation Files

The Act permits the Attorney General, District Attorneys, municipal attorneys and agency attorneys authorized by law, to keep confidential their litigation files and investigatory reports. *See* 51 O.S.2011, § 24A.12. Unfortunately, the Act does not address the investigatory reports of agencies not authorized to have an attorney. (However, records concerning internal personnel investigations may be kept confidential pursuant to Section 24A.7(A)(1)). If the record is subject to disclosure, a law enforcement agency may deny access to records in investigation files if the records are accessible at another public body. *See* 51 O.S.2011, § 24A.20. The fact that an agency transfers the record to another public body or public official for investigatory or litigation purposes does not exempt it from release if it would otherwise be subject to disclosure. *See id.*

10. Department of Wildlife Conservation

The Open Records Act protects the confidentiality of information provided by persons applying for or holding a permit or license issued by the Wildlife Department to a certain extent. 51 O.S.Supp.2014, § 24A.23. This limited protection does not apply to information voluntarily provided by persons for promotional purposes by the Wildlife Department.

This statute has been amended to require the Wildlife Department to disclose an antler description of each deer harvested and the name of the hunter who harvested the deer, if the hunter chooses to have the name of the hunter released.

11. Homeland Security and the Department of Environmental Quality

The Act authorizes that certain information related to acts of terrorism and certain records of the Oklahoma Office of Homeland Security may be kept confidential. 51 O.S.Supp.2014, § 24A.28.

Records received, maintained or generated by the Department of Environmental Quality that contain information regarding sources of radiation significant to public health and safety may also be kept confidential. *Id.* § 24A.28(A)(9).

THE DELIBERATE PROCESS PRIVILEGE

In 2014, the Oklahoma Supreme Court recognized a qualified deliberative process privilege applied to records of Oklahoma Governors for advice they receive in confidence from “Senior Executive Branch Officials,” when deliberating discretionary decisions and shaping policy. *Vandelay Ent. LLC v. Fallin*, 2014 OK 109, ___ P.3d ___, 2014 WL 7157015 (Dec. 16, 2014). This privilege, grounded in the separation of powers, is protected from encroachment by legislative acts such as the Open Records Act.

The Court found: “[t]he sheer number, diversity and magnitude of discretionary decisions entrusted to the Governor demonstrate the public interest is best served by the Governor seeking and receiving advice to aid in deliberations and decision-making.” *Id.* ¶ 17, 2014 WL at * 4.

The Court further discussed the burden of asserting the privilege, finding that the burden falls on the government entity asserting the privilege to demonstrate that the withheld documents fall within the privilege. *Id.* ¶ 22, 2014 WL at * 5. This requires a showing the advice was pre-decisional and deliberative. The Court also found the burden would include records where:

(1) the Governor solicited or received advice from a “senior executive branch official” for use in deliberating policy or making a discretionary decision, (2) the Governor and the “senior executive branch official” knew or had a reasonable expectation that the advice was to remain confidential at the time it was provided to the Governor, and (3) the confidentiality of the advice was maintained by the Governor and the “senior executive branch official.”

Id. ¶ 24, 2014 WL at * 6.

Once the Governor establishes the document satisfies the criteria, the burden shifts to the requester to show (1) a substantial or compelling need for disclosure, and (2) the need for disclosure outweighs the public interest in maintaining confidentiality. *Id.* ¶ 25, 2014 WL at * 5.

In discussing the relationship to the Open Records Act, the Court found that, like the Act, the Governor’s need for confidential advice in the deliberation of public policy is grounded in a strong public interest. *Id.* ¶ 27, 2014 WL at * 6.

IMPLEMENTATION OF THE ORA

The ORA attempts to balance public access to information with the orderly maintenance of public business. A public body must designate a person who is authorized to release records to the public. This person must be available to provide access for inspection and release of records during regular business hours. *See* 51 O.S.2011, § 24A.5(6). The Act commands a public body to provide prompt, reasonable access to its records, but the public body may adopt “reasonable procedures” for the review and release of its records. *Id.* § 24A.5(5).

It is important to note that the public body may set up its own procedures to protect its public records and to prevent record requests from causing “excessive disruptions of [the public body’s] essential functions.” *Id.* § 24A.5(5); *see* A.G. Opin. 85-36 (specifically addressing electronically stored information, *i.e.*, computer tape or disk, but applicable to records in all types of formats as contemplated by this subsection); *see also* A.G. Opin. 06-35. A public body

may require a form to be filled out before a records request is processed, but cannot use its procedures or such a form as obstacles to disclosure. *See* A.G. Opin. 99-55.

Except for records required by Section 24A.4 of Title 51 (regarding the receipt and expenditure of public funds by public bodies and officials), the Act does not impose any additional record keeping duties on a public body. *See* 51 O.S.2011, § 24A.18. For example, if a citizen requests the names and addresses of all agency employees who have children in child care facilities, must the agency compile such information for the requestor? Under Section 24A.18, the agency does not have a duty to create a record if it is not already in existence. Additionally, the Act's definition of a public record presumes that the government information has been reduced to some form.

FEES THAT MAY BE CHARGED

The Act also addresses charging copying or reproduction fees and search fees. With respect to copying fees, a public body may not charge more than 25 cents per page for copies of documents having the dimensions of 8½ by 14 inches or smaller, or \$1.00 per page for certified copies of documents. *See id.* § 24A.5(3). The only exception is if the request is for records containing individual records of persons for which the cost is otherwise prescribed by state law. In that instance, the copying or certifying fee is set by the statute specifically addressing such fees for the particular records in question (*e.g.*, digital records of county assessors, *see* 68 O.S.2011, § 2864; records in the custody of court clerks, *see* 28 O.S.2011, § 31). *See* A.G. Opins. 2012-4, 09-27.

REPRODUCTION FEES

Reproduction fees are relevant when the record is requested in video, audio, computer tape or disk format. Section 24A.5(3) of Title 51 provides that “a public body may charge a fee only for recovery of the ***reasonable, direct costs*** of document copying, or ***mechanical reproduction***.” *Id.* (emphasis added). This is the only language in the Act that arguably even contemplates the fees that may be charged for reproducing records in these formats, and then only in a general manner (unlike the language that establishes specific fees for copying paper documents). The issue then is, what are the reasonable and direct costs of providing copies of public records in these formats?

In providing advice on this issue to State agencies and officials, the Attorney General has considered the legislative admonition that fees such as reproduction fees are not to “be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Id.* § 24A.5(3). In view of this, and the rule of statutory construction holding that words in a statute are to be given their plain, ordinary meaning unless a contrary intention appears, the Attorney General has advised State agencies and officials that they may

recover the costs of materials and labor specifically incurred in reproducing the particular record requested in one of these formats or another non-paper format. *See* A.G. Opin. 96-26.

In application, this has meant that a State agency could charge a requestor for: (1) the storage media used, including disk, tape, or other format unless provided by the requestor; (2) any access or processing charges imposed upon the agency for the request; (3) any hardware or software specifically required to fulfill the request which would not otherwise generally be required or used by the agency, but used in reproducing the record requested in a machine-readable format; and (4) the cost of labor used in providing the record.

The agency would not, however, be able to charge for: (1) hardware or software or a percentage thereof which is otherwise generally required or used by the agency for day-to-day operations; (2) storage, processing or access charges not specifically identified to the request; or (3) maintenance and materials required not directly resulting from the request. In the context of a request for a paper record, this is like an agency being unable to charge for: (1) a percentage of the typewriter or copying machine cost used to make the copies; (2) the cost of archiving and storing the records; or (3) the cost of fixing a copier which broke while copying a record.

The Attorney General's advice on this issue proceeded from a decision of the Oklahoma Supreme Court. In *Merrill v. Oklahoma Tax Commission*, 831 P.2d 634, 642-43 (Okla. 1992), the court affirmed that a reproduction charge "based upon the cost of materials [and] labor needed for providing the computer program and service to produce the requested data" was legal. Undoubtedly, questions concerning reproduction fees for records in non-paper formats will continue to occur. Charging for costs directly related to responding to such a request, and not for costs which are indirect or remote, should provide a safe harbor for a public body.

SEARCH FEES

A public body may charge a "search fee" only when the information sought is "solely for commercial purpose" or when the information requested would clearly cause an "excessive disruption of the public body's essential functions." 51 O.S.2011, § 24A.5(3). In *Merrill*, the Oklahoma Supreme Court affirmed that both factors were present. *See Merrill*, 831 P.2d at 642. Therefore, the Oklahoma Tax Commission, the agency from which the records were sought, was authorized to charge search fees in the form of certain labor and administrative costs incurred in responding to the records request. (The issue of search fees should not be confused with the issue of reproduction fees in *Merrill*. It is clear that the court addressed each issue separately and found the factors present allowing search fees (*id.* at 642) and the evidence necessary to uphold the reproduction costs as reasonable and direct (*id.* at 642-43).)

Even with *Merrill*, this is an area in which an agency should proceed carefully. Section 24A.5(3) of the Act authorizes a search fee, but cautions:

In no case shall a search fee be charged when the release of said documents is in the public interest, including, but not limited to, release to the news media, scholars, authors and taxpayers seeking to determine whether those entrusted with the affairs of the government are honestly, faithfully, and competently performing their duties as public servants.

Id. This language makes clear that search fees will be tolerated in very few circumstances. This particular provision was at issue in *Merrill*, and the court affirmed that the private attorney's request for records was "solely for commercial purposes," his law practice, and not to determine whether the Tax Commission was "honestly, faithfully, and competently performing [its] duties." *Merrill*, 831 P.2d at 642 (*cf.* A.G. Opin. 88-35, in which the Attorney General opined that pursuant to Section 24A.5(3) a search fee may not be charged to a member of the news media); *see also* A.G. Opin. 2012-4 (a county may charge only the amount set by 68 O.S.2011, § 2864(F) for the "search, production and copying in electronic and/or of digital format of property data . . . for the real property maintained within the county assessors' computer systems for commercial purposes").

WHAT OF INDIVIDUAL PRIVACY RIGHTS?

The Act specifically provides that the exceptions to disclosure established in the ORA, together with other State and federal law, adequately protect individual privacy interests. *See* 51 O.S.2011, § 24A.2. The Legislature allows public bodies to determine whether the release of documents regarding employee evaluations or payroll deductions is an invasion of personal privacy. Yet, the ORA states, "[e]xcept where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access[.]" *Id.* § 24A.2.

The Legislature has provided a specific procedure in the Open Records Act for obtaining a protective order for pleadings filed in a public record. 51 O.S.Supp.2014, § 24A.29. A party may seek a protective order directing the withholding or removal of pleadings and other information from a public record. The party or counsel who has received the protective order is responsible for presenting the order to the appropriate personnel for action. *Id.* § 24A.29(C).

The Oklahoma Supreme Court reviewed this issue in *City of Lawton v. Moore*, 868 P.2d 690, 693 (Okla. 1993). In *Moore*, the court held that the City of Lawton had no duty to give notice and an opportunity to be heard to persons

whose interest would be affected by disclosure of public records. In so holding, the court expressly recognized that amendments to the Act in 1988 had overruled *Tulsa Tribune Co. v. Oklahoma Horse Racing Commission*, 735 P.2d 548 (Okla. 1987), in which the court had imposed such a duty on custodians of public records.

In sum, a public body seeking to keep a record confidential always bears the burden of establishing a statutory reason for doing so. 51 O.S.2011, § 24A.2.

PENALTIES FOR VIOLATION OF THE ACT

The ORA provides that a public official's "willful" violation of any provision of the Act is a misdemeanor punishable by a fine of up to \$500.00 or imprisonment in the county jail for a period not to exceed one year, or both. 51 O.S.2011, § 24A.17(A). A person who is improperly denied access to a record may bring a civil suit for declaratory or injunctive relief and may be awarded attorney fees if successful. *See id.* § 24A.17(B). The Supreme Court recently held this remedy is not an exclusive one. *Shadid v. Hammond*, 315 P.3d 1008, (2013). A party aggrieved by the sealing of a record may file a petition in a district court, setting forth a course of action.

Finally, in keeping with the legislatively-created presumption that all records of a public body are open, a public body or public official is not civilly liable for damages resulting from disclosure of records pursuant to the Open Records Act. *See id.* § 24A.17(D).

ATTORNEY GENERAL OPINIONS REGARDING THE ORA

A.G. Opin. 85-36:

One of the most sensitive areas of records access involves electronically stored information. This Opinion held that the Oklahoma Secretary of State need not allow commercial entities on-line access to computerized data absent reasonable assurances that the records involved can be fully preserved and safeguarded from destruction, mutilation and alteration.

A.G. Opin. 85-167:

The Attorney General harmonized the State law regarding “directory information,” as defined by Section 24A.16(B) of Title 51, with federal statutes requiring school districts to notify students’ parents prior to making such information available to disclosure. This Opinion filled a major gap in the law resulting from the omission of this important safeguard in Oklahoma’s adoption of language from the Federal Family Educational Rights and Privacy Act of 1974 (hereafter referred to as “FERPA,” is also known as the “Buckley Amendment”). This problem was corrected by the Oklahoma Legislature in 1986 when it cast Section 24A.16(B) in its present form.

A.G. Opin. 86-69:

This Opinion resolved an apparent conflict in the law between an employee’s right to see his/her own personnel file (*see* § 24A.7(C)) and the confidentiality of information the Oklahoma State Bureau of Investigation had obtained as part of a “background investigation of the employee.” In this circumstance, the balance tips in favor of employee access to the personnel file unless the legitimate privacy interests of “confidential informers” are involved.

A.G. Opin. 86-152:

Existing lists of *former* college students come within the ambit of the ORA subject to several caveats: that the disclosures are limited to directory information as defined in the Act; that the disclosure of information made confidential by FERPA is not permitted; and, that the rights of individuals who have made known their objection to such disclosure be protected.

A.G. Opin. 88-33:

This Opinion addresses the question of whether the Council on Law Enforcement Education and Training (“CLEET”) is a public education institution within the meaning of the Open Records Act and, whether CLEET is required to disclose the list of names and addresses of persons applying for or holding investigation or security licenses. *See* §§ 24A.16; 24A.7(A). CLEET does fall within the definition provided by the Act for a public education institution. However, the

Oklahoma Security Guard and Private Investigator Act, 59 O.S.1988, §§ 1750.1 - 1750.14, as amended, requires that application information pertaining to those licensed by CLEET remain confidential unless otherwise ordered by a court.

A.G. Opin. 88-35:

Under the clear reading of Section 24A.5(3), a public body may not charge a search fee to a member of the news media who is seeking information in the public interest.

A.G. Opin. 88-79:

This Attorney General Opinion answered the question of whether a written complaint filed by a citizen with the State Dental Board may remain confidential pursuant to Section 24A.14 of the Open Records Act. The Opinion concluded that such a complaint was a personal communication which could remain confidential to the extent necessary to protect the identity of the person making the complaint.

A.G. Opin. 88-87:

Letters written to the Pardon and Parole Board regarding clemency considerations of inmates are confidential personal communications pursuant to Section 24A.14 of the ORA. Such letters are considered to be “personal communications” of a person exercising constitutionally secured rights, and therefore, are deemed confidential communications.

A.G. Opin. 93-2:

Addressing the destruction of tape records in the Treasurer’s Office, A.G. Opin. 93-2 affirmed the clear statutory language that audio recordings are records under the Act. The Opinion found that recordings made in connection with the Treasurer’s bidding process were State records as sound recordings made pursuant to law in connection with the transaction of official business or the expenditure of public funds.

A.G. Opin. 95-15

The Oklahoma Historical Society is a public body, as defined by the Open Records Act. As such, its membership list is required to be made available for public inspection and copying. § 24A.3; 53 O.S.1991, § 1.2.

A.G. Opin. 95-68

While this Opinion did not deal primarily with the Open Records Act, the Attorney General did determine that employee service ratings of the various agencies in the State which are received by the Office of Personnel Management

for review do not become public record for that reason alone. The confidentiality of employee service ratings is determined by the employing agency, which has discretion to do so. § 24A.7.

A.G. Opin. 95-97

Telephone bills received by a municipality, for the use of landline and cellular phones by elected official and administrative personnel of the municipality, are public records under the Open Records Act. § 24A.4. A municipality may withhold or delete information on such a bill only when a privilege of confidentiality exists to permit the withholding or deletion of information. *Id.* §§ 24A.2; 24A.5.

A.G. Opin. 96-9:

Records of the Oklahoma County Sheriff Department's Bomb Squad, a law enforcement agency under the ORA, are confidential pursuant to Section 24A.8 of the Act, except as specifically provided by that section.

A.G. Opin. 96-26

This Opinion addresses whether a county assessor may contract to sell, for amounts to be set by the contract, computer-stored information to a private entity. A county assessor is limited in the setting of fees to the amounts authorized by the ORA at Section 24A.5(3) and by 28 O.S.Supp.1996, § 60, which sets certain fees for county assessors. Although this Opinion involves computer-readable records, the Attorney General determined that the provisions of Section 24A.5(3) which allow a fee only for recovery of "reasonable, direct costs of [the] mechanical reproduction" of the requested records. Further, search fees for such records are likewise limited by Section 24A.5(3) and are allowed only if the request for records "is solely for a commercial purpose" or "would clearly cause excessive disruption of the public body's essential functions." *Id.*

A.G. Opin. 97-16:

Documents comprising a background investigation for a judicial nomination performed by the Oklahoma State Bureau of Investigation are confidential records pursuant to 74 O.S.Supp.1996, §§ 150.5(D) and 150.34. As such, these records must be kept confidential by the OSBI. § 24A.5(1).

A.G. Opin. 97-48:

This Opinion deals with the issue of the State of Oklahoma as an employer for the purposes of releasing information regarding a State employee to a prospective employer. For the purposes of 40 O.S.Supp.1997, § 61, which relates to the disclosure of employment information, the State is a covered employer. As such, if a State employee consents to the disclosure of employment, job

performance and/or employee service evaluation information regarding the State employee, such information may be released to a prospective employer, including service evaluations made pursuant to 74 O.S.1997, § 840-4.17.

A.G. Opin. 97-79:

When a State employee is terminated because of a positive random drug test, the State must disclose to a prospective employer of the terminated employee that the employee was terminated. § 24A.7(B). Records supporting disciplinary action against the employee may be kept confidential. *Id.* § 24A.7(A). Records of drug and alcohol test results and related information must be kept confidential by the agency and must be maintained separately from other employee records. 40 O.S.Supp.1996, § 560. If drug or alcohol test results are found within otherwise disclosable personnel records, such information must be redacted. *Id.* § 560; 51 O.S.Supp.1996 § 24A.5(2).

A.G. Opin. 99-22:

The Oklahoma Open Records Act, 51 O.S.Supp.1999, § 24A.23, requires that the Oklahoma Department of Wildlife keep license holders information confidential unless it is used for a department purpose. The Attorney General held that generating revenue is not a department purpose, and that the information may not be released for that purpose.

A.G. Opin. 99-30:

The Oklahoma Statutes differentiate between state employees and public employees as to keeping employee information confidential. According to 74 O.S.Supp.1999, § 840-2.11, state agencies must keep state employees' home phone numbers, home addresses, and social security numbers confidential. Under the Open Records Act, public bodies other than state agencies must keep their current and former employees' home addresses confidential, 51 O.S.Supp.1999, § 24A.7, but may keep employee phone numbers confidential only if disclosure would constitute a clearly unwarranted invasion of privacy.

A.G. Opin. 99-37:

The Association of County Commissioners Self Insurance Fund and the Association of County Commissioners Self Insurance Group are public bodies because they are supported in whole or in part by public funds, or entrusted with expending public funds. Both groups are therefore subject to the Open Records Act, 51 O.S.1991 & Supp.1999, §§ 24A.1 – 24A.24, and the Open Meeting Act, 25 O.S.1991 & Supp.1999, §§ 301 – 314.

A.G. Opin. 99-55:

Certificates of Non-Coverage issued by the Department of Labor are public records under the Act, 51 O.S.Supp.1999, § 24A.5, and are therefore subject to disclosure. The Department: 1) may not require those who request information to enter into a written contract to obtain public records; 2) may solicit only reasonable information from requestors; and 3) may not create distinctions in the public's ability to inspect or copy public records. *See* 51 O.S.Supp.1999, §§ 24A.2, 24A.5.

A.G. Opin. 99-58:

Once a district attorney has filed the pleadings in a criminal case, a court clerk must make the pleadings available for inspection and copying unless the pleadings are protected by court order or other privilege. 51 O.S.Supp.1999, §§ 24A.3, 24A.5. A district attorney may, however, keep information in his or her litigation files confidential according to § 24A.12. Finally, police departments are not required to provide public access to department records except as provided in § 24A.8, or pursuant to court order.

A.G. Opin. 99-74:

County sheriffs' jail registers are public records subject to the Open Records Act, 51 O.S.Supp.1999, § 24A.8(A)(1), (8), and must be released to the public, including bail bondsmen, upon request.

A.G. Opin. 01-7:

Pursuant to 51 O.S.1991, § 24A.13, the State Department of Health may keep confidential certain personal information, including home addresses and social security numbers, of nursing aide applicants and licensees, because the information is confidential under federal law. However, the Open Records Act allows the Department to release the date a nursing aide became eligible for placement in its registry, as well as any finding that a nursing aide has been guilty of abuse, neglect, or exploitation.

A.G. Opin. 01-24:

When a court clerk files of record the names of persons selected as general panel jurors, the jurors' names become available to the public under the Open Records Act.

A.G. Opin. 01-29:

Banks may withhold information from the public regarding public funds held in deposit, because banks are not public bodies as defined by the Open Records Act, and are therefore not subject to the Act's disclosure requirements.

A.G. Opin. 01-46:

This Opinion addressed whether electronic messages (emails) created or received by public bodies constitute records under the Open Records Act and thus are subject to the Act's disclosure requirements. The Opinion concluded that as long as an email is connected with the transaction of public business, expenditure of public funds, or administration of public property, it is a record under the Act. The Opinion further determined that emails may be retained either in electronic form or on paper; however, if emails are retained on paper, documentation must exist to direct persons seeking information to all relevant material regarding the record. Finally, public bodies may allow electronic access to their records; however, public bodies must provide records in another format if confidential information cannot be redacted in the electronic format.

A.G. Opin. 02-5:

Documents created by the Governor's Security and Preparedness Executive Panel are not subject to the Open Records Act, 51 O.S.2001, §§ 24A.1 – 24A.26, because the Panel is not a "public body" as defined in that Act, nor are records the Panel creates "public records" under the Act. However, materials connected with the transaction of public business, expenditure of public funds, or administration of public property which are created by, or come into the possession of, any of the public officials who serve on the Panel constitute records under the Open Records Act.

A.G. Opin. 02-27:

Under the Open Records Act, 51 O.S.2001, § 24A.11, a public body may keep confidential donated library, archive, or museum materials, as well as any information which would reveal the identity of an individual who lawfully makes a donation to or on behalf of a public body.

A.G. Opin. 02-42:

The Silver Haired Legislature is subject to the Open Records Act, 51 O.S. 2001, §§ 24A.1 – 24A.26, because it is supported in part by publicly funded state agencies, thereby making it a public body under the Act.

A.G. Opin. 02-44:

The Grand River Dam Authority Lakes Advisory Commission is a public body as defined in the Open Records Act, 51 O.S.2001, §§ 24A.1 – 24A.26, and is therefore subject to the Act.

A.G. Opin. 03-28:

As a State agency administering or operating public property, a State-created Indian housing authority is subject to the provisions of the Oklahoma Open

Records Act. 51 O.S.Supp.2002, § 24A.3. The names and addresses of the participants contained in the records of a State-created Indian housing authority are subject to disclosure under the Oklahoma Open Records Act because no exemption applies and no other provision of law requires their confidentiality. 51 O.S.2001, § 24A.5.

A.G. Opin. 03-31:

Records of the Oklahoma Tax Commission regarding the Workers' Compensation Assessment Rebate Fund are not subject to the Open Records Act, 51 O.S.2001 & Supp.2002, §§ 24A.1 – 24A.26, but instead are confidential and cannot be disclosed except where specifically authorized. 68 O.S.2001, § 205(A).

A.G. Opin. 05-3:

A public body under the Open Records Act may contract with a private vendor to provide electronic access and reproduction of its records, but it must still provide access to those records at the public body's office under 51 O.S. 2001, § 24A.5(3), (5) and (6). Therefore, even though a public body maintains its records at some other physical location, it must also make its records available at its office, either in original or duplicated form. If more than one office location exists, the records must be maintained and made available at the office where the records are maintained in the ordinary course of business. A public body is not prohibited from contracting with a private vendor for record storage, but must retrieve any requested records and provide access to a requester at the public body's office.

A.G. Opin. 05-19:

Computer registries maintained by libraries are records under the Open Records Act. However, the records are confidential under 65 O.S.2001, § 1-105(A) because they indicate which of the libraries' documents or material have been loaned to or used by identifiable individuals, unless one of the exceptions in the Act is met.

A.G. Opin. 05-21:

Furnishing electronic copies of instruments kept by a county clerk in computer-readable format is subject to the fee limitations of the Oklahoma Open Records Act, which allows a search fee in some cases. 51 O.S.Supp.2004, § 24A.5(3).

A.G. Opin. 05-39:

The Health Insurance High Risk Pool is not a public body under the Open Records Act and its records are not subject to disclosure under the Open Records Act. 51 O.S.Supp.2005, § 24A.3; 36 O.S.Supp.2005, § 6535.

A.G. Opin. 05-50:

Section 2835(E) of Title 68 provides an exemption for “sworn lists of property” filed by a taxpayer with the county assessor from the Open Records Act. The exemption does not make confidential records created or received in the informal hearing process of 68 O.S.Supp.2005, § 2876(F).

A.G. Opin. 06-35:

A public body that receives an open records request must permit the requester to use his/her personal copying equipment as long as the copying process does not unreasonably disrupt the public body’s essential functions or result in loss of or damage to records. Public bodies need not furnish original records as long as any copy supplied is a true and correct reproduction of the original.

A.G. Opin. 08-19:

Records of the receipt and/or expenditure of public funds by legislators and their employees are subject to disclosure under the Open Records Act. While the Open Records Act does not require disclosure of communications among members of the Legislature, any written or electronic communication received by a public body from a legislator or legislative employee becomes a record of that public body and is subject to disclosure unless made confidential or privileged by law.

A.G. Opin. 09-12:

E-mails, text messages, and other electronic communications made or received in connection with the transaction of public business are subject to the Open Records Act regardless of whether the equipment used to create or send them is publicly or privately owned.

A.G. Opin. 09-27:

Court clerks may charge the copying fees specified in 28 O.S.Supp.2008, § 31 regardless of the fee limitations in the Open Records Act, 51 O.S.Supp.2008, § 24A.5(3).

A.G. Opin. 09-33:

A public body may, on an individual basis, determine that disclosing a personnel record indicating an employee’s date of birth is an “unwarranted invasion of personal privacy” under the Open Records Act, 51 O.S.Supp.2008, § 24A.7(A)(2).

A.G. Opin. 2012-1:

The provisions of 74 O.S.2011, § 5085.6(C) requiring the Oklahoma Capital Formation Board to keep certain information confidential applies to informa-

tion supplied to the Board by entities other than the Board. Other records of the Board are open and subject to disclosure. *See* 51 O.S.2011, § 24A.5(1).

A.G. Opin. 2012-4:

With regard to producing electronic or digital records of real property to a private company for commercial purposes, a county may charge only the fees authorized in the Open Records Act and set by the State Board of Equalization under 68 O.S.2011, § 2864(F).

A.G. Opin. 2012-22:

A mugshot is a physical description of an arrestee and is, therefore, subject to disclosure pursuant to 51 O.S.2011, § 24A.8.

A.G. Opin. 2014-1:

Audio recordings of court proceedings filed with or maintained by court clerks are public records and are subject to disclosure under the Oklahoma Open Records Act unless they are properly sealed by court order or specifically exempt from disclosure by law.

INDEX SECTION

OKLAHOMA CONSTITUTION CITED OR CONSTRUED

Article	Section	Opinion 2014-	Page
II	15	7	48
II	26	3	13
V	54	7	48
V	56	7	46
V	57	7	48
X	5	4	30
X	9B	4	25
X	9C	13	78
X	12	12	73
X	13	12	73
X	14	6	41
X	15	6	41
X	19	15	89
X	19	16	101
X	19	17	105
X	20	12	74
X	23	7	47
X	23	17	108

OKLAHOMA STATUTES CITED OR CONSTRUED

Title	Section(s)	Opinion 2014-	Page
2 O.S.2011	16-22	5	33
	16-24	5	33
10A O.S.2011	1-4-712	15	92
	2-3-103	15	88
	2-7-902	15	92
10A O.S.2011 & Supp.2014. . .	2-4-101 – 2-4-110	15	87
10A O.S.Supp.2014	2-1-103	15	91
	2-4-101	15	93
	2-4-107	15	93
11 O.S.2011	29-105	5	35
12 O.S.2011	22	1	4
	32.1	1	3
	33	1	3
	34	1	3
18 O.S.2011	592 – 594	5	33
19 O.S.2011	1	9	57
	3	9	57
	339.1	9	58
	342	9	58
	345	15	95
	349	9	58
	351	5	32
	351.1	5	34
	351.2	5	34
	351.3	5	34
	388	15	90
	901.2	5	34
	901.7	5	33
	901.25	5	34
19 O.S.Supp.2013	180.65	15	94
	220	17	107
	339	9	57
	339	15	95
	345	15	95
	421.1	9	58
	421.2	9	57

Title	Section(s)	Opinion 2014-	Page
20 O.S.2011	106.4	1	4
21 O.S.2011	1220	17	106
	1290.10	3	15
21 O.S.Supp.2013	263	11	67
	1247	12	75
	1272	3	13
	1272.1	3	18
	1277	3	17
	1290.3	3	15
	1290.5	3	15
	1290.9	3	15
	1532	11	67
22 O.S.Supp.2013	991a	11	67
	991c	11	67
25 O.S.2011	303	14	85
	304	14	85
	307	14	84
25 O.S.2011 & Supp.2014	301 – 314	14	83
26 O.S.2011	4-112	10	62
28 O.S.2011	153	17	106
34 O.S.2011	9	15	90
36 O.S.2011	102	2	8
	307.1	2	9
	4421 – 4430	2	6
	4422	2	6
	4423	2	6
	4424	2	6
	4426	2	6
	4426.1	2	6
	4426.2	2	6
	4427	2	9
	4429	2	6
	4430	2	6
37 O.S.2011	600.1 – 600.23	12	75
	600.2	12	76
	600.10	12	74

Title	Section(s)	Opinion 2014-	Page
47 O.S.2011	6-303	17	106
	17-101	17	106
	17-102	17	106
47 O.S.Supp.2013	6-101	17	107
	6-212	17	106
51 O.S.2011	24A.2	1	2
	24A.3	1	2
	24A.5	1	3
	24A.25	1	4
	24A.29	1	4
	152	5	35
	152.1	5	35
	154	5	35
51 O.S.2011 & Supp.2013	24A.1 – 24A.29	1	1
	151 – 172	5	35
51 O.S.Supp.2013	155	5	35
57 O.S.Supp.2013	515	11	67
57 O.S.Supp.2014	515a	11	69
59 O.S.2011	1750.2	3	14
	1750.3	3	14
	1750.4	3	14
59 O.S.2011 & Supp.2013	1750.1 – 1750.14	3	14
59 O.S.Supp.2013	1750.5	3	15
60 O.S.2011	176 – 180.4	15	93
62 O.S.2011	253	17	107
62 O.S.Supp.2013	34.87	7	44
63 O.S.2011	1-1521	12	75
	2-404	17	106
	2-405	17	106
	2-406	17	106
	2-407	17	106
	2-407.1	17	106
	4021	17	107

Title	Section(s)	Opinion 2014-	Page
63 O.S.Supp.2013	1-1527	12	75
	1-2530.1	17	106
	1-2530.9	17	105
	2-401	17	106
	2-402	17	106
63 O.S.Supp.2014	2-415	17	106
68 O.S.2011	301	12	71
	302-5	17	107
	303	12	72
	401	12	71
	402-3	17	107
	404	12	72
	1370	5	34
	1370	15	95
	1511	12	75
	2861	15	94
	3005.1	15	94
	3007	15	94
68 O.S.Supp.2013	3006	15	94
70 O.S.2011	14-108	4	25
70 O.S.2011 & Supp.2013	2601 – 2605	7	44
70 O.S.Supp.2013	17-106	8	51
	3311	11	68
	3953.1	7	44
74 O.S.2011	2202	6	40
	2212	6	41
75 O.S.2011	250.1	14	83
	309	14	84
75 O.S.2011 & Supp.2014	250 – 323	14	83
85A O.S.Supp.2013	1 – 125	14	83
	1	16	99
	19	14	83
	19	16	99
	28	16	99
	72	14	83
	78	14	83
	122	16	99

Title	Section(s)	Opinion 2014-	Page
	200 – 213	14	83
	200	16	99
	211	14	83
	300 – 328	14	83
	300	16	99
	322	14	83

OKLAHOMA “ACTS” CITED IN 2014 OPINIONS

Opinion 2014-

Administrative Procedures Act	14
75 O.S.2011 & Supp.2014, §§ 250 – 323	
Administrative Workers’ Compensation Act	14, 16
85A O.S.Supp.2013, §§ 1 – 125	
Governmental Tort Claims Act	5
51 O.S.2011 & Supp.2013, §§ 151 – 172	
Long-Term Care Insurance Act	2
36 O.S.2011, §§ 4421 – 4430	
Oklahoma Employee Injury Benefit Act	14, 16
85A O.S.Supp.2013, §§ 200 – 213	
Oklahoma Higher Learning Access Act.	7
70 O.S.2011 & Supp.2013, §§ 2601 – 2605	
Oklahoma Open Meeting Act	14
25 O.S.2011 & Supp.2014, §§ 301 – 314	
Oklahoma Open Records Act.	1
51 O.S.2011 & Supp.2013, §§ 24A.1 – 24A.29	
Oklahoma Security Guard and Private Investigator Act	3
59 O.S.2011 & Supp.2013, §§ 1750.1 – 1750.14	
Oklahoma Self-Defense Act	3
59 O.S.2011 & Supp.2013, §§ 1290.1 – 1290.26	
Prevention of Youth Access to Tobacco Act	12
37 O.S.2011, §§ 600.1 – 600.23	
Workers’ Compensation Arbitration Act	14, 16
85A O.S.Supp.2013, §§ 300 – 328	

**PREVIOUS ATTORNEY GENERAL OPINIONS
CITED OR CONSTRUED IN 2014 OPINIONS**

Opinion Cited	Current Opinion	Page
79-216	14.....	.85
80-15	5.....	.34
80-283	6.....	.43
81-16	6.....	.43
82-251	5.....	.34
83-300	12.....	.81
84-5	6.....	.42
96-70	5.....	.34
99-58	1.....	.3
03-29	12.....	.73
04-32	16.....	.102
09-12	1.....	.3
09-27	1.....	.3
12-16	15.....	.89

2014 TOPIC INDEX

ADMINISTRATIVE LAW

Insurance Commissioner, approval of renewal premium increases for long-term care insurance policies	14-2
--	------

BOARD OF CAREER AND TECHNOLOGY EDUCATION	14-4
--	------

BOARD OF EDUCATION, STATE

Career Tech., school district to deannex from	14-4
---	------

CONSTITUTIONAL LAW

General Appropriations, Article X, § 23	14-7
One Subject Rule, OKLA. CONST. art. V, § 57	14-7
Proceeding begun	14-7

CONSTITUTIONAL QUESTIONS

Article X, § 23	
general appropriations bill	14-7
substantive provisions	14-7
transfers	14-7
One Subject Rule	14-7
Proceedings Begun	14-7
Public funds	
Emergency Medical Services District	14-13
purchase of wheelchair van	14-13

CORRECTIONS, DEPARTMENT OF

Probation and parole officers supervision, district attorney and DOC	14-11
---	-------

COUNTY COMMISSIONERS, BOARDS OF

Authority, declare property surplus	14-9
County sales tax	
use of	14-15
Fire-protection services, authority to provide	14-5
Liability for policy decision - fire protection services	14-5
Property, surplus, transfer of/or declaration of	14-9
Sovereign Immunity - for policy decision	14-5

COUNTY GOVERNMENT

Taxation, cigarettes & tobacco products	14-12
---	-------

COUNTY SALES TAX

Distinct and specific purpose of the financing, etc.	14-15
Use for voter approved purpose only	14-15

Topic	Opinion
COURT CLERK	
Open Records Act, audio recordings of court proceedings	14-1
COURTS	
Firearms	
private investigators may lawfully carry a firearm into a state courthouse or other state building	14-3
Open Records Act, audio recordings of court proceedings	14-1
DISTRICT ATTORNEY	
Probation & parole officer supervision.	14-11
ELECTIONS	
Voter, signature requirements in applications.	14-10
EMERGENCY MEDICAL SERVICE DISTRICTS (EMS)	
Funds, authority to use levied funds to purchase wheelchair vans.	14-13
FIRE PROTECTION DISTRICTS	
Services	
authority to provide in the county	14-5
Board of County Commissioners, authority to contract	14-5
INSURANCE	
Long-Term Care Insurance	
approval of renewal premium increases by Insurance Commissioner.	14-2
LEGISLATURE	
Authority, to transfer funds.	14-17
OPEN MEETING ACT, OKLAHOMA	
Executive sessions,	
exemption Article II of the Administrative Procedures Act	14-14
Workers' Compensation Commission	14-14
OPEN RECORDS ACT, OKLAHOMA	
Court clerk, audio or sound recordings	14-1
PROFESSIONS AND OCCUPATIONS	
Private investigators may lawfully carry a firearm into a state courthouse or other state building	14-3
PUBLIC FUNDS	
Ambulance services, purchase of wheelchair van	14-13

Topic	Opinion
REGENTS, BOARDS OF	
Oklahoma Higher Learning Access Fund - Oklahoma's Promise	14-7
RETIREMENT SYSTEMS	
Teachers' Retirement System	
composition of Board of Trustees	14-8
rules, authority to promulgate	14-8
REVENUE AND TAXATION	
Cigarette tax, county ability to impose	14-12
County sales tax	
approved by voters	14-15
use for voter approved purpose only	14-15
Equalization, State Board of, certification, recertification	14-7
Tax, purpose of tax restricts spending	14-17
Tobacco product tax, county's ability to impose	14-12
Workers Compensation Fund	14-16
SELF-DEFENSE ACT, OKLAHOMA	
Private investigators, no superior rights from the Act	14-3
STATUTORY CONSTRUCTION	
Words, choice of	14-8
TOURISM AND RECREATION DEPARTMENT	
Leasing municipal land for use as public park	14-6
TRAUMA SYSTEMS IMPROVEMENT AND DEVELOPMENT ACT, OKLAHOMA	
Trauma Care Assistance Revolving Fund	
Legislature's authority, transfers, narrow power	14-17
VOCATIONAL-TECHNICAL EDUCATION (See also EDUCATION)	
Districts, annexation	14-4
WORKERS' COMPENSATION ACT	
Fund	14-16
WORKERS' COMPENSATION COMMISSION	
Fund	14-16
Open Meeting Act, executive sessions, confidential deliberations	14-14

CUMULATIVE TOPIC INDEX 1983 – 2014

Topic	Opinion	
ABANDONMENT		
Property what constitutes	99-18	
ABORTIONS		
Constitutionality	83-182	
Health Department, regulation of	91-10	
ABSTRACTORS		
Access to records	85-30	
All inclusive rate	86-102	
Certificate of	82-46, 83-203, 83-281	
Fees, limitations and violations	82-155	
Licensed abstractors	82-109	
Oklahoma Abstractors Law	85-30	
ACHIEVING CLASSROOM EXCELLENCE ACT OF 2005		12-14
ADMINISTRATIVE LAW		
Accountancy, Board of Public rules and regulations	83-290	
Administrative Hearing right to, before Health Care Authority	01-15	
Agencies		
hiring freeze (withdraws 80-145)	96-47	
insurance, requirement to purchase	99-49	
interpretations afforded great weight	00-44	
jurisdiction, expiration of time	98-39	
orders, appeal time	98-39	
powers, expressed and implied	98-44, 00-37	
given to	02-23	
public funds, expenditure of	98-44	
regulations, injunction to enforce	97-95	
revolving fund	03-9	
right or privilege, exclusive	86-18	
rules and regulations, irrevocable	86-44	
temporary, creation of	02-29	
Architects, civil penalties	87-12	
Ardmore Higher Education Center, powers & authority of Board	07-7	
Bail bondsmen, right to hearing	85-11	
Capitol-Medical Center Improvement and Zoning Commission	83-91	
Cemetery, Boards of Trustees	83-25	
Chiropractic Examiners, Board of	83-90	
Civil penalties, architects	87-12	

Topic	Opinion
<i>ADMINISTRATIVE LAW (CONT.)</i>	
Conflict of interest, administrative officer	85-132
Constitutional questions	08-17
Corporation Commissioner	
pipeline	99-70
utilities, authority to investigate	97-76, 98-40
Corrections, Department of	99-51, 99-56
Delegation of Power	95-28, 96-94, 01-15
Due Process	
delegation of adjudicative power	01-15
hog feed yard license, rights of landowners	96-76, 98-40
Ethics Commission	08-15
Federal rules	
adoption of, by reference	99-70
Health Care Authority	
right to hearing before	01-15
Health Department	83-145
Hog Feed Yard License Procedure	96-76
Industrial Finance Authority, Oklahoma	83-150
Insurance Commissioner, approval of renewal premium	
increases for long-term care insurance policies	14-2
Landscape architecture, unlawful to aid and abet unlicensed practice.	05-34
Legal fees for representation by Labor Department	07-36
Legislative delegation	99-62
Legislature – One-House Veto	86-17
Motor Vehicle Commission	
used motor vehicle dealers, jurisdiction over	99-48
Rules and Regulations	
Accountancy, Board of Public	83-290
administrative penalty not a “fee”	01-5
adoption of, by reference	99-70
ambiguity	13-7
applicability to facilities under construction	97-101
arbitration agreements, Department of Transportation	87-29
emergency rules	
adoption of	83-161
expiration of	01-8
Ethics Commission Rules, Legislature’s consideration of	94-7, 04-40
fees, Corporation Commission	87-98
general application	
Department of Corrections	99-51
Oklahoma Health Care Authority	95-62
legislative review period for permanent rules	01-8
Legislature, lack of disapproval	13-7

Topic	Opinion
<i>ADMINISTRATIVE LAW (CONT.)</i>	
necessity for rules	10-2
needed when appropriations run out	00-33
Physical Therapists, conflict with statutes	96-35
real estate appraisers certification requirements	95-11
Real Estate Commission	04-37
“rule,” what constitutes	99-51
scope of authority	96-35
smoking in public places, Department of Health	87-121
statutory authority	98-40
validity	01-28, 01-48, 13-7
Scenic Rivers Commission	83-16, 83-157
implied powers	06-30
Teachers’ retirement system	85-6
 <i>ADMINISTRATIVE PROCEDURES ACT (APA)</i>	
Administrative penalty not a “fee”	01-5
Agencies subject to	99-56
Chiropractic Examiners, Board of	
promulgate, requirement to	02-22
Clerical mistakes, correction of	88-112
Commissions subject to	84-189
Corrections, Department of	
rulemaking requirements	99-51
Emergency rules, expiration of	01-8
Final orders	88-112
Grand River Dam Authority	02-44, 04-35
Grand River Dam Authority Lakes Advisory Commission	03-25
Individual proceedings - notice appeals	03-32
Labor commissioner	87-97
Legal fees for representation by Labor Department	07-36
Legislative review period for permanent rules	01-8
Linked Deposit Review Act, subject to	88-52
Rule	
needed when appropriations run out	00-33
<i>prima facie</i> evidence of proper interpretation	00-43
procedures, establishment of	05-26
what constitutes	99-51, 99-56
Rulemaking hearing	
formal hearings	85-64
notice, ability to hold in evening	00-27
present, who must be	00-27
statements, ability of agency to summarize	00-27
Rulemaking requirements, local function exception	95-67

Topic	Opinion
ADOPTION CODE, OKLAHOMA	
Adoption decree, out-of-state	04-8
AD VALOREM TAXES (<i>see also</i> REVENUE AND TAXATION)	
Ambulance service, funding for	02-39
Assessment	
benefit to property	07-10
ratio, permissible deviations	83-44
Banking associations and credit unions	85-142
Board of Tax Roll Corrections	
members/replacement	99-69
Churches, exemption	01-9
County	
fair, special levy for property and facilities	13-4
hospital, mill levies	90-7
Court Clerk, funding	83-39
Elderly/Low income (Article X, § 8C)	97-27, 05-17
Enforcement, use of private counsel	04-24
Equal Protection Clause, educational/building millages	95-83
Equalization, State Board of	
authority to interpret Constitution	98-32
Exemption, application deadline	13-24
Farm and ranch land, tax exemption	85-67
Farm equipment and machinery	99-42
Funds, apportionment of invested, school district	84-35
Grossly undervalued property, reassessment	04-24
Homestead exemption	87-103
Household goods	
exemptions	95-7
livestock, millage adjustment factor	95-22
Human Services, Department of	
proper purposes of	83-210
Investment of (partially withdrawn by 93-32)	83-284
Lease-Purchase agreements	
payment under	88-73, partially withdrawn by 05-14
state agency	95-92
Leases	
public trusts	98-28
Libraries	01-22, 04-36
Livestock exemption	95-7
Manufactured homes	84-41
permit to move	95-47
Manufacturing facility, replacement/expansion	85-122
Millage rate adjustment	03-22

Topic	Opinion
<i>AD VALOREM TAXES (CONT.)</i>	
Municipalities	
exempt property outside county	99-40
Notice	88-14
Oil and Gas	
equipment	83-123, 84-44
property exempt	89-54
real property	83-142
Payment schedule	88-110
Property	
improvements to (Article X, § 8B)	97-27
interest	05-30, 06-37
omitted, procedure to add	00-23, 05-30
tax roll	06-37
public	
property, exemption from	83-96
service property	
comprehensive revaluation	84-40
methodology of assessment	83-296
unit appraisal valuation	84-2
valuation protest	83-296, 88-31
Protests	
county assessments	82-241
public entities	99-20
Reimbursement fund	
buffer strip claims	03-16
compensation to counties for lost ad valorem, state-owned lands	09-9
homestead exemptions	03-16
manufacturing concerns (qualifying)	03-16
Religious use exemption	01-9
Revaluation budget	
county assessor's	
office, funding of	83-243
revalue	84-100
fire protection districts	85-78
recipient jurisdiction protests	99-46
school districts	85-4
Rural Electric Cooperatives	
exemption	00-56
Salary incentive aid formula	84-7
School Districts	
bond reduction	92-2
school districts, formula for State aid	83-44
Statutory filing deadlines	03-23

Topic	Opinion
<i>AD VALOREM TAXES (CONT.)</i>	
Tax deed for non-payment	04-12
Tax roll, contents	05-30
Taxpayer information, real or personal.	85-40
Timberland	99-20
Time deposit by County Treasurer	
certificate of deposit	84-106
investment of ad valorem tax revenues.	84-35
Valuation	
authority to adjust	02-30
benefit to property	07-10
buildings under construction.	07-34
constitutional limitations.	01-36, 02-30
laws	95-89
platted lots	01-4, 07-34
protest, public service companies	88-31
use value	99-8
value increases	01-36
Visual Inspection Program	
expenses attributable	99-46
private counsel	04-24
 ADVANCE DIRECTIVE ACT	
Attorneys-in-fact.	06-34
Health care proxy requirements	06-34
Physicians.	06-32
 ADVANCEMENT OF HISPANIC STUDENTS IN HIGHER EDUCATION TASK FORCE	
Constitutional law.	04-29
Equal protection	04-29
Statutory construction.	04-29
 ADVERTISING	
Free speech, advertisement of out-of-state business	96-93
Highway, placement of signs	85-75, 09-8
Intoxicating liquors.	85-114
Legal notice	85-65
Motor vehicle dealers	
false or misleading advertising, discipline of	99-48
Real estate organizations	95-30
Sale of health-care goods or services at less than cost.	97-18
Tattooing.	96-93
Trade name, use of by dentists.	08-13

Topic	Opinion
AERONAUTICS COMMISSION, OKLAHOMA	
Aircraft registration fees	87-150
Heliport facilities, funding of (withdraws 80-122).	88-53
AGE DISCRIMINATION IN EMPLOYMENT ACT	
Reasonably necessary to position.	83-167 96-83
AGRICULTURE	
Agriculture and mechanical college	
dispute resolution	
certification of mediation program by Administrative	
Director of the Courts	03-20
governance	99-47
institute for issue management and alternative resolution	
certification of mediation program by Administrative	
Director of the Courts	03-20
Agriculture Mediation Programs	
certification of mediation program by Administrative	
Director of the Courts	03-20
Board of	
enforcement of limitations for owning or leasing any interest in land	
to be used in the business of farming or ranching.	99-50
Concentrated animal feeding operations	
license renewal, right of adjacent property owner to due process . . .	00-52
recreational sites	98-40
setback requirements	
groundwater	97-107
public water supplies	97-107
zoning	98-31
Contract growing arrangements	01-17
Cooperative corporations	82-185
Department of,	
inspection, Grade A milk.	85-83
permits to discharge into State waters, authority to issue	90-2
regulation of animal waste	97-95
water quality standards implementation	97-95
Farming or ranching	99-50
Farming or Ranching Business Corporations Act	00-36
Feed Yard Act, constitutionality of.	97-30
Feed yard rules	
facilities under construction, applicability	97-101
Financial assistance of the State Board	82-45
Fire departments, rural, grants	89-77
Grain Storage Act.	83-107

Topic	Opinion
<i>AGRICULTURE (CONT.)</i>	
Hearing in hog feed yard license procedure	96-76, 98-40
renewal license procedure	00-52
Hog feed yard license procedure	
hearing rights of landowners in vicinity	96-76, 98-40, 00-52
notice to local landowners	96-76, 98-40
Liens-agister, feedman's	85-171
Peanut Commission, State agency entitled to legal representation	87-83
Public lands, State Board of Affairs' power	82-102
Sheep and Wool Commission	86-76
Tax exemption, farm and ranch land	85-67
Vertically integrated corporations	
legality of	98-31
Wheat Commission	82-71, 83-45
 <i>AGRICULTURE, OKLAHOMA DEPARTMENT OF</i>	
Department of Agriculture	
foot and mouth disease	01-44
quarantines, animal	01-44
 <i>AIRCRAFT REGISTRATION ACT</i>	 87-150
 <i>ALARM AND LOCKSMITH INDUSTRY ACT</i>	 13-12
 <i>ALCOHOL AND DRUG ABUSE ACT</i>	 84-22
 <i>ALCOHOLIC BEVERAGE CONTROL ACT</i>	
Bar areas, designated	05-41
Caterer license	97-7
Definitions	
licensee	07-2
sale	07-2
Licenses	97-7, 07-2
Tribal-State Gaming Compact	07-2
 <i>ALCOHOLIC BEVERAGE LAWS ENFORCEMENT COMMISSION (ABLE)</i>	
Beer, low-point	
food item, qualifies as in main purpose determination	05-41
licensing of clubs (00-57 <i>overturned</i>)	98-15, 00-57
peace officer's authority to enforce	06-33
regulation of (00-57 <i>overturned</i>)	00-18, 00-57, 06-33
Beverages exempted from control	85-72
Dual office holding	
ABLE commissioned agent	06-42
ABLE hearing officer	06-42
ABLE municipal attorney	06-42

Topic	Opinion
<i>ABLE (CONT.)</i>	
First Amendment considerations	00-18
Legislature, authority to give additional duty to regulate low-point beer to the ABLE Commission	<i>(overturned)</i> 00-57
License, caterer and locality	97-7
Political participation restriction	00-18
Price affirmation, unconstitutional	89-44
Vehicles, state	06-42
Wine shipping	05-25
ALCOHOLIC BEVERAGES (<i>see also</i> NONINTOXICATING BEVERAGES)	
Alcoholic Beverage Control Act	
enforcement powers, none on 3.2 beer	06-33
entertainers, age requirement	85-102
liquor advertising, printing	85-114
liquor by the drink	
authorization of private clubs (by Legislature)	84-195
elections	84-148
retail sales, hours	85-52
wine	
production	05-24
sampling	08-18
shipping	05-25
Allocation of proceeds from alcoholic beverage sales & excise taxes . . .	11-3
Beer (3.2%)	
Alcoholic Beverage Laws Enforcement, no enforcement powers . . .	06-33
food item, qualifies as in main purpose determination	05-41
legal age for possession	84-64
licensing of clubs	98-15
low-point beer	<i>(00-57 overturned)</i> 00-18, 00-57
peace officer's authority	06-33
regulation on state-owned and operated lands	06-30
Drive-in windows	83-231
Excise tax	84-197
Indian land, distribution or possession,	83-125
Inducement discounts	83-285
Legislature, authority to give additional duty to regulate low-point beer to the ABLE Commission	<i>(overturned)</i> 00-57
License, caterer	97-7
Private clubs	
authorization by Legislature	84-195
operating hours, subterfuges	82-8
Regulation on state-owned and operated lands	06-30

Topic	Opinion
<i>ALCOHOLIC BEVERAGES (CONT.)</i>	
Retail package store	
distance from church or school property.	86-60
zoning, schools	82-70
Sales surtax.	84-197
Saloons, open	84-173
State-Tribal Gaming Act	
alcoholic beverages, license & sale.	07-2
Wine	
cooking	82-128
production	05-24
samples	08-18
shipping.	05-25
 <i>ALCOHOL/DRUG IMPACT PANEL</i>	
District Attorney, authority to establish	02-1
Nature of.	02-1
 <i>AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (FEDERAL ACT)</i>	
Custodial funds.	09-17
Tenth Amendment (U. S. Constitution)	09-17
 <i>ANATOMICAL BOARD</i>	
Authority.	84-162
 <i>ANATOMICAL GIFT ACT.</i>	
	84-162
 <i>ANNEXATION</i>	
Fence line, strip parcel	86-16
Municipalities, strip method.	02-15
Sales tax, by consent to share.	11-20
 <i>ANTI-KICKBACK ACT OF 1974</i>	
	98-20
 <i>ANTITRUST REFORM ACT, OKLAHOMA</i>	
	98-20
 <i>ARBITRATION</i>	
Police or firefighters, municipalities.	83-287
 <i>ARCHITECTS</i>	
A and M Colleges	
Board of Regent's power to supervise construction	01-49
statutory procedures, inapplicability for contracting services	01-49
Civil penalties.	87-12
Incidental, practice of.	00-25
License, required for certain education or assembly buildings	06-38

Topic	Opinion
<i>ARCHITECTS (CONT.)</i>	
Nursing homes (partially modifies 64-108)	93-36
Practice, who can	00-25, 07-19
ARCHITECTURAL ACT, STATE	05-34
ARCHITECTURAL AND INTERIOR DESIGNERS ACT, STATE.	07-19
ARCHIVES AND RECORDS COMMISSION	
Records	
destruction and disposition	93-2
Uniform Electronic Transactions Act	
effect on	01-14
effect on exempt agencies	01-13
ARMY CORPS OF ENGINEERS, U.S.	
Reservoir construction, zoning regulations	86-21
ART IN PUBLIC PLACES ACT, OKLAHOMA	
Appointing authority, distinction of	05-37
Funding	
allocation by State agencies	05-37
Purpose	05-37
ARTIFICIAL INSEMINATION	83-162
ASBESTOS CONTROL ACT	
Asbestos abatement	09-35
ATTORNEY GENERAL OF OKLAHOMA	
Counsel for	
Veterans Affairs, Department of	83-155
War Veterans Commission	83-155
District Attorneys Council	05-7
Judicial Comity	06-35
Litigation, control over	06-11
Opinions	
binding effect of	91-10, 06-8, 06-35
constitutional question	06-35
pending court matters	06-35
pending litigation	06-35
Quasi-judicial capacity	06-35
Quo warranto, may initiate	07-12
Real Estate Appraisers Board	
counsel for	03-9
Scenic Rivers Commission, separate counsel authorized.	83-58

Topic	Opinion
ATTORNEYS	
Court appointments	85-98
Dual employment, State agencies.	92-22
Emergency Medical Service Districts, authority to employ.	02-4
Power of, health care decisions	
special power of attorney	91-2
supervised power of attorney	91-2
uniform durable power of attorney	91-2, 06-34
School board members, legal fees in criminal proceedings	96-101
School district, authority to employ for grand jury	96-43
Small Claims Court, attorneys use of and power in	03-26
State agencies	
contract	03-9
ATTORNEYS-IN-FACT	
Hydration and nutrition decisions	06-34
Life-sustaining treatment decisions	06-34
BAIL	
Arrests, based on certified copy of bond	03-33
Bail bondsmen	
arrest, may make anywhere in State	02-6
equal access to prisoners	99-74
regulation	99-74
responsible for cost of returning defendant.	03-33
right to hearing	85-11
Bail schedules.	00-61
Exoneration of bond upon plea of guilty or nolo contendere.	09-16
Nolo Contendere	
Jurisdiction of court after exoneration of bond pending J & S	09-16
Personal recognizance	85-118
BANKING (see also SAVINGS AND LOAN ASSOCIATIONS)	
Bank loans, conflict of interest.	85-138
Banking board, reimbursement for expenses	83-224
Banking Commission	99-52
Bond issues, participation in.	03-50
Branch banking.	87-116
applications, approval of	83-244
foreign bank, by	88-7
Cemeteries	99-52
Comptroller of the Currency, Office of	03-50
Direct deposit, to consumer or payroll card account	09-31
Federal Credit Union interest rates.	81-115

Topic	Opinion
<i>BANKING (CONT.)</i>	
Federal Savings and Loan Associations	
licensing as insurance agents	83-264
set-off, right of	81-88
Holding companies	
constitutionality	83-100, 83-181
participation in bond issues	84-184
Insurance Agents Licensing Act	89-14, 90-39
Interstate banking	87-116
Investment Custodian, Law Enforcement Retirement System	83-184
National Bank Act	03-50
Public Funds	
disclosure	01-29
Registrar banks, minimum or maximum fees	84-83
Savings and Loan Association, merger	87-116
Taxation of real property	85-142
Uniform Electronic Transactions Act, effect on records	01-14
Unit Collateral System	83-64, 86-135, 87-15
BANKING DEPARTMENT	
Commissioner's Jurisdiction	
Cemetery Merchandise Trust Act	96-85
Perpetual Care Fund Act	96-85
Uniform Electronic Transactions Act, effect on records	01-14
BINGO	
Firemen's Organization or Auxiliary, license	89-59
Licensing	83-309, 89-59
BLOOD EXCHANGE COUNCIL	83-180
BOARD OF CAREER AND TECHNOLOGY EDUCATION	14-4
BOARD OF EDUCATION, STATE	
Alternative schools, requirements	00-12
Annexation to municipality (partially withdraws 70-150)	94-15
Approval of actions	00-32
Arbitration, grievance	87-20
Authority to employ negotiators	97-70
Board member	
ability	
hold office if reelected	01-33
conflicts of interest	03-17, 04-11
continuing education requirements	
ability of incumbent to run or failure to obtain	01-33

Topic	Opinion
<i>BOARD OF EDUCATION (CONT.)</i>	
contracts, interest in	03-17, 04-11
conviction of felony	07-43
dual office holding	
clerk, school board	83-66
county purchasing agent	83-49
director, fire protection district	83-220
dual office/tribal office	00-39
volunteer fire chief	97-55
eligibility	92-19
continuing education credits, when fail to obtain	01-33
guilty plea to felony	07-43
legal fees in criminal proceedings	96-101
nepotism	87-55, 92-19, 04-11
re-election - challenge to, if requirements not met	01-33
replacement of	00-24
if failure to obtain continuing education hours	01-33
residency requirements	95-71, 00-24
spouse, conflict of interest	
athletic equipment (withdraws Opinion to Hodge 11/1/60)	83-119
performing services under third party contract	04-11
vo-tech board member	83-177
unilateral actions	00-32
vacancies, guilty plea or felony conviction	07-43
validity of board's actions if member ineligible	01-33
Career Tech	
contributions credit	10-14
school district to deannex from	14-4
Charter Schools Act	00-12
Collective bargaining agreements	87-20, 87-21, 98-14
(87-21 withdraws 81-126)	
Contracts	
cooperative Agreements Between	96-3
feasibility study	84-14
temporary, discretion in use of	83-253
Contributions Credit, funding from appropriations	10-14
Curriculum, duty to determine for graduation & to develop & adopt	
end-of-instruction tests to meet standards	12-14
Duty	
declaring vacancy	01-33
seating "ineligible" member if elected	01-33
Executive Sessions	96-100
Feasibility study	84-14

Topic	Opinion
<i>BOARD OF EDUCATION (CONT.)</i>	
Flexible benefits allowance, funding	00-29
Leave	87-80
Lobbying.	95-14
Local boards of education - actions cannot conflict with state law	12-14
Minute Clerk.	96-100
Oklahoma School Testing Program Act	12-14
Open Meeting Act	
approval of actions	00-32
executive sessions	96-100
Retirement allowances, additional	89-67
Salary schedule, power to adopt minimum teacher	96-73
School activities	87-18
School districts (<i>see</i> School Districts)	
Sick leave program, shared.	96-20
Teacher Preparation Act, duties under	00-6
Travel, employee per diem meal expenses.	98-42
Trustee	88-88
Vacancies	
authority to fill.	00-24
who determines whether one exists	01-33
 BOARD OF EQUALIZATION, STATE	
American Recovery and Reinvestment Act of 2009 (Federal Act)	09-17
Authority to	
adjust valuations	86-88
designate method for assessments, public service property	83-296
Duty of	83-44
 BOARD OF REGENTS	
Oklahoma Higher Learning Access Fund - Oklahoma’s Promise	14-7
 BOATING, RECREATIONAL SAFETY PROGRAM	
Department of Public Safety	02-11
Grand River Dam Authority	
federal grant funds	02-11
 BOGUS CHECK RESTITUTION PROGRAM	
Bogus Check Restitution Program	85-100
Office space	99-29, 99-29 A
 BOILER AND PRESSURE VESSEL SAFETY ACT	
	83-111, 99-7
 BONDS	
Bond holder rights	05-05
Bond oversight	02-41

Topic	Opinion
<i>BONDS (CONT.)</i>	
Commissioners of Land Office	
legality of Bond Guarantee Program	96-77
County fair, ad valorem levy to fund payment of.	13-4
Credit Enhancement Reserve Fund General Obligation Bonds	89-21
Housing.	08-29
Indentures, covenants of.	05-05
Master Lease Program	12-23
National banks as trustees	03-50
Private activity, allocation	08-29
Public Trust	
conflict of interest, trustee.	85-109
refinancing, use of excess proceeds	85-184
Rates	
hedge.	05-42
variable or fixed	05-42
School bonds	02-14, 11-18
School Districts	
bond reduction.	92-2
buildings, financing methods	07-42
general obligation bond proceeds, use of	07-42
method of issuance and retirement	02-14
swaps or derivative financial product agreements	05-43
use for property acquisition.	02-43
State Bond Advisor	
administrative support from the Department of Central Services.	03-3
created by Oklahoma Bond Oversight and Reform Act	02-41
funding	03-3
State debt	
moral obligations.	12-23
self-liquidating	12-23
Surety	
purpose	99-67
Swaps, derivative	05-42
BOXING COMMISSION, PROFESSIONAL (ADMINISTRATOR)	
Authority	
lack of power to enter into compact	06-39
regulate on Indian Country	06-39
Funding.	03-53
Health Department, to give administrative support	03-53
Indian tribes power to regulate.	06-39
Professional Boxing Act, Indian tribes.	06-39
Salary	
boxing administrator	99-16

Topic	Opinion
BUDGET ACT, STATE	
State-Beneficiary Public Trusts, not subject to	90-23
BUREAU OF INDIAN AFFAIRS (BIA)	
Cross-Deputization	90-32
BUREAU OF RECLAMATION	
Reservoir Construction, zoning regulations	86-21
BUSINESS CORPORATION ACT	
88-57	
CABINET	
Creation	
alteration	00-54, 02-29
words, use of in establishing	02-29
Hiring freeze in State Personnel Act, use in implementation of	95-12
Secretaries	
appointment	00-54
authority	88-3, 02-29
confirmation	00-54
employee, status as	
payment for service	00-54, 02-29
interim term	
document proving appointment to	00-54
service after nomination rejected	00-54
number allowed	02-29
officer, status as	
Secretary of Commerce	00-54
renomination	00-54
salary	95-26, 02-29
support staff, use of	02-29
Secretary of Security and Safety, attend executions	96-86
CABLE TELEVISION SERVICES	
Manager/City Councilman	83-153
CAMPAIGN CONTRIBUTIONS AND EXPENDITURES ACT	
Contributions	
declaration of candidacy	84-94
excess, 48 month limitation	86-119
use of - death of candidate	84-120
County officer, compelling contributions	84-120
Interest Income	84-159
Lobbyist	09-25
State & federal office construction	09-25
State ballot questions (withdraws 80-68 and 77-193)	83-138

Topic	Opinion
CAMPUS SECURITY ACT	
Reserve Campus Police Officers, certification and training.	95-74
CAPITOL IMPROVEMENT AUTHORITY, OKLAHOMA	
Bond Counsel, financial advisors and underwriters, selection of.	87-99
CAPITAL INVESTMENT ACT, OKLAHOMA	88-20
CAPITAL INVESTMENTS BOARD, OKLAHOMA	
Constitutionality of.	88-20
Open Records Act.	12-1
CAPITOL-MEDICAL CENTER IMPROVEMENT AND ZONING COMMISSION	
Power	
contract for enforcement within District.	03-27
relationship to other governmental subdivisions	07-5
require agencies to follow zoning rules, etc..	83-91
CASH MANAGEMENT PROGRAMS	
School districts' participation.	91-3
CATASTROPHIC HEALTH EMERGENCY POWERS ACT	07-11
CELLULAR TELEPHONE COMMUNICATION	
Local Fees.	97-24
CEMETERY	
Alienability of lots	07-17
Boards of Trustees	83-25
Bodies, removal or replacement of	83-25
Charge for opening graves	09-14
County Cemetery Association	09-14
County Commissioners - duty to maintain.	09-14
Lots, sale & transfer of municipal	08-34
State Banking Department/Commissioner Jurisdiction	
regulation	96-85
trust funds	96-85
CEMETERY CORPORATION ACT	07-17
CENTRAL BUSINESS DISTRICT REDEVELOPMENT ACT.	87-13
CENTRAL PURCHASING ACT (see also COMPETITIVE BIDDING)	
Bond Counsel, financial advisors and underwriters.	87-99
Cities and towns/municipalities acquisition of insurance	02-45
Commissions, subject to	84-189
Competitive bidding, technology systems	04-18

Topic	Opinion
<i>CENTRAL PURCHASING ACT (CONT.)</i>	
Contracts	
authority to bid with designated youth services agencies	
Department of Central Services	05-44
Department of Juvenile Justice	05-44
Office of Juvenile Affairs.	05-44
negotiation	
after award	01-2
exception for consolidation	04-18
mandatory negotiation	04-18
State agencies, inapplicable between	03-40
Court fund - not subject to	03-34
Custodian of Investments	
Oklahoma Law Enforcement Retirement System.	83-184
Insurance Fund (State), subject to	88-41, 88-61 withdrawn by 07-31
Investments counselors.	withdrawn by 07-31 - 84-66
professional services	83-198
Invitation to bid, authority to	
cancel and re-bid	96-52
issue purchase order	96-52
Public Trusts, State beneficiary, subject to	84-135
Purchasing agent for state agencies	07-31
Turnpike Authority	84-201
Water Resources Board	84-127
 <i>CENTRAL SERVICES, DEPARTMENT OF</i>	
<i>(FORMERLY PUBLIC AFFAIRS, OFFICE OF)</i>	
Acquisition requirements	07-31
Administrative support for the State Bond Advisor	03-3
Authority of State Purchasing Director	04-18
Central Purchasing Act.	11-9
Competitive bidding	
contracts, exception for consolidation	04-18
enterprise agreements	04-18
technology systems	04-18
Construction & properties	11-9
Contract	
authority to bid with designated youth services agencies	05-44
negotiation of statewide mandatory	04-18
Department of Human Services	00-49
Exempt state agencies.	07-31
Office space leasing	00-49

Topic	Opinion
<i>CENTRAL SERVICES (CONT.)</i>	
Property	
asset reduction & cost savings program	12-5
disposition	
State agency real estate	98-8
State park	98-18
statutory right to use granted to State agency	96-58
lease-purchase, acquisition of	99-6
sale or disposal of real property	98-18
Public Building Construction and Planning Act	
guidelines for allotting space	98-30
Request for proposal	11-9
State Use Committee	06-23, 09-22, 10-12
CEREBRAL PALSY COMMISSION	
Giving through life insurance program	83-156
J.D. McCarty Center	83-156, 84-82, 98-8
Real estate, sale of agency	98-8
CHARTER SCHOOL ACT, OKLAHOMA	
Delegation of power	07-23
Equal protection	07-23
Special law	07-23
CHILD DEATH REVIEW BOARD	
Powers and duties/investigations	
authority to obtain OSBI records	96-10
records, access to - allowed by HIPAA	04-28
Records, access to confidential by OSBI	96-10
CHILDCARE FACILITY LICENSING ACT	
Criminal history check, Sex Offenders Registry	96-56
CHILDREN	
Adoption	
decree, out-of-state	04-8
records, right to view	82-87
Adult certification, incarceration	86-127
Arrest warrants, failure to pay traffic fines	07-29
Child	
abuse	
examination by licensed Oklahoma physician	06-16
reporting of	85-116, 95-18

Topic	Opinion
<i>CHILDREN (CONT.)</i>	
care facilities, licensing	
background check	96-56
records	82-69
passenger restraint requirements	95-76
support	
collection remedies	00-53
garnishment	83-53
lien, as	85-178
Commission on Children and Youth	
powers and duties	99-39
Confidentiality	
parental consent, court order or other authority required	99-39
release and transfer of confidential information	99-39
Disabilities Education Act (I.D.E.A.), Individuals with	99-39
Driver’s license, parent liability	82-21
Educational services in Department of Human Services’	
contracted group homes	09-15
Family Educational Rights and Privacy Act.	99-39
Handicapped children	
J.D. McCarty Center	84-82
school for the deaf, transportation.	84-164
special educational services	82-61
Health services for minors, no parental consent.	85-73
Indian Child Welfare Act	85-94
Information release of, death or near death of children	06-9
Interagency, coordinating Council of Special Services	
to children and youth.	99-39
Juvenile Proceedings, publication notice	86-116
Minor, definition of.	85-191
Nonintoxicating beverage, consumption of	82-88
Psychotherapists, reporting of abuse	95-18
Records, death or near death, release of information.	06-9
Safety, school -- zone of - sex offenders	08-24
Sex offenders, protection from - school activities	08-24
Sex Offenders Registration Act	08-24
Special services	
membership on interagency coordinating council	99-39
CHILD PASSENGER RESTRAINTS	95-76
CHILD SUPPORT	
Collection Remedies.	00-53
Garnishment	83-53
Lien, as	85-178

Topic	Opinion
CHIROPRACTORS	
Chiropractic Association of Oklahoma nominations to Advisory Committee	83-19
Chiropractic Examiners, Board of post graduate program, accreditation	83-90
Chiropractic Practice Act legislative intent	92-13
scope of practice, injections, diagnostic procedures	02-22
Renewal of license	83-19
Travel reimbursement	89-11
CIRCUIT ENGINEERING DISTRICTS	
Authority and objectives	05-6
Establishment of	05-6
CITIES AND TOWNS	
Alcoholic beverage sales & excise taxes, allocation from	11-3
Ambulance Service charter municipality, may not prohibit other providers	84-84
fees, charging for service	04-15
public funds	04-15
Annexation (partially withdraws 70-150)	86-16, 94-15, 02-15, 11-20
Appropriations, by governing body majority vote required	88-56
monthly claims of payroll	88-82
supplemental appropriations	83-215
Arbitration with police/firefighters	83-287
Architectural Act, all government entities must abide	05-34
Assessments, paving (withdraws 73-158)	84-126
Bingo license, not authorized for city	89-59
Board of trustees, authority of	13-22
Boundaries overlapping-municipal coverage for emergency services	01-35
Building codes, ordinances	91-1
Cemetery, Board of Trustees cash bonds	83-25
liability of	83-25
rules and regulations, removal and replacement of body	83-25
Chamber of Commerce, funds to	86-26
Charter City, fiscal year	96-4
Charter election; election of freeholders	06-40
City Charter, amendment, publication of	89-10
City-County Planning Commission action without Board of Adjustment	83-269

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
City ordinances	
authority to impose emergency (911) tax	87-110, 97-24
beverages, sale of nonintoxicating	86-15
building codes	91-1, 11-20
consolidating offices	87-63
dogs, breed-specific regulations	05-27, 07-28
electrical codes	91-1
express and implied powers	96-53
fees, water supply - availability or standby.	09-29
firefighting, tort liability	82-119
funeral processions, directing traffic.	95-99
jurisdiction	02-28
license fee, real estate broker	11-17
mechanical codes	91-1
natural gas distribution	96-53
oil and gas regulation	06-12
plumbing codes	91-1
private investigation contracts	99-24
pseudoephedrine, no power to regulate through ordinance	11-10
rental property - broker duties.	11-17
security guards, no authority to license.	87-112
smoking in public places.	87-121
superior sovereignty, state-owned land.	98-2
(98-2 withdraws 73-327 and 83-292)	
ticket scalping, prohibition on	86-86
trustees, mayor, city manager	82-125
Competitive bidding.	86-26
solid waste collection and disposal service.	97-47
Concurrent jurisdiction.	99-7
Conflict of interest	
city council member	
ambulance	95-41
“direct or indirect interest” in any contract	04-11
city manager	08-15
elected official, contract	01-32
fire chief	08-15
municipal police officer, board of directors	03-47
municipality, bank.	85-138
Constitutional	
adequate consideration for consensual annexation.	11-20
restrictions on gifts	04-6
Contract, power to	04-15

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
Controlled dangerous substances (drugs), cities have no power to enact ordinance inconsistent with State statutes	11-10
Convicted felon, eligibility to run for office	98-34
Courts of Record	
jurisdiction	02-28
municipal conviction for driving while intoxicated	84-142
powers	07-1
Cross-Deputization agreements with Indian tribes	
between government entities not officers	97-43
duration of	97-43
Dispensing funds to nonprofit corporations	85-161
Dogs	
ban specific breeds	05-27
need specific regulations	05-27
Dual capacity	
employee/elected officer	01-23
Dual office holding	
assistant district attorney, municipal judge	01-34
city manager	08-15
fire chief	08-15
mayor	08-15
municipal police	
city council member of another city	06-22
probation and parole officer	95-48
serving simultaneously in another state	00-58
school board member/volunteer fire chief	97-55
Education - higher - gifts	04-6
Elected offices, qualifications for state or federal employees	09-18
Electrical License Act	85-137
electrical codes	91-1
Eminent domain	01-19
Employees (city/municipal)	
elected office, capacity to hold	01-23
military leave	88-103
residency requirement	84-51
salary changes	85-13
water, providing services free or reduced rate	02-33
Fire and ambulance service	95-105
Fire departments, grants	89-77
Firefighters	
fire chief, conflict of interest, dual office holding	08-15
license for bingo, auxiliary	89-59

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
Pension and Retirement System	
employment qualifications, examinations	82-24
excess contributions, holiday pay	82-18
municipal membership	82-72
physical and mental examinations, pension	82-30
revenue sharing	01-35
salary continuation	08-4
salary payments, temporarily sick or disabled	85-5
shift exchange practices	97-78
Fiscal year	96-4
Franchises	
assignment	99-19
cable television systems	02-21
control of rights-of-way	06-15
expanding terms of	99-19
franchises	97-47
telecommunications	99-19, 06-15
telephone companies, authorization to provide service	06-15
Funeral procession, directing traffic	95-99
Geographic limitations, public trusts with municipal beneficiary	07-42
Gifts, authority to make	04-6
Home Rule	06-40, 08-15, 10-3
Housing authority, municipal, annual audits	88-19
Improvement District Act	82-142
Incorporation	
charter city, any municipality over 2000 may	05-15
petition for incorporation	05-9
residing in compact form	08-23
restrictions, proximity to other cities/municipalities	05-9
unincorporated territory	02-15
Initiative/Referendum	03-12
Inspectors, plumbing and electrical, qualifications	89-60
Insurance	
acquisition of insurance	02-45
competitively bid	02-45
Interlocal Cooperation Act, investment powers as an insurer	06-24
Interlocal Cooperation Act	00-5, 06-24
Investments, interest credited to general fund	83-277
Landscape architects, all government entities must abide	05-34
License tax	83-297
Licensing power	99-7
Maintenance of prisoners	84-93

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
Mayor	
dual office holding	08-15
may appoint himself/herself as a reserve police officer	98-13
Mechanical codes, ordinances	91-1
Meetings, absence from Municipal Governing Body	96-98
Metropolitan Area Planning Commission	
approval of subdivision of property	88-1
group homes	87-90
jurisdiction	83-194
Military leave	10-3
Motor vehicles, State fuel tax exemption	85-172
Municipal	
buildings, licensed architectural services required on	99-59
corporation, lease of public land	82-102
county trust authority	83-129
ordinances, funds, deposit of	13-22
Municipal Budget Act.	86-26
transfer of tax revenues	84-183
Municipal courts, Trauma Care Assistance Revolving Fund	
jurisdictional power, lack	05-1
ordinances	05-1, 12-6
power.	07-1
Municipal fire department coverage	
revenue sharing	01-35
Municipal judge	
assistant district attorney, prohibited dual office.	01-34
salary/funding	96-68
victim-witness coordinator	85-16
Municipal offices/officers	
conflict of interest	
board of directors for fire protection district	03-47
city councilman/cable television manager.	83-153
clerk	13-22
elected official/contract	01-32
law enforcement officer/wrecker service.	83-30
municipal planning commission member/newspaper	83-249
treasurer	13-22
consolidation of offices	87-63
contracts	99-24
dual office holding	
assistant district attorney	01-34

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
city councilman/	
Grand River Dam Authority board member	83-105
municipal board of adjustment/appraiser	86-65
mayor/county superintendent of schools	83-50
officer/employee	01-23, 01-34
Rural Electric Cooperative trustee	83-158
(modified 78-206, withdrawn by 89-72)	
purchasing officer	01-31
supervision of private investigation	99-24
Municipal Planning and Zoning Commission	
appointments, nepotism	83-176
jurisdiction of	83-293
member of regional planning commission	83-293
notice, public hearing requirements	83-246
Nine-One-One system, authority to create or withdraw from county . .	07-22
Oath of office	
failure to file by municipal official	97-9
Officers De Facto	97-9
Open Records Act	
applicability to	01-46
telephone bills	95-97
Ordinances, smoking in public places	13-2
Peace officers	98-13
arrests based on copy of bail bond	03-33
Petition	
incorporation	05-9
recall election	05-15
Plumbing codes, ordinances	91-1
Police	
arrests based on copy of bail bond	03-33
department	
civilian employee	85-56
mayor may appoint himself/herself as a reserve police officer . . .	98-13
duties, limitations	82-133
mandatory participation in OPERS	07-27
nepotism, dual office holding	82-221
officer for dual office holding purposes	95-48
pension and retirement system	
mandatory participation in OPERS	07-27
participation requirements, disability	82-123
pension benefits, eligibility and amount	82-42

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
power	
cannot contract away	11-20
must a sheriff accept arrestee from officer	01-12
police power	99-7
ticket scalping	86-86
reserve	95-74
Political subdivisions	
campaigning, lobbying (overruled and withdrawn by 95-14).	82-6
Private entities, appropriation of funds	86-26
Property	
purchased in another county	99-40
removal of trash	84-57
Public funds, use of	88-109
Public Library Board, dual office holding	82-189
Public trusts	
beneficiary of.	07-42
constitutional restrictions on gifts	04-6
sewer backup, has no authority to pay private property damages	09-4
subject to competitive bidding	87-79
trustee, dual office holding	82-35
urban renewal, low income housing revenue bonds	82-34
Purchase Order	
signature - how it can be properly signed	01-31
Records Management Act, applicability to	01-46
Residency requirements	
city manager	88-63
employee	84-51
Retail outlet, financing of	82-81
Revenue and taxation	
city housing authorities, in lieu payments.	86-13
franchise tax, utilities	83-20
motel and hotel room tax	86-7
sales tax	
city council, discretion of	06-31
collection by Rural Electric Co-op	85-155
(overruled by <i>Branch Trucking v. Okla. Tax Comm'n</i> (Okla. 1990))	
earmarking	86-26
elimination	99-12
irrepealable statute	95-86
legislative, function of city council	06-31
purpose.	82-86, 06-31
school support	00-59, 03-6, 05-1

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
utilities	83-20
validity of.	05-2
school bond reduction	92-2
school support	03-6
tax rebate agreements	10-4
taxation rate/workers compensation awards	96-50
Revenue Sharing Act, Federal	86-26
Road construction & maintenance, funding for	08-9
Rural	
public transportation	00-10
residential subdivision - not a municipality	13-5
School support	
construction or improvement of facilities	03-6
teachers' salaries	03-6
Sewer backup, has no authority to pay private property damages	09-4
Solid Waste Collection and Disposal Contracts	97-47
Special obligations bonds	87-13
Statutory Board of Trustees	
co-trustees are co-equal in authority	12-20
election to increase membership	88-74
mayor as co-trustee is co-equal in authority	12-20
town attorney accessibility by co-trustees	12-20
town prosecutor - necessity of presence in municipal court	12-20
Streets, use of county highway funds	89-42
Strong-Mayor-Council	
city attorney - classified employee	95-91
mayor's authority to appoint, remove	95-91
Taxes	
collection, exchange of information for	85-182
equal protection requirements	05-2
exemption, annexed farm and ranch land	85-67
ordinance, amendment of	06-31
purpose	05-2, 06-31
sales tax	
approval by voters	12-16
use for voter approved purpose only	
change in purpose requires voter approval.	12-16
extension of time period in which tax is collected requires	
voter approval	12-16
imposition of tax can start after county commissioners'	
terms of office	12-16
school buildings, use for construction, maintenance or demolition	01-40

Topic	Opinion
<i>CITIES AND TOWNS (CONT.)</i>	
school support	00-59, 01-40, 05-2
voter approval	06-31
Traffic, offenses, penalties	12-6
Trauma Care Assistance Revolving Fund	
Municipal courts	
jurisdictional power, lack.	05-1
ordinances, may only collect fines established by	05-1
Treasurer	
public utility authority, constitutional prohibition does not apply . . .	07-14
town - salary - constitutional prohibition does apply	07-14
Trustee, resignation of	84-85
Urban Renewal Authority	82-33, 01-19
Use Tax	
election	00-35
Utilities, lease-purchase	84-37
Vacancy in Municipal office, how determined	96-98
Vehicle License & Registration Act, apportionment of proceeds.	11-3
Water	
fees, water supply - availability or standby.	09-29
providing services free or reduced rate.	02-33
storage fees to county	01-6
Zoning	
city-county planning commissions, actions of	83-269
dedication of land for parks	83-276
municipal planning commissions	
notice and hearing	83-246
Used Motor Vehicle and Parts Commission	83-35
CITY-COUNTY PLANNING AND ZONING ACT	86-21
CIVIL DEFENSE AND EMERGENCY RESOURCES MANAGEMENT ACT	
(<i>see</i> Emergency Management Act of 2003, Oklahoma)	
Evacuation orders	07-11
Governor, authority	
evacuation powers.	07-11
quarantine, animal.	01-44
Purpose	01-44
CIVIL PROCEDURE	
Condemnation proceedings	84-176
Court Clerk	
duties imposed by HB 1828	82-378
issuance of bench warrants	82-17

Topic	Opinion
<i>CIVIL PROCEDURE (CONT.)</i>	
Court costs	
payment by county hospitals	87-47
protective order	98-41
Court of Indian Offenses	85-94
Death certificates, filing of	95-52
Discovery Code	84-38
Domestic relations, military pensions	85-128
Faxes, admissibility	95-78
Fees	
court reporter	88-113
district court clerk	
alias garnishment summons	93-12
alias writ of execution	93-12
Garnishments	83-53
Judgments, interest on	
post-judgment commencement	07-13
reimbursement expenses, does not constitute	84-176
rendition of judgment	07-13
Juvenile proceedings, publication notice	86-116
Libel and slander	83-308
Newspapers, legal notices	85-65
Partition, mineral rights	82-126
Service of process, by Sheriff on private business property	85-27
Small Claims Court	86-55
State Board of Equalization, civil contempt	82-60
State Execution on Judgement	82-40
CIVIL RIGHTS	
Damages, punitive or exemplary	
indemnification of employees	98-4
CLEAN CAMPAIGN ACT OF 2008	
Federal preemption	09-25
State v. federal office	09-25
COLLECTIVE BARGAINING	
Firefighters and police	83-287
School Boards	
employ negotiators	97-70
COLLEGES/UNIVERSITIES	
A and M Colleges	
Board of Regent's power to supervise construction	01-49

Topic	Opinion
<i>COLLEGES/UNIVERSITIES (CONT.)</i>	
agriculture	
dispute resolution	
certification of mediation program by Administrative Director of the Courts.	03-20
institute for issue management and alternative resolution	
certification of mediation program by Administrative Director of the Courts.	03-20
Campus Police Departments, reserve officers	95-74
Financial disclosure	85-163
Governance	
legislative power	99-47
Lease obligations	02-41
Murray State College, construction of student housing	83-171
Oklahoma State University & A and M Colleges	
construction contract forms.	83-234
Physician Manpower Training Commission	
funding medical residency training programs.	95-61
Rogers State College	
reimbursement for travel.	83-228
School of Dentistry.	09-40
Seminole Junior College	
executive session.	85-89
Student housing	02-41
Teachers' Retirement System, contributions to	87-109
Tulsa Community College Area School District	
local incentive levy	84-187
University of Oklahoma	
Board of Regent's authority to establish programs.	09-40
contracts	98-20
use of facilities	83-149
University of Science and Arts of Oklahoma	
leave benefits, employees	91-6
Western Oklahoma State College	
board membership.	83-185
 COMMUNITY SENTENCING ACT, OKLAHOMA	
Community Sentencing Local Planning Council	05-20
County sheriff's office, reimburse	
community sentence jail time	05-20
medical care of inmate in county jail	06-41
Three-year limitation on a community sentence	09-1

Topic	Opinion
COMPETITIVE BIDDING (<i>see also</i> CENTRAL SERVICES, DEPARTMENT OF)	
Acquisition of insurance, county employees	85-45
Auctions, school lands	96-1
Bond Counsel, financial advisors and underwriters	87-99
Cities and towns/municipalities acquisition of insurance	02-45
Computer Hardware/Software	85-180
Conflict of interest	06-23
Contracts	
fixed rate	04-3
multiple years	04-18
negotiation, after award.	01-2
State agencies	
Department of Central Services, technology system.	04-18
not required between	03-40
Department of Transportation, subject to	84-194
Institutions of Higher Learning	87-7 withdrawn by 07-31, 98-20 (87-7 withdraws 11/9/59 to Roy T. Hill)
Invitation to Bid, authority to	
cancel and re-bid	96-52
issue purchase order	96-52
Public trusts	87-79
Sale of State Agency Real Estate	98-8
School	
construction	
manager	10-13
using force account	10-13
districts -- janitorial services.	08-3
Solid Waste Collection and Disposal Contracts	97-47
COMPUTER HARDWARE/SOFTWARE	
Counties, purchase by.	04-14
District courts, must inventory	02-17
Purchase by county.	85-180
State agencies, State Purchasing Director has authority	04-18
COMPUTERIZED FILES	
Access to.	85-36
Sale by county assessor	96-26
CONCENTRATED ANIMAL FEEDING OPERATIONS ACT	
.00-52	
CONFLICT OF INTEREST	
Administrative officer	
proceedings before administrative tribunal.	85-132
Board of directors for the fire protection district	03-47

Topic	Opinion
<i>CONFLICT OF INTEREST (CONT.)</i>	
Board of Managers State Insurance Fund/Doctor	87-147
Board of Regents Member, business interest	82-16
City Council Member	
ambulance service	95-41
cable television manager	83-153
City manager	08-15
City official, elected	
voting on contract/recusal	01-32
Competitive bidding	06-23
County Excise Board	01-18
Environmental Quality Board	
criminal penalties	04-40
Ethics Commission Rules	04-40
public members of boards or commissions	04-40
State officers	04-40
Fire chief	08-15
Fire protection district	03-47
Governor's spouse,	
ability to do legal work	
for CompSource	11-14
for the University of Oklahoma	11-14
Grand River Dam Authority	
Chief Executive Officer/Director of Investments	11-7
Lakes Advisory Commission	03-25
Horse Racing Commissioner	
prohibited from receiving awards from	
Oklahoma Breeding Development Fund	87-73
Law enforcement officer/wrecker service	83-30
Legislator	
director of bank	87-8
employment by	
Community Action Agency	03-52
school district	82-48
Municipal Beneficiary Public Trust, city council member	95-41
Municipal Planning Commission	
member/newspaper owner	83-249
Municipality, public trust/bank	85-138
Public officer	
dual position	00-2, 03-47
Public trust, trustee, bonds	85-109
Scenic Rivers Commission, member	82-19
School Board Member/spouse	
sale of equipment to school (withdraws 11/1/60 to Hodge)	83-119

Topic	Opinion
<i>CONFLICT OF INTEREST (CONT.)</i>	
spouse	
also school board member	83-177
on staff of House of Representatives	83-177
School Board Member/trustee	88-88
Sheriff	
jail trust authority, chair of	00-2
State employee	
attorneys/OLERS (withdraws 80-213)	92-22
board of control, county hospital	83-112
dual employment (modifies 80-213)	88-23
State Treasurer providing information to Board of Equalization	05-28
Urban Renewal Commissioner	
trustee of public trust	82-35
 CONGRESS	
Congressional district	03-2
Interstate compacts, approval of	99-62
Prohibition on two members of State Ethics Commission	
representing the same congressional district	03-2
 CONGRESSIONAL AND LEGISLATIVE DISTRICTS	
Reapportionment, boundaries, residency	82-94
 CONSERVATION COMMISSION	
Districts	09-28
Fish and Wildlife Loss Settlement	82-58
Mine Reclamation Act, abandoned	82-32
 CONSTITUTION, UNITED STATES	
Interstate Commerce Clause	93-20
 CONSTITUTIONAL LAW	
A and M Colleges	
Board of Regent's power to supervise construction	01-49
statutory procedures, inapplicability for contracting services	01-49
ABLE Commission, low-point beer <i>(overturned)</i>	00-57, 06-33
Advertising by out-of-state business	96-93
Appropriation	
federal funds	00-47
insufficient to operate program	00-33
power to spend on existing program anticipated program	
changes are vetoed	96-73

Topic	Opinion
<i>CONSTITUTIONAL LAW (CONT.)</i>	
Article X, Section II's prohibition on officer's receipt or interest perquisites	
Governor's spouse, ability to do legal work	
for CompSource	11-14
for the University of Oklahoma	11-14
Authority, delegation of	96-94, 99-50
Bonds	
indebtedness authorized	02-14
method of issuance and retirement	02-14
Budget, balanced	00-33
Charter cities, no power to regulate dispensing, sale or	
distribution of pseudoephedrine	11-10
Constitution, amendments to	98-37
Constitution Law, ordinance, cities & town, tobacco	13-2
Corporation Commissioner	
salary increase restrictions	97-21
Courts	
administrative authority vested in Supreme Court	01-16
Department of Wildlife Conservation, power to set salary schedule	96-71
Due Process	96-94, 98-37, 99-50
adjacent property owner	
license renewal of feed yard	00-52
termination of Medicaid benefits	00-33
vicinity land owner, proposed hog feed yard	96-76, 98-40
Emergency Medical Service Districts	
authority	05-48
Board of Trustees, powers	05-48
Legislature	
authority, lack of to restrict powers	05-48
powers, separation of -- violation of	05-48
Equal protection	98-37, 99-4, 00-62, 01-40, 04-16, 04-29, 09-37
Feed yards	
hog feed yard license procedure	
right of adjacent property owner in license renewal	00-52
First Amendment	99-4, 04-30, 08-10, 09-37
Free speech	
advertisement of out-of-state business	96-93
contributions and independent expenditures	
by non-profit corporations	13-1
by 501(c)(6) qualified business leagues, Chamber of Commerce, etc.	13-1
Council on Judicial Complaints	00-15
employment rights	04-30
open meeting	98-45
restrictions on Alcoholic Beverage Laws Enforcement	00-18

Topic	Opinion
<i>CONSTITUTIONAL LAW (CONT.)</i>	
General Appropriations, Article 10, § 23	14-7
Governor	
authority to enter into agreements without legislative approval	04-27
separation of powers, violation of Legislature	04-27
spouse's ability to do legal work	
for CompSource.	11-14
for the University of Oklahoma.	11-14
Interstate Compact Clause	99-62
Law, enactment of	99-53
Legislature	
authority, may give Alcoholic Beverage Laws Enforcement Commission additional duty of regulating low-point beer	(overturned) 00-57
lack of power to set salary schedule	
Department of Wildlife Conservation employees	96-71
organization day	01-8
separation of powers, violation of.	04-27
Licensing	
hog feed yard license procedure	
right of adjacent property owner in license renewal	00-52
Living Wills	06-7
Low-point beer	(overturned) 00-57
One-subject rule, OKLA. CONST. art. 5, § 57,	10-7, 14-7
Powers	
executive	
council on judicial complaints	
empowered to hire secretary	98-1
executive branch agency	98-1
separation of	
council on judicial complaints	
empowered to hire secretary	98-1
executive branch agency	98-1
Preemption	03-46, 03-50
Privileges and Immunities Clause	00-62
Proceeding begun	14-7
Property, unlawful taking	00-38
Real Estate, restricts corporate ownership	01-11
Separation of Powers	
Governor empowered to enter agreements	04-27
Legislature, violation of to have power to approve	04-27
Special laws	98-37, 07-23
Special privileges	98-37
Supremacy Clause	02-21, 03-50
Tattooing, advertising of.	96-93
Veto, effect of separate appropriation made to fund vetoed program . .	96-73

Topic	Opinion
CONSTITUTIONAL QUESTIONS	
Abortion statutes	83-182, 91-10
Accrued rights	88-57
teacher retirees	88-51
Actuarial accrued liability of pension systems	
State's obligation to fund	96-21
Ad valorem taxes	
court clerk funding	83-39
criminal justice districts	88-44
exemption, application deadline	13-24
fair cash value increases	01-36
improvements	97-27
income, elderly/low	97-27
State agency lease purchase	95-92
State purpose	83-210, 88-10
unit appraisal valuation	84-2
valuation increase	
limitations, retroactivity	03-39
Advertising - free speech	
Oklahoma Real Estate Code	95-30
out-of-state business	96-93
Alcoholic Beverage Laws Enforcement Commission	85-72
low-point (3.2%) beer	98-15
Alcoholic beverages	
excise tax, sales surtax	84-197
Appointment powers, Governor	88-91
associations, special privileges	90-22
Article 10, § 23	
General Appropriations Bill	14-7
substantive provisions	14-7
transfers	14-7
Attorney General Opinions, binding effect of	91-10
Balanced Budget Requirement, Oklahoma's	
fiscal year limitation on contracts	98-20
indefinite term and uncertain amount prohibited	96-7
Bank holding companies	83-100, 83-181
Bill of attainder	88-48
Board of Equalization	
ad valorem tax, State aid	83-44
certification of school land funds (withdraws 81-306)	87-88
Burden of proof	
clear and convincing	97-113
sentencing enhancers	97-113
Campaign contributions, compelling employees	84-120

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
Candidate for public office, right to be.	92-19
Charitable organizations	
fund-raising fees	88-98
Charter cities.	05-27
Chiropractic Association	
right to submit nominations	83-19
Colleges/universities	
governance	99-47
Commerce Clause, U.S.	
price affirmation statute, ABLE Commission	89-44
waste tire recycling	
Interstate Commerce	05-47
facilities/compensation	05-47
Constitution, amendments to	98-37, 10-15
Constitutional Reserve Fund	
authorized use of.	91-17
Construction of	04-40
Contracts for multiple years	04-18
Contributions and independent expenditures	
by non-profit corporations.	13-1
qualified business leagues, by 501(c)(6), Chamber of Commerce, etc.	13-1
Corporate farming	99-20
Corporation Commission	
regulation of oil and gas	84-105
County	
constitutional duty to maintain & fund jail operations	07-35
credit to county, extension of prohibited by State.	96-7
exception to OKLA. CONST. art. X, § 26	07-35
hospital, mortgage of leasehold	83-148
inmate medical expenses.	11-19
priority funding for constitutional duties	07-35
reimbursement from Department of Corrections	11-8, 11-19
Credit of the State	
county superintendent, payment of salary.	83-69
“lending of credit” clause	90-34, 08-10
shift exchange practices	97-78
Debt	
forgiveness of	88-20
limitations	84-39
Delegation of	
administrative agencies	01-15
authority	83-189, 88-20

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
legislative power	87-98, 11-4
power	07-23
Department of Human Services	87-46
Disability insurance program	02-46
Due process	98-37
delegation of ministerial functions by administrative agencies	01-15
inmates, parole consideration	88-87
legislative procedure	98-38
tax assessment proceeding	88-14
termination of benefits	02-46
Emergency clause	
nature of emergency	84-63
subject to initiative	84-36
Emergency Medical Service Districts	
ambulance service, requirement to provide	02-4
Board of Trustees, powers	89-61, 05-48
incurring debt	87-139
legislative interference with constitutional powers	05-48
Employment Security Commission	
expenditure of Workforce Investment Act funds	00-47
surcharge assessment	83-189
Unemployment Trust Fund	83-99
Enterprise Zone Act	83-218
Equal protection	98-37, 07-23
legislative procedure	98-38
Equal Protection Clause	86-10, 86-63, 89-39, 89-52, 95-83, 00-62, 04-16
Oklahoma Public Employees Retirement System	83-56
Establishment Clause	83-227, 08-10
Exclusive right or privilege	86-18
disclosure of information	95-81
immunity from civil liability	95-81
Executive Branch Officers	
salary adjustment restriction, Corporation Commissioners	95-59
Executive Orders, creation of entities	96-31
Ex-Legislator, appointment	85-22
Ex Post Facto	88-48
Extraordinary session	88-96
Fourth Amendment	99-35
Free speech	
advertisement of out-of-state business	96-93
Council on Judicial Complaints	00-15

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
Full Faith and Credit Clause	
adoption - out-of-state decree	04-8
judgments and laws, distinction between	04-10
public policy exception	04-10
General law/special law	89-77
Governor	
appointment powers	88-91
line item veto	89-55
mansion account expenses, incident to duties	83-18
power to fill vacancy	87-67, 02-24
Grand Jury, impanelment of	88-47
Healing Arts statutes	99-17
Husband, head of family	86-10
Impairment of contract, pension rights - OPERS	95-45
Indemnifying U.S. Government	
indefinite term and uncertain amount prohibited	96-7
Initiative and referendum	
legislative referendum	
not subject to referendum petition	03-36
State question	03-36
referendum	91-19
Inmate labor, use of	05-33
Interest payments, leased equipment	83-120
Labor Commissioner	
salary increase	97-69
Legislative procedure	
read at length	98-38
Legislator	
appointment	
ineligible to receive from the Legislature	13-20
to State office, dual office holding	03-52
constituent communications, birthday greetings	05-32
employment by a state agency	04-25, 05-13
holds public office	84-90
power to enact implementing laws to Constitution	04-40
suspension from office, compensation	84-89
twelve-year term limitation	90-37
Legislature	
governance of	
colleges/universities	99-47
Emergency Medical Service Districts	05-48
irrepealable statutes	95-86
“One-House” veto	86-17
organization day	01-8

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
“Lending of Credit” clause	90-34, 08-10
Levies/Equal	92-2
career tech	08-32
incentive levies	08-32
Licensing	
hog feed yard license procedure	
right of adjacent property owner in license renewal	00-52
Liquor by the drink	
open saloons	84-173
private clubs	84-195
Local	
incentive levy (partially withdrawn by 86-105)	84-187
taxes	87-100
Municipal Fire and Ambulance Services	95-105
Municipalities	
budget act, transfer of revenues	84-183
debt, method for incurring	87-13, 97-47
expenditure of funds	86-26
franchises	
cable television systems	02-21
expanding terms	99-19
solid waste contracts	97-47
telecommunications	99-19
funds, use of in support of school districts	01-40, 05-2
“New Debt”/Certificates of Indebtedness	91-3
Oath of office	86-148
Officers	
change in salary or emoluments	02-18, 06-26
conflict of interest, public funds	95-41
Oklahoma	
Development Authority	
purchase of nonpayable warrants	84-5
Waste Tire Recycling Act - Waste Tire Recycling	
Indemnity Fund gifts	00-1
public purpose	00-1
One-subject rule	83-186, 86-99, 14-7
Pardon and Parole Board	
authority to grant parole	13-11
Legislature, application for commutation minimum	
terms of confinement - power to restrict	13-19
Pension systems, State’s obligation to fund	96-21
Pensions, repeal of (overruled by <i>York v. Turpen</i> 1984)	83-202

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
Powers	
executive	
Council on Judicial Complaints	
empowered to hire secretary	98-1
executive branch agency	98-1
separation of	
Council on Judicial Complaints	
empowered to hire secretary	98-1
executive branch agency	98-1
power to impose fines.	00-15
Preemption	
expressed and implied	99-7
State law	03-50
Presidential Preferential Primary Act	86-73
Privileges and Immunities Clause	00-62
“Proceedings Begun”	88-57, 14-7
Property, taking of	97-30
Public funds	
constituent communications, birthday greetings.	05-32
defined.	83-227
Emergency Medical Services District.	14-13
expenditure, Article X, Sections 14 and 15.	03-35
gift to the State	88-109, 08-10
public purpose (87-38 withdraws 79-78)	83-227, 87-38, 08-10
purchase of wheelchair van.	14-13
special laws – “pork”	87-100
Public purpose, use of State property for Governor’s transportation. . .	97-72
Public trust	04-6
Public utility, fees for service.	95-105
Referendum	85-24, 03-54
Refunding bonds.	85-184
Regents, Board of, OSU & A and M Colleges	
internal decision-making	withdrawn by 07-31 - 87-7
powers of.	83-234
State system of higher education	
leave benefits, employees	91-6
Repeal.	84-173
Residency requirements	
Licensed Professional Counselors	88-58
Revenue	
certification of.	91-19

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
raising bill	
Senate Bill 759	92-25
tire recycling fee	95-58
voted on at general election	03-54
raising, Oklahoma Tax Commission	83-201
sales tax/specific purpose defined	83-217
Revolving Fund, as collateral for investment	83-1
Salary, change of	
county superintendent	89-55
public official	85-13
town public utility authority	07-14
town treasurer	07-14
Salary Incentive Aid Formula	84-7
Sales tax, interest on (partially withdraws 83-284)	93-32
School Land Trust, appropriations by Legislature	87-88
(withdraws 81-306)	
Schools	
absences, excused for religious holidays	87-41
contracts, foundations	98-7, 98-25
Search and seizure	99-35
Self-executing	84-173, 13-24
Separation of powers	
appointments	90-31
Legislature, infringement by	05-5
“pork”	87-100
re-creation of agency terms/executive officers	88-91
Severability Clause	83-132, 88-96
Special laws	
advertising agencies, contracting	88-70
closed class, county sales tax	83-132
contract, sale of water	93-20
“pork”	87-100
rural fire departments, grant reductions	89-77
school activity funds	95-54
telecommunications	98-37
transfer fees, dependent school districts	87-134
Special privileges	
appointments from associations	90-22
telecommunications act	98-37
State aid formula	95-111
State Land Reimbursement Fund	09-9
State monies, County Highway Fund	89-42

Topic	Opinion
<i>CONSTITUTIONAL QUESTIONS (CONT.)</i>	
Statewide Water Development Revolving Fund	
transfer of unencumbered monies	84-4
Supremacy Clause	03-50
Tattooing, advertising of	96-93
Taxation	
compromise of liability	98-33
estate tax exemptions	99-11
legislative authority to provide alternative methods of	87-150
nonresidents	00-62
out-of-state vendors	86-64
protests by public entities	99-20
tax credits	88-20, 10-10
uniformity of taxation	88-20
Teacher, tenured payment of salary	84-87
Telephone company, public utility	13-18
Tobacco Settlement Endowment Trust	11-11
Tort Claims Procedure	
Department of Human Services	83-186
Truth in Sentencing Act	
burden of proof	97-113
Tuition rates	
blended rates	97-84
limits on	97-84
Vested vacancies, authority to fill	00-24
allocation of royalties	88-76
firefighters/police (overruled by <i>York v. Turpen</i> 1984)	83-202
real property	
amendment of restrictive covenant	00-38
use of	97-101
teacher retirees	88-51
Voter affidavits	83-206
Water Resources Board	
authority to administer grants	83-146
Workweek	87-4
 CONSULTATION ACT	
Public notice	85-165
 CONSUMER	
Direct deposit, to banking or payroll card account	09-31
Protection, telemarketing	
text messaging	02-38
wireless telephone	02-38

Topic	Opinion
CONSUMER CREDIT CODE	
Consumer credit sales	10-7
Mortgage Broker Licensure Act, enforcement of	06-5
Prohibited surcharges on credit card usage	10-7
Sales transaction	10-7
Supervised lenders	
allowable charges	96-84
fee for dishonored checks	84-75
origination of phone use	00-9
UCCC purpose (or consumer credit code purpose)	10-7
CONSUMER CREDIT, DEPARTMENT OF	
Authority of administrator	87-104, 03-32
Commissioners	
appointment process	07-12
enforceability of rulings - defacto officer	07-12
qualifications and eligibility	07-12
removal from office	07-12
Mortgage brokers - investigations	03-32
Supervised lenders	
allowable charges	96-84
origination of phone use	00-9
CONTRACTS	
Adhesion contracts	01-17
Choice of law	01-17
Cross-deputization agreements with Indian tribes	
between government entities not officers	97-43
duration of	97-43
Fees, underground storage tank	93-9
Fire protection services, Boards of County Commissioners, authority . .	14-5
Hiring freeze in State Personnel Act	
not applicable to professional or personal service contracts . .	95-12, 95-36
Impairment prohibited	05-05
Interpretation, in accordance with laws at time of execution	96-85
Liability	
contracts	12-18
limitation	
State procurement contracts	01-2, 06-11, 12-18
Monopolies	98-20
Multi-year	98-20, (88-73 partially withdrawn by 05-14)
Non-appropriation clause	98-20, (88-73 partially withdrawn by 05-14)
Performance-Based Efficiency Contracts	09-32
Prisoners, capacity to enter into	96-112

Topic	Opinion
<i>CONTRACTS (CONT.)</i>	
School districts, swaps or derivative financial product agreements . . .	05-43
Schools	
educational services in Department of Human Services'	
contracted group homes	09-15
non-appropriation clause	05-14
pay periods, teachers,	03-42
renting classroom space	99-73
Signature	01-31
State agency	
between agencies	03-40
real estate	
contract to sell to be performed within a reasonable time	98-8
Supervised lenders, allowable charges	96-84
Swaps, interest rate, derivative finance product	05-42
CONTROLLED DANGEROUS SUBSTANCES ACT	
Controlled dangerous substances (drugs)	
cities & towns have no power to enact ordinances inconsistent with	
State statutes of general, state-wide concern	11-10
Physician Assistant, prescribe and administer	00-34
Prescribing, administering exempt narcotics	86-58
Pseudoephedrine, charter and non-charter cities & towns have no power to	
regulate through ordinances	11-10
CONTROLLED INDUSTRIAL WASTE MANAGEMENT ACT	85-134
COOPERATIVE AGREEMENTS	
Electric	
organization	99-27
purpose	
ability to purchase goods and services from Corrections	99-27
ability to use inmate labor	99-27
Independent school districts	96-3
CORPORATION COMMISSION, OKLAHOMA	
Administrative rules	
federal rules, adoption of	99-70
interpretation	99-70
Amendments to constitutional provisions governing	98-37
Authority to issue permits to discharge into State waters	90-2
Fees, filing and duplication	87-98
Inspection and investigation authority	97-76
Legal counsel, plea bargains	89-30
Motor carrier enforcement officers, transferred to OSBI	85-112

Topic	Opinion
<i>CORPORATION COMMISSION (CONT.)</i>	
Motor Vehicle Enforcement Officers	13-25
Oil and gas	
development	86-37, 08-31
regulation	08-31
constitutionality of	84-105
fees, may impose permit fees	06-12
Oil, saltwater contamination, removal of soil-power to require.	86-59
Pipeline safety standards	99-60
Pollution control coordinating board, member.	83-178
Public service company	96-53
Tariffs	96-53
Telecommunications Act of 1974, Oklahoma	
ability to regulate under	98-37
Transportation Division, duties of	89-30
Wrecker and towing services, regulatory powers.	84-115
 <i>CORPORATION COMMISSIONERS</i>	
Authority to investigate public utilities	97-76
Divestiture of oil and gas interest.	91-29
Executive branch officer	
salary adjustment restriction	95-59
Meetings	
attendance of other public and private entities	12-24
Open Meeting Act.	12-24
Salary adjustment restrictions.	97-21
 <i>CORPORATIONS</i>	
Advertising audiology or speech-language pathology services	02-20
Campaign contributions, non-partisan election	89-19
Change of status (withdraws 71-114).	87-135
filing with county clerk	88-55
Charitable organization	
real estate, acquiring outside of city limits	01-11
requirements	82-182
Corporate by-laws, amendments to	84-3
Employment	
audiologist.	02-20
speech -language pathologist	02-20
Exemptions and Exceptions	00-36
Farming or ranching business corporations	99-50, 00-36
Insurance agent, limited insurance representative	89-14, 90-39

Topic	Opinion
<i>CORPORATIONS (CONT.)</i>	
Limited Liability Company Act	
mergers	96-38
Real Estate Investment Trust “REIT”	08-11
Mergers	
effect on right to contract with State	83-250
foreign business entities	96-38
limited liability company	96-38
Non-profit	
contributions and independent expenditures	
by non-profit corporations	13-1
qualified business leagues, by 501(c)(6), Chamber of Commerce, etc.	13-1
public funds from municipalities	85-161, 86-26
rural residential subdivision, not a municipality	13-5
use of inmate goods and services	99-27
Non-Profit Corporation Act	84-134
Open Meeting Act, subject to	02-37
Professional, shareholders	86-111
Public trust, ultra vires acts	82-34
Real Estate Investment Trust “REIT”	08-11
Registered office/register agent	88-38
Sale or transfer of shares	84-3
Vertically integrated farming	98-31
Voluntary dissolution	88-57
distribution of shares	86-45
 <i>CORRECTIONS, DEPARTMENT OF</i>	
Administrative Procedures Act	99-56
Administrative rules	
requirement to promulgate	99-51
Central Purchasing Act	99-65
Certified teachers, consultant stipend	84-20
Community Sentencing Act	99-65
administrative fees, eligible offenders	00-55
funding formula	04-2
reimbursement of medical care expenses	06-41
Community Service Sentencing Program	
nighttime/weekend incarceration	
reimbursement to county	90-40
Court costs, criminal case	89-79
Drug and alcohol testing of employees	98-16
Employee reinstatement (76-114 distinguished)	83-97
Executions, attendance	96-86
Firearms, possession of in parking lot, locked vehicle	04-38

Topic	Opinion
<i>CORRECTIONS (CONT.)</i>	
Goods	
authorization to purchase	99-27
services, sale of	99-27
Inmate labor, use of	99-27
prisoners' Public Works Act	05-33
private prison industry	05-33
Inmate medical expenses	98-46, 11-19
Interlocal Cooperation Act	99-65
Juveniles, adult certification	86-127
Mental Health Act.	99-65
Oklahoma Personnel Act	99-65
Physicians, Tort Claims Act	89-75
Policies, establishment of	07-37
Power and duties.	07-37, 11-19
Prison	
canteen, use of funds	86-23
contractors, private	05-33
Probation and parole officers	
ability to arrest/search	99-51
dual office holding - municipal police officers	95-48
restrictions of duties	99-51
supervision, district attorney and DOC.	14-11
Reimbursement from to county jail	11-8
Sex offender registry	08-20
State inmates retained in county jails	11-08, 11-19
 <i>COSMETOLOGY, STATE BOARD OF</i>	
Executive secretary, requirements	87-120
Instruction of secondary & post-secondary students	13-6
Membership requirements, Board	87-120
 <i>COUNCIL ON JUDICIAL COMPLAINTS</i>	
Board of Governors	
duty of Board to consider merits of complaint from the Council on Judicial Complaints before exercising its discretion whether to file a petition with the Court of Judiciary	00-20
 <i>COUNCIL ON LAW ENFORCEMENT EDUCATION AND TRAINING (CLEET)</i>	
Armed security guard license	88-80
Certification	
campus police officers.	95-74
motor vehicle enforcement officers.	13-25
municipal peace officers	98-13

Topic	Opinion
<i>CLEET (CONT.)</i>	
police or peace officer	84-98, 85-29
psychological exams	08-25
reserve officers	
ability to carry concealed weapons	99-32
campus police, authority to appoint	95-74
licensing to carry concealed weapon	99-32
mayor may appoint himself as one	98-13
Convicted felon, possession of firearm	84-101
Municipal peace officers	98-13
Park Rangers, certified as peace officers	05-16
Public Education Institution	88-33
Reserve officers, retired	
concealed weapons, ability to carry weapon	05-45
Security guards	
definition - “special event license”	03-45
licensing of	87-112, 03-45
“special event license”	03-45
training, Oklahoma National Guard	86-46
unarmed security guard license	03-45
Verification of license status	88-33
 COUNTY ASSESSOR	
Ad valorem, exemption application deadline	13-24
Appraisal	
authority	07-10
property, to enter, notwithstanding trespass statute	05-49
Appraisers, employment of (modifies 80-269 and 80-295)	83-200
Assessors	04-24
Computer data, authority to sell	96-26
Duty to equalize assessment rolls	86-88
Fees	
copies of records	96-26
electronic/digital records	12-4
Homestead exemption, may revoke	87-103
Mandamus to compel assessment	99-42
Manufactured home	
assessed for ad valorem purposes	84-41
Private attorneys	04-24
Revaluation	
budget, county assessor’s office	83-243
every five years	84-100
school district, appropriate funds for	85-4

Topic	Opinion
<i>COUNTY ASSESSOR (CONT.)</i>	
Tax ferrets	04-24
Vacancy, appointment to fill in executive session	92-23
Valuation	
building under construction	07-34
confidential records	05-50
limitations, increase	
County Equalization Board appeal	02-30
fair cash value, assessed	02-30
retroactivity	03-39
transfers within family	03-39
notification	88-14
platted lots	07-34
property	82-145
use value	99-8
Visual inspection program	04-24
COUNTY BOARD OF ADJUSTMENT	83-269
COUNTY BRIDGE AND ROAD IMPROVEMENT ACT	
Fund, sets specific expenditures	05-6
COUNTY BUDGET ACT	
County Budget Board	
computer-related not under	04-14
purchasing agent, has duty to purchase computers	04-14
County budgets	
adopted	04-14
county officers role in budget making	07-6
fair, county free fair - use of surplus funds to purchase land	13-4
supplemental appropriations	83-215
County Commissioners, discretion to approve contracts	06-8
County Excise Board, role of	07-6
Entity, separate - independent and district	07-10
COUNTY CEMETERY ASSOCIATION (<i>see CEMETERY</i>)	
COUNTY CLERK	
Abstractors, access to records	85-30
Certification of legal instrument	83-26
Fees	
copies, providing paper and electronic	05-21, 09-27
filing or recording of multi-tract instrument	83-77
mechanics' or materialmen's lien	83-89
Records Management and Preservation Fund	05-8

Topic	Opinion
<i>COUNTY CLERK (CONT.)</i>	
Judgment and lien notices	05-8
Property, filing documents to subdivide	88-1
Purchasing Procedures Act	
Emergency Medical Service District, not covered	83-190
proceeds generated from county sales tax for common education . . .	13-14
Real Estate Mortgage Tax	
treasurer’s certification	95-84
Recording of plat	84-61
Records Management and Preservation Fund	05-8
<i>COUNTY COMMISSIONERS, BOARDS OF</i>	
Abuse of discretion	82-65
Acquisitions by lease-purchase	83-212
Alcoholic beverage sales & excise taxes, allocation from	11-3
Appraisers, approval of payment (modifies 80-269 and 80-295).	83-200
Authority	
acceptance of beneficial interest in public trust	83-254
“cafeteria plan,” offer employees	88-21
contract	
county purchase to approve or disapprove	06-8
data processing technician to assist and advise the board	06-8
district attorney	88-60
office space, lease	99-29, 99-29 A
county election board secretary	09-36
designate holidays	84-56
disability payments	
qualifications for under county retirement system	83-252
fill vacancies	
County Assessor (executive session)	92-23
County Commissioner (partially withdraws 81-225)	86-151
County Superintendent (withdraws 79-143)	88-54
fire protection services	14-5
investment income, allocation of	83-284
(partially withdrawn by 93-32)	
military service credit	97-35
property surplus, declare	14-9
set salaries of County Officers (withdraws 78-224).	99-1
transfer funds	85-20
“twenty percent” funds, use of	85-80
Bridges	
corporations, private	04-22
franchises	04-22
signs	01-41

Topic	Opinion
<i>COUNTY COMMISSIONERS (CONT.)</i>	
toll bridges	04-22
weight limits	01-41
Cemeteries (<i>see also cemetery</i>)	
maintenance of	09-14
Charge for use of land regulation of public utilities	13-18
Chief Deputy County Commissioner	
power to exercise commissioner's function	96-15
Competitive bidding, total net cost	85-31
Computer, management information systems under	04-14
Convicted felon	
automatic suspension from office	83-303
employment of	07-16
purchasing from	83-41, 83-144
County Economic Development Program, budget for	90-36
County officers	
authority to set salaries (withdraws 78-224)	99-1, 09-36
County sales tax	
earmarking	83-217
use of	87-66, 14-15
Courthouse	99-29, 99-29 A, 99-49, 00-49
Drainage Act, Oklahoma	07-10
Elections	
authority to hold — “right to work”	85-54
county option, responsibility to call	85-37
liquor by the drink, authority to call	84-148
pari-mutuel horse racing	85-18
Enterprise Zone Act	83-218
Equipment, public auction	84-65
Executive sessions, fill vacancy	92-23
Fairs, county free, funding of - purchase of land	87-17, 13-4
Farm and home demonstration work, funding	84-103
Fire-protection districts	
agreements	96-70
authority to provide	14-5
revenue sharing	82-251, 03-10
Franchises	04-22
Gasoline tax, appropriation & distributions of proceeds from	11-3
Highways	01-41
Immunity, no - for torts committed carrying out policy	14-5
Interest, “direct or indirect” in any contract	04-11
Lease-purchase, real property	82-65, 83-65
Liability for policy decision - fire protection services	14-5
Management Information Systems, computer-related under	04-14

Topic	Opinion
<i>COUNTY COMMISSIONERS (CONT.)</i>	
Municipal ambulance service	84-84
Nepotism	
continued employment, raises (modifies 88-45)	90-25
county employee continued employment (withdraws 72-202)	88-45
prohibition	03-44
Office space	
courthouse annex	04-32
Department of Human Services	00-49
district attorney	99-29, 99-29 A
provide space	04-32
Powers and duties	
act on behalf of county as a whole	11-23
construction and maintenance of county highways	95-95, 03-10
dispute resolution program	97-83
zoning and planning regulations	12-2
Private attorneys, use of	04-24
Property	
disposition of destroyed	99-26
fair, county may purchase land	13-4
private	09-20
surplus	
sale of	97-105A
transfer of	97-105, 14-9
Public Roads	03-10
Reapportionment of county	83-195
Rental of District Court Room	82-206
Retirement system, establishment of	82-23
Revenue and taxation	
county housing authority, in lieu payments	86-13
seismographic operations	82-10
Revenue sharing funds, senior citizens center	82-112
Road crossing permits, charging fee, levying fine	12-10
Road machinery	83-212
Salary	
county election board secretary, authority to set	09-36
use of highway fund	84-21
Section line road right-of-way	
permit to place salt water disposal pipeline	82-1
Seismographic operations, authority to authorize	82-91, 82-240
Solid waste disposal sites, location of	85-28
Sovereign Immunity	
for policy decision	14-5
for torts by independent contractors	14-5

Topic	Opinion
<i>COUNTY COMMISSIONERS (CONT.)</i>	
Toll bridges	04-22
Tort actions of sheriff, liability for	82-208
Travel	
allowance	99-68, 09-36
county election board secretary	09-36
reimbursement	83-229, 99-68
Vacancy filled by Governor	83-303, 86-151
Vehicles, county owned- use of	99-68
 <i>COUNTY CONSERVATION DISTRICTS</i>	
Premises, liability - tort	05-35
Tort actions	05-35
 <i>COUNTY ECONOMIC DEVELOPMENT PROGRAMS ACT</i>	
90-36	
 <i>COUNTY ELECTION BOARD</i>	
Assistant Secretary, Salary of	85-92, 03-7, 03-30
Hours of work	03-30
Municipal	
charter election; election of freeholders	06-40
elections, generally	06-40
Notice of elections	06-40
Secretary of, retirement benefits	83-230
 <i>COUNTY EMPLOYEES</i>	
Availability of Records	83-219
“Cafeteria Plan,” Insurance	88-21
County Commissioners/employees, salaries	84-21
Data processing technician, salary level	85-187
Disability Insurance Program	89-74
Dispute Resolution Act	
retirement system	97-83
salaries	97-83
Disqualification, criminal conviction	86-79, 07-16
Election board secretary, salary	09-36
Holidays, designated	84-56
Insurance Coverage	85-45
Military leave	88-103
Nepotism	
continued employment (withdraws 72-202)	88-45
county commissioner, nepotism, prohibition	03-44
raises/transfers/promotions (modifies 88-45)	90-25
Office Hours/work day	83-219
Retirement/reemployment	88-71

Topic	Opinion
<i>COUNTY EMPLOYEES (CONT.)</i>	
Retirement Systems	
disability payments	83-252
eligibility	
military service credit	97-35
re-election to consecutive terms of office	93-18
secretary of Election Board	83-230
participating	
employee, OPERS	12-8
service credit	12-8
pension benefit	12-8
policy accrual of sick leave	12-8
Salary Act	00-30
Sheriff's secretary, interest in wrecker service	06-20
Travel	
allowances	87-117
reimbursement	83-229, 06-29
Vacation leave	99-9
Workweek	87-4
 <i>COUNTY EQUALIZATION, BOARD OF</i>	
Ad valorem taxes	02-30
Information, authority to request	85-40
Property inspection	82-59
Salary, increase during term	00-13
Valuation	
adjustment	86-88
appeal by taxpayer	02-30
authority to adjust	97-74, 02-30
County Assessor limitation	02-30
duties	02-30
 <i>COUNTY EXCISE BOARD</i>	
Appraisers, approval of payment (modifies 80-269 and 80-295)	83-200
Authority of Board	07-6
Availability of funds	
farm and home demonstration program	84-103
Budget and non-budget Board counties	07-6
Conflicts of Interest	01-18
County Economic Development Program	
authority to increase budget	90-36
Dual office holding	
school employee/volunteer	84-102 withdrawn by 01-18
Duties	96-14, 00-30, 01-18

Topic	Opinion
<i>COUNTY EXCISE BOARD (CONT.)</i>	
Emergency Medical Services Districts	83-190
Estimate of probable income (partially withdrawn by 93-32)	83-284
Holidays, authority to designate	84-56
Levies, county hospital	87-115
Library system, approval of budget	93-34
Mill levies, county hospital	90-7
Millage rate	83-160
Salary	
county officers, authority to set (withdraws 78-224)	99-1
increase during term	00-13
 <i>COUNTY FREE FAIR</i>	
Authority to conduct	81-139
Awards to students	95-33
County election	12-19
Funding of	87-17
Horse racing, license fee tax exemptions	95-101, 95-107
Permanent free fair site	12-19
Property, county may purchase real property & facilities	13-4
 <i>COUNTY GOVERNMENT</i>	
Authority	
create 911 system	07-22
internet link	12-4
Chief Deputy County Commissioner	
power to exercise commissioner's function	96-15
service on Board of Tax Roll Corrections	99-69
Chief Deputy or First Assistant, salaries of	03-7, 03-30
County Budget Act	90-36, 01-18, 07-6
funds to be included	12-11
hearing & notice requirements	12-11
salaries	96-14
County Fair Association	
horse racing, tax on multiple wagers accepted by	00-50
County free fair	13-4
Court Clerk records - fees for copies	09-27
Cross-Deputization agreements with Indian tribes	
between government entities not officers	97-43
duration of	97-43
Dispute Resolution Act	
salaries	97-83
Economic Development Program	90-36

Topic	Opinion
<i>COUNTY GOVERNMENT (CONT.)</i>	
Election Board	
Assistant Secretary, salary of	03-7, 03-30
Secretary, salary	09-36
Employees	
insurance	
cafeteria plan	88-21
coverage	85-45
disability	89-74
leave plan	99-9
military leave	88-103
retirement system	88-71
salaries	96-14
election board secretary	09-36
Salary Act	00-30
sheriff's secretary, interest in wrecker service	06-20
Equalization/Excise Boards	
salary increase	00-13
Equipment and machinery purchased by County	
county property, title to	95-95
Forestry payments	03-11
Gifts, property gifted for county free fair	13-4
Inmate incarceration	00-5
Interlocal Cooperation Act	00-5
Lease-purchase contracts	
ad valorem taxation	88-73
Municipalities with overlapping boundaries	01-35
National Forests	03-11
Nine-One-One system	
authority to create	07-22
withdrawal of municipality from system	
Officers, county	
equality	00-63
Open Records Act	
applicability to	01-46
fees for copies in court records	09-27
Public funds	
investment of	00-48
use of	88-109
Records	
disposition of	02-13
fees for copies	09-27
Management Act, applicability to	01-46, 02-13
preservation of	02-13

Topic	Opinion
<i>COUNTY GOVERNMENT (CONT.)</i>	
Resale property fund	
district attorney, use of for computer, salary	94-14
interest from omitted property	05-30
Sales tax, limitations on goods and services	03-29
Surplus property	
sale of or transfer of	97-105A, 97-105
Taxation	
cigarettes & tobacco products	14-12
emergency services, firefighting	01-35
Zoning and planning regulations	12-2
 <i>COUNTY HIGHWAY FUNDS</i>	
Distribution by County Commissioners, division of funds	95-95
Interest on Dedicated Funds (partially withdraws 83-284)	93-32
Municipal streets, construction repairs	89-42, 08-9
Public or private road, maintenance	82-236
Salaries, county commissioners, employees	84-21, 96-14
Section line road bridge	82-2
 <i>COUNTY HOSPITAL AUTHORITY</i>	
Dual Office Holding	85-151
 <i>COUNTY HOSPITALS</i>	
Annual mill levies	87-115, 90-7
Assignment of lease	95-23
county beneficiary trust	95-23
Board of Control	83-112
Court costs, payment of	87-47
Governance, implied powers	82-134
Minimum wages on Public Works Act	84-13
Mortgage of leasehold	83-148
Ownership interest conveyed	83-129
Sales tax	
support municipal trust	00-14
Voter approval of leases	95-23
 <i>COUNTY JAIL</i>	
Constitutional duty to maintain & fund jail operations	07-35
Improvement fund	83-65
Inmate	
incarceration	00-5
medical expenses	11-19
Reimbursement from Department of Corrections	11-8, 11-19

Topic	Opinion
COUNTY LAW LIBRARY	
Expenditure of funds	83-130
COUNTY PAYROLL ACCOUNTS	
Warrant	82-103
COUNTY PLANNING COMMISSION	
Oil and gas development	86-37
Oklahoma gives counties planning powers	13-13
Zoning and planning regulations	12-2
COUNTY POLITICAL SUBDIVISION	
Extension of credit to, prohibited by State	96-7
Indebtedness, gifts	81-165
COUNTY PURCHASING ACT	
Acquisition of insurance, county employees	85-45
Computer hardware/software	85-180
COUNTY PURCHASING AGENT	
Acquisition of insurance coverage, county employees	85-45
Dual office holding	83-49
Emergency medical services districts	83-190
Lease-Purchase Agreement	83-65
Public auction, county equipment	84-65
COUNTY RECORDS	
Ad Valorem tax revenue proceeds	81-132
Availability of records	83-219
Filing death certificates	95-52
Removal from County, microfilming	83-34
COUNTY RESALE PROPERTY FUND	
District Attorney, use of for salary, computer equipment	94-14
COUNTY SALES TAX	
Amendment or repeal	05-23
Approval by voters	12-16
Jail facilities	04-32
Limitations	
on goods and services	03-29
on purposes and use of	04-32
Transfer of proceeds	05-23
Use for voter approved purpose only	
change in purpose requires voter approval	12-16
distinct and specific purpose of the financing, etc.	14-15

Topic	Opinion
<i>COUNTY SALES TAX (CONT.)</i>	
extension of time period in which tax is collected requires voter approval	12-16
imposition of tax can start after county commissioners' terms of office	12-16
Use of proceeds, purpose of tax	05-23
COUNTY SHERIFF	
Bomb squad	96-9
Civil rights, violations of	82-153
Community sentence inmates, contract rate, reimburse	05-20
Constitutional duty to maintain & fund jail operations	07-35
County Jail Trust Authority	99-15
Deputies	
private process server	83-141
reserve force	85-46
Disability allowance	87-125
Duties	
arrests based on copy of bail bond	03-33
counties with multiple courthouses	99-14
Mandatory Seat Belt Use Act, may enforce	07-1
officer of the court	99-23
prisoners, must a sheriff accept arrestee	01-12, 04-17
security for district courts	99-23
sheriff	81-163
transportation of prisoners	99-14, 02-34
Employees, secretary and reserve deputy, interest in wrecker service.	06-20
Open Records Act	
prisoner information	99-74, 02-13
Posse Comitatus, common law	02-34
Prisoners	
admitting prisoner surrendered by bail bondsmen	03-33
bail bondsmen, access to prisoners	99-74
bail schedule	00-61
Community Service Sentencing Program, reimbursement of medical	06-41
costs of returning defendant on bail	03-33
Inmate medical expenses	11-19
maintenance of	84-93, 98-35, 00-11, 11-19
must a sheriff accept arrestee from municipal police officer	01-12
nighttime/weekend incarceration	
reimbursement from Department of Corrections	90-40
reimbursement from Department of Corrections	11-8, 11-19
Records, disposition of	02-13
Reelection after felon charge	84-170

Topic	Opinion
<i>COUNTY SHERIFF (CONT.)</i>	
Retirement benefits	81-34
Service of process	85-27
Travel	
allowance	99-68
expenses	82-25, 06-29
reimbursement	83-229, 99-68, 06-29
Use of proceeds, purposes of tax	
benefiting public schools, allowed	13-14
Vacancy, special election	85-103
Vehicles	
county owned, use of	99-68
 <i>COUNTY SUPERINTENDENT OF SCHOOLS</i>	
Dual office holding	83-50
Duties	83-66
Funding	89-55
Qualifications	82-103, 84-138
Salary	83-69
Travel expenses	82-54
Vacancy, abolishment of office (withdraws 79-143)	88-54
 <i>COUNTY TREASURER</i>	
Certificate tax deed	07-9
Delinquent taxes, sale	07-9
Documentary stamps	83-271
Duties as School District Treasurer, permissible investments	89-64
Funds	
bogus check fund	85-100
county funds, interest on	83-73
highway funds, interest on	93-32
invested funds, apportionment of, school districts	84-35
investment of funds, authority	81-183, 81-189
Motor license agent	88-10
Taxes	
ad valorem tax revenues, investment of	83-284
(partially withdrawn by 93-32)	
bids at tax resales	84-131
certificate sale	07-9
collect, duty to	88-110
delinquent taxes, sale	02-12
mortgage tax, certification,	95-84
notice to taxpayer	81-9, 81-206
protests	83-296

Topic	Opinion
<i>COUNTY TREASURER (CONT.)</i>	
sales tax, interest on (partially withdraws 83-284)	93-32
tax certificate sale	02-12
tax-roll corrections, board of exemption.	81-151
Time deposits	
certificate of deposit	84-106
investment of ad valorem tax revenues.	83-284, 84-35 (83-284 partially withdrawn by 93-32)
 COUNTY ZONING	
Animal feeding operations, concentrated	98-31
Contracts purporting to limit zoning powers	98-19
Reservoirs, regulations,	86-21
 COURT CLERK	
Bail schedules	00-61
Bond forfeitures	82-40
District court clerk	
property, must inventory	02-17
Fees	
additional (writ, summons)	93-12
authority to collect	03-48
private process server licensing fee	03-48
Funding, ad valorem taxes	83-39
General panel jury list	01-24
Open Records Act	
audio recordings of court proceedings	14-1
criminal pleadings subject to	99-58
Sheriff's fee, collection of	99-14
Subpoena, authority	84-38
 COURTS	
Administrative Director of the Courts	
certification of mediation program by Administrative Director of the Courts	03-20
Agriculture Mediation Programs	
certification of mediation program by Administrative Director of the Courts	03-20
Bail schedules	00-61
Confidentiality, mental health cases	00-43
Court Administrator	
property given to district court must be inventoried	02-17

Topic	Opinion
<i>COURTS (CONT.)</i>	
Court, district court	
bail bondsman may make arrest in courthouse	02-6
equipment, who retains ownership	02-17
inventory of property	02-17
Court Information System	
property, retains ownership	02-17
Court on the Judiciary	
Board of Governors	
duty of Board to consider merits of complaint from the Council on Judicial Complaints before exercising its discretion whether to file a petition with the Court of Judiciary	00-20
order removing district judge, creating vacancy	02-24
Dispute resolution	
certification of mediation program by Administrative Director of the Courts	03-20
District Judge	
Grand Jury, convening of	81-265
filling vacancies in	02-24
qualifications for office	81-66
Durable power of attorney, definition.	03-26, 06-34
Examiners of Official Shorthand Reporters, Board of	
Examinations.	81-199
Firearms	
private investigator may lawfully carry a firearm into a state courthouse or other state building	14-3
Fund	
court fund	
Central Purchasing Act, not subject to.	03-34
expenditure of	86-116, 03-34
Judicial Retirement Fund	
estimation and certification	81-276
Trauma Care Assistance Revolving Fund, municipal courts	05-1
Judge's Post Retirement Assignment to judiciary duties and service on Pardon and Parole Board	
prohibition against	93-16
Jurisdiction of court after exoneration of bond pending J & S.	09-16
Justice or Judge, retirement compensation.	81-80
Longevity pay plan	
employees & judges, eligibility of	08-7
Municipal courts, Trauma Care Assistance Revolving Fund	
jurisdictional power, lack	05-1
ordinances, may only collect fines established by	05-1

Topic	Opinion
<i>COURTS (CONT.)</i>	
Open Records Act, audio recordings of court proceedings	14-1
Practice of law, definition	03-26
Property	
inventory of county/State property	02-17
Protective order	
issuance costs/collection	98-41
Retired Judge's service on Pardon and Parole Board	93-16
Retirement system for judges, Uniform	08-7
Security for district courts	99-23
Small Claims Procedures Act	
court costs	99-25
transfer to district court	
court costs	99-25
Special Judges	
appointment by district judges	07-3
employees at will	07-3
power of district judges to terminate employment of	07-3
Worker's Compensation Court	
Open Records, access to open & closed claims - files under specific provision in Title 85	10-8
CREDIT SERVICES ORGANIZATION ACT	
Consumer report requests	06-18
Loan Brokers	87-126
State	
community based membership	99-72
Trust Account	87-104
CREDIT UNION ACT, FEDERAL	86-53
CREMATION	
Property, prosthetic devices & implants	09-10
CRIME VICTIMS COMPENSATION BOARD (OKLAHOMA)	
Crime Victims Compensation Revolving Fund	
authority to budget	89-18
Crisis Counseling	97-66
Powers, statutory authority to expend funds	98-3
Vehicular death, compensable	84-129
CRIMES AND PUNISHMENT	
Autopsy, retention of tissue	81-216

Topic	Opinion
<i>CRIMES AND PUNISHMENT (CONT.)</i>	
Bingo	
qualifying organization, license	83-309
requirements for license	89-59
volunteer worker	81-123
Board of Regents Member, conflict of interest.	82-16
Casino Nights, illegal	95-6
Child abuse, report of.	81-288, 85-116, 95-18, 06-16
Child passenger restraints.	95-76
Communications, surveillance, wiretap	
plain view interceptions	00-45
Community Sentencing Act	
funding formula.	04-2
illegible offenders	00-55
Community Service Sentencing Program	
nighttime/weekend incarceration, reimbursement to county	90-40
reimbursement of medical care expenses	06-41
Contributions and independent expenditures	
by non-profit corporations.	13-1
qualified business leagues, by 501(c)(6), Chamber of Commerce, etc.	13-1
Counseling	
sex offenders, mandatory	04-7
County bridge, weight limit, violations	82-2
County Sheriff	
felony conviction.	84-170
inmate medical expenses.	11-19
reimbursement from Department of Corrections	11-8, 11-19
release of prisoner.	81-82, 81-103
County Treasurer	
ad valorem tax notice	81-206
Crisis counseling	97-66
Deferred sentences	83-48
Dentist, practicing without a license	00-41
Destruction of State records	93-2
Driving While Intoxicated, second offense as felony.	84-142
Enforcement authority	
U.S. postal property	98-21
Enhancement of punishment	83-301
Executions, attendance	96-86
Felon	
firearms	84-101
security guard, armed, not licensed as	88-80

Topic	Opinion
<i>CRIMES AND PUNISHMENT (CONT.)</i>	
Felony conviction	
county sheriff	84-170
effect on sales to the State	83-41, 83-144, 83-250
eligibility for employment with county	07-16
eligibility to run for office	
county officers	98-34
legislators	98-34
pardon	98-34
legislator	83-235
school board member, guilty plea to felony	07-43
Firearms, carrying of	
convicted felon	81-263, 81-283
district attorney, assistant	81-193
Forgery, use of State Seal	97-68
Gambling	87-102
Grave robbing, Native American burial sites	86-43
Headlighting, rabbit hunting.	82-106
Housing Authority, conflict of interest	81-102
Legislator	
felony conviction.	83-235
vote influence	83-22
Lotteries	
Indian land.	85-23
laws against amusement and carnival games	95-6
pari-mutuel tracks	91-38
raffles, Political Action Committees	86-40
residence, real property	81-186
Minor	
arrest warrants, failure to pay traffic fines.	07-29
definition	85-191
Municipal Officials, dual office holding.	82-221
Nepotism	
Board of Education	81-96, 81-288
county commissioner, nepotism, prohibition	03-44
Department of Human Services	82-143
legislator, spouse	82-73
municipal government.	81-248
Rural Water, Sewer, Gas and Solid Waste Management Districts	01-38
Open Meeting Act	
county commissioners, board of	81-92

Topic	Opinion
<i>CRIMES AND PUNISHMENT (CONT.)</i>	
Pardon and Parole Board	
consecutive sentences	01-47
earned credits	86-36
felonies, three or more	01-47
Pardon and Parole Board's authority to grant parole	13-11
Pari-Mutuel Wagering	87-102
Poker tournaments	05-18
Possession of Firearm, pardon sister state	85-26
Postal Property, U.S.	
enforcement authority	98-21
Report, duty to	09-7
Sale and Consumption, nonintoxicating beverage	82-88
Salt Water Disposal Pipeline, compensation	82-1
Secretary of Security and Safety, attend executions.	96-86
Seismographic Operations, trespassing	82-10
Sex offenders	
registration requirements.	08-20
zone of safety (mandatory counseling).	04-7
Slot machines	81-241
lotteries, on Indian land.	85-23
phone card sweepstakes machines are illegal slot machines	09-24
State Bureau of Investigation, requirements	82-156
Tattooing	
advertising of.	96-93
performing.	00-16
Three-year limitation on a community sentence	09-1
Ticket scalping	86-86
Tobacco, sale to minor	85-191
Trafficking in Children	83-162
Truth in Sentencing Act	97-113
Victims Compensation Board.	97-66
CRIMINAL JUSTICE DISTRICTS.	88-44
CRIMINAL PROCEDURE	
Attorneys	
court appointments	85-98
fee, multiple counts.	89-79
Bail	
arrestee, release,	81-82, 81-103
bond Forfeiture	82-40
bonds	00-61
schedules.	00-61

Topic	Opinion
<i>CRIMINAL PROCEDURE (CONT.)</i>	
Bench warrant, issuance of	82-17
Community Sentencing Act	
funding formula	04-2
Deferred Prosecution	
not a conviction	04-34
revolving fund	95-17
Deferred sentencing	05-10
Grand Jury, convening of	81-265
Healing Arts, diagnosis, human ill and physician in Healing Arts	06-16
Information, John Doe	01-43
Public funds, misuse, statute of limitations	82-84
Search and seizure	99-35
wiretap, plain view interceptions	00-45
Sentences, void or voidable	99-57, 00-55, 03-24
Truth in Sentencing Act, sentencing enhancers	97-113
Witness, travel reimbursement	89-22
 CROSS DEPUTIZATION	
Agreements with Indian tribes	
between government entities not officers	97-43
duration of	97-43
Law enforcement, Indian country	90-32
 DAMAGES	
Punitive or Exemplary	
indemnification, civil rights	98-4
sovereign immunity, suits against State	81-124
 DEFERRED COMPENSATION PLAN	 90-38
 DEFINITIONS	
Actuarial accrued liability	96-21
Amend	00-38
Amusement rides	07-33
Architecture, practice of	99-59
At-large members	07-12
Basement, when counted as story of building height	06-38
Broker	89-64
Broker-dealer	89-64
Building	
official, applicable	07-19
owned or operated by this State	02-40
Candidate	89-19

Topic	Opinion
<i>DEFINITIONS (CONT.)</i>	
Capitol complex/grounds	97-62
Child care facility, record	82-69
Chiropractic	92-13
Compensation	06-19
Consumer report	06-18
Day, 5-day rule - Sex Offenders Registration Act	05-36
Defacto officer	07-12
Dentistry, practice of	03-13
Diagnosis	99-17
Divestiture of interest	91-29
Doctor	
employee, State	01-39, 04-19
health professions	92-13
Durable power of attorney, definition	03-26, 06-34
Earnings	11-11
Electrical	
construction work	06-36
contractor	06-36
Employer's Liability Act	00-51
Examination	03-32
Federal interpretation	99-70
Fees	93-9
Food processing	00-36
Food products	00-36
Healing Arts	
defined	99-17
diagnosis	02-19
physician	02-19
treatment	02-19
Human illness	99-17
Immediate family	10-15
In lieu of, travel expense	82-54
Incidental to	00-25
Indemnity	
health and dental insurance	95-60
United States	96-7
Internet	00-41
Investigation	03-32
Licensed health care facility	95-27
Land	07-10
Lobbying	95-14
Longevity pay	07-26

Topic	Opinion
<i>DEFINITIONS (CONT.)</i>	
Marriage	04-10
Metropolitan area	84-22
Minor(s)	85-191
harmful to	97-46
knowingly, for purposes of influence	97-46
person, for purposes of influence	97-46
Municipal	
authority, meaning.	04-20
building	99-59
Necessary prison officials.	96-86
Nursing homes	88-86
Officer de facto	97-9
Osteopathy	92-13
Oxygen, as a drug.	88-59
Peace officer	83-8
Pediatrics	92-13
Person	99-67
Physical therapy in the Physical Therapy Practice Act	04-5
Physician in the Healing Arts statutes	02-19
Place	98-47
Plea bargain	89-30
Podiatry.	92-13
Police officer.	99-24, 99-32
Political subdivisions	96-7
Practice of law, definition.	03-26
Precious metal and gem dealer.	81-181
Process piping.	00-31
Property, real.	07-10
Prosecute.	95-77
Protect/protection	91-36
Public	
pension rights	95-45
place	02-40
road	95-108
Read at length.	98-38
Record.	05-19
Residence, for voting	97-45
Residential care facility	88-86
Revenue raising bill	95-58
School	
day	83-152
district, full-time employee.	81-217
personnel, other.	99-53
year	82-159

Topic	Opinion
<i>DEFINITIONS (CONT.)</i>	
Shall	83-152, 08-16
Slot machines	
phone card sweepstakes machines are illegal slot machines	09-24
Special law (Legislature)	93-20
Statutory construction.	82-23, 02-20, 04-5, 14-16
Tax, restaurant, for tourism.	94-8
Treatment	99-17
Violent crimes.	13-11
Volunteer.	01-26
Water recreation attraction	07-33
Water Resources Board, staff attorney	81-222
Water rides	07-33
 DENTAL ACT	
Advertising	08-13
Dental Assistants	
duties and services	97-44
Internet, jurisdiction over out-of-state dentists.	00-41
Investigator, authority of	83-8
Practice, multiple dentist practicing together	08-13
Specialty license	95-112, 00-8
Speech, test for reasonableness of regular speech	08-13
Teeth bleaching, practice of dentistry.	03-13
Trade name, use of	08-13
 DENTISTS, BOARD OF GOVERNORS OF REGISTERED	
Authority	
no authority to determine courses	09-40
to seek administrative or injunctive relief.	09-40
Complaints, confidentiality.	88-79
Education and certification rules, compliance with APA	97-44
Internet, jurisdiction over out-of-state dentists.	00-41
Investigations, application of HIPAA.	05-31
 DEPUTY SPECIAL OFFICER	
Cross-Deputization, Bureau of Indian Affairs	90-32
 DERIVATIVE FINANCIAL PRODUCTS	
Swaps	05-42
 DEVELOPMENTALLY OR PHYSICALLY DISABLED PERSONS	
COMMUNITY RESIDENTIAL LIVING ACT.	87-90

Topic	Opinion
DISPUTE RESOLUTION ACT	
Agriculture Mediation Program	
certification of mediation program by Administrative	
Director of the Courts	03-20
DISTRICT ATTORNEY	
Administration of HB 1828	82-249
Alcohol/Drug Impact Panel, authority to establish	02-1
Assistant District Attorney	
compensation	06-19
de facto officer Uniformed Services Employment & Rememployment	
Rights Act of 1994	11-16
dual office holding prohibition, officer or deputy	01-34
tribal judge	99-41
Authority	
to approve OK Health pay incentive program	06-10
to pay bar dues for assistants.	06-19
Bogus Check Restitution Program	99-29, 99-29 A
Confidentiality of records	99-58
Contract with County Commissioners, authority to	88-60
Deferred Prosecution Agreement	95-17
Dual office holding	11-16
Duties of	84-16, 02-1
Employee benefit allowance	02-18, 06-10
Employees	
eligibility for State longevity pay	08-12
subject to the Oklahoma Personnel Act and Merit System rules	06-10
under Oklahoma State Employees Benefits Act	06-10
Firearms, right of district attorney & assistant district attorney to carry	13-17
Funds	
drugs, revolving fund	95-17
public, misuse of	82-84
Juvenile Bureaus, represent	08-30
Nepotism, niece	87-19
Office space	99-29, 99-29 A
Payment of salary and travel expenses	87-77
Payroll request	98-26
Power	
initiate quo warranto, may	07-12
limitations on.	02-1
Prisoners, maintenance of	98-35
Private attorneys, use of	04-24
Probation & parole officer supervision.	14-11

Topic	Opinion
<i>DISTRICT ATTORNEY (CONT.)</i>	
Prosecution abstract violation	82-155
Prosecutorial discretion	04-40
Salaries	
constitutional limitation	06-26
source of funds for	95-49
Subpoena, issuance of	01-43
Victim-witness coordinator	
form, assistance to victim to fill out	04-4
petition for protective order	04-4
DISTRICT ATTORNEYS COUNCIL	
Assistant District Attorney	
dual office holding prohibition	01-34
officer or deputy	01-34
Authority to	
approve	
OK Health pay incentive program	06-10
payroll requests	98-26
expend money	89-18
pay bar dues	06-19
Employee service ratings	05-7
DOGS	
Attacks	05-27
Ban specific breeds	05-27
Dangerous, breed-specific regulations	05-27, 07-28
DOMESTIC ABUSE ACT, PROTECTION FROM	
Petition for protective order	
assistance with preparing	04-4
DOMESTIC RELATIONS	
Child support, as lien	85-178
Head of household	86-10
Military pensions	85-128
Surrogate gestation	83-162
DRIVER LICENSE NUMBERS	
Disclosure requirements	97-3
DRUG TESTING	
Standards for Workplace Drug and Alcohol Testing	
public employees drug and alcohol testing	98-16
Testing facility, defining	06-3

Topic	Opinion
DRUGS (see also CONTROLLED DANGEROUS SUBSTANCES)	
Oxygen, prescribed by physician	88-59
Pharmacists	
administration by - not authorized	01-28
dispensing, may supervise certain quantities of pseudoephedrine . . .	11-10
Revolving Fund	95-17
DUAL OFFICE HOLDING	
ABLE (Alcoholic Beverage Laws Enforcement Commission)	
commissioned agent	06-42
hearing officer	06-42
municipal attorney	06-42
Assistant District Attorney	
tribal judge or justice	99-41, 01-34
Board of Education/County Purchasing Agent	83-49
Cabinet Secretary	05-28
Chief Executive Officer, OIFA/President, ODFA	91-22
City Councilman/GRDA Board of Directors	83-105
City Councilman/Trustee, Rural Electric Co-op	83-158
(modified 78-206, withdrawn by 89-72)	
City manager	08-15
County Excise Board	
chief, volunteer fire department	84-102 withdrawn by 01-18
school employee	84-102 withdrawn by 01-18
County Hospital Authority/Excise/Equalization Board	85-151
County Superintendent of Schools	
clerk, school board	83-66
mayor	83-50
District Attorney, Uniformed Services Employment & Remployment	
Rights Act of 1994	11-16
Fire chief	08-15
Legislator, employment by Community Action Agency	03-52
Library Board Member, commission member	82-189
Mayor	08-15
Municipal	
Board of Adjustment/Appraiser	86-65
Judge/Victim-Witness Coordinator	85-16
officials, nepotism	82-221
police officer	
board of directors for the fire protection district	03-47
city council member of another city	06-22
probation and parole officer	95-48
simultaneous service, federal or state office	00-58
Officer or deputy	01-34, 03-47

Topic	Opinion
<i>DUAL OFFICE HOLDING (CONT.)</i>	
Pardon and Parole Board/Retired Judge	93-16
Peace Officer/Indian Tribal Peace Officer	90-32
(84-108 withdrawn by 90-32)	
Presidential Electors	88-68
Probation and Parole Officer/Municipal Police Officer	95-48
Retired Judge/Pardon and Parole Board	93-16
Rural Electric Cooperative/Trustee not an officer (withdraws 83-158)	89-72
Scenic Rivers Commission, member	82-19
School Board Member	
director, fire protection district	83-220
tribal officer	00-39
volunteer fire chief	97-55
Security Commission, Board of Review	82-199
Trustee, Public Trust and Urban Renewal Authority	82-35
Turnpike Authority Member/Regional Hospital Authority	85-58
Volunteer fire chief-school board member	97-55
 DURABLE POWER OF ATTORNEY	
Hydration and Nutrition decisions	06-34
Life-sustaining treatment decisions	06-34
 EDUCATION (see also REGENTS, VOCATIONAL EDUCATION, AND SCHOOLS)	
Absences, religious holidays	87-41
Accreditation standards, delegation of power	95-28
Achieving Classroom Excellence Act of 2005	12-14
Administrator	
evaluation of	12-7
tenure	83-143
Alternative education	
requirements for local public school districts	00-12
Alternative Placement Certification	
competency examination, requirement	99-63
teacher competency review panel, appearance	99-63
Bargaining agents	
negotiations	98-14
nonprofessional organization	83-92
school boards may employ negotiator	97-70
Board of Education (<i>see</i> Board of Education, State)	
Building	
architects, licensed required for certain buildings of education	06-38
fund millages	95-83
fund, use of for parking lot	88-17
funding for construction, improvement or demolition of	01-40

Topic	Opinion
<i>EDUCATION (CONT.)</i>	
Career & technology (<i>see</i> Vocational Education)	
Central Oklahoma Juvenile Center (modifies 65-428)	83-292
(withdrawn by 98-2)	
Charter schools	
charter school act and alternative education	00-12
Constitutional restrictions on support.	04-6
Contracts	
cooperative	99-64
Schools, educational services in Department of Human Services ⁷	
contracted group homes.	09-15
County Superintendent	
dual office holding, mayor	83-50
duties of.	83-66
funding	89-55
qualifications	84-138
salary.	83-69
vacancy, abolishment of office (withdraws 79-143)	88-54
Curriculum, core mandates	
concurrent enrollment	99-64, 12-14
Disabilities, individual with - IDEA.	06-27
Elementary School Districts.	95-83
Employee organization	
bargaining unit, duties of.	87-24
exclusive representative	87-85
petition calling for election.	84-59
Employees	
collective bargaining.	88-95
flexible benefit plan.	99-53, 01-37
payment of insurance premiums	88-11, 95-57, 99-53, 01-37, 03-15
shared sick leave programs, sick leave banks.	96-20
Funding	
use of municipal revenues for.	01-40
Gifted and Talented Program, funding.	95-103
Gifts, from municipalities.	04-6
Handicapped children	
education for all Handicapped Children Act.	83-79, 09-15
Oklahoma School for the Deaf, transportation	84-164
out-of-state placement.	83-5
special education, transfers.	83-79
Higher education funding to state-supported institutions.	88-109, 04-6
Hot water supply heaters, inspection of.	83-111
Independent school districts.	95-83, 96-3
Lobbying, private associations.	95-14

Topic	Opinion
<i>EDUCATION (CONT.)</i>	
Midterm supplement.	95-111
National Board Certification.	13-23
Open Records Act, directory information	85-167, 86-152
Parent teacher groups/associations	95-54
Public trust gifts	04-6
Regents, Boards of (<i>see</i> Regents, Boards of)	
School Boards (<i>see</i> Board of Education)	
School Districts (<i>see</i> School Districts)	
School, funding, use of municipal revenues for	01-40
School Superintendent	
benefits	95-57
display of campaign sticker on vehicle.	86-22
School Teachers (<i>see</i> School Teachers)	
Section Thirteen Funds.	86-110
Special Education (<i>see also</i> Handicapped Children, this topic index)	
alternative placement certification	99-63
cooperative programs	97-89
core curriculum mandates	99-64
educational services to children in DHS' contracted group homes.	09-15
local education agency	97-89
recoupment of state aid	99-36
responsibility for district students.	97-89
State Aid, average daily attendance, calculation of	95-2
State System of Higher Education, Ardmore Higher Education Center	07-7
Student loans, through public trusts	83-254
Students, grading of papers	83-66
Support	04-6
Teacher Preparation Commission	
certification	00-6
competency examination, components and costs	99-63
Teachers, evaluation of.	12-7
Testing program	12-14
Textbooks	
State Textbook Committee	
extent of authority	00-7
Tuition Rates	
blended rates	97-84
limits on.	97-84
Nonresident	84-113
University of Oklahoma	
contracts	98-20
use of facilities	83-149
Vocational and Technical Education (<i>see</i> Vocational-Technical Education)	

Topic	Opinion
EDUCATIONAL QUALITY AND ACCOUNTABILITY BOARD	12-14
ELECTIONS	
Ballot Questions, contributions (withdraws 80-68 and 77-193)	83-138
Campaign Contribution Act	
contributions, declaration of candidacy	84-94
county officer, compelling contributions	84-120
during legislative session	09-11, 09-25, 09-37
excess contributions, 48-month limitation	86-119
from	
lobbyist and lobbyists principals	09-11, 09-37
political action committees (PAC).	09-11, 09-37
interest income	84-159
state & federal statutes	09-25
use of contributions, death of candidate	84-120
Candidate qualifications	
bill of attainder/ex post facto	88-48
Cities and towns, charter election; election of freeholders.	06-40
City charter, amendment	
publication of	89-10
Contributions and independent expenditures	
by non-profit corporations.	13-1
qualified business leagues, by 501(c)(6), Chamber of Commerce, etc.	13-1
Convicted felon	
eligibility to run for an office	98-34
County	
ad valorem levy/overlapping districts.	96-104
authority to hold – “right to work”	85-54
authority to rescind, pari-mutuel horse racing	85-18
county-option	
pari-mutuel betting	83-283
eligibility, county retirement system.	93-18
liquor by the drink, authority to call	84-148
responsibility to call	85-37
County Commissioner, vacancies.	82-264
County sheriff, after felony charge file.	84-170
Display of bumper sticker, publicly owned vehicle	86-22
Disqualification from criminal conviction	86-79
Election Board Secretary	
Assistant Secretary, salary of	03-7, 03-30
Initiative/Referendum	
legislative referendum -	
not subject to referendum petition	03-36
State question.	03-36
supermajority not required	03-1

Topic	Opinion
<i>ELECTIONS (CONT.)</i>	
Non-partisan, corporate contributions	89-19
Oklahoma Campaign Finance Act, constitutionality	82-186
Pari-mutuel betting, county-option	83-283
Penalties, Ethics Commission	87-27
Precinct caucuses, time off to attend	84-54
Presidential electors, dual office holding	88-68
Presidential Preferential Primary	86-73
Public funds	
expenditure of	91-27, 96-23
private associations, school board members	95-14
School districts	
board members	
nepotism	92-19
residency requirements	95-71, 00-24
right to position	95-71
boundaries, federal installations	83-109
expenditure of funds for	83-115, 91-27, 96-23
Special elections	
assumption of duties	84-47
authority to call	85-24
county commissioner	
fill vacancy for (partially withdraws 81-225)	86-151
county sales tax	87-66
limits on calling special election for:	
elections held not fewer than sixty days from date called	03-37
must be on a Tuesday	03-37
vacancy, county sheriff	85-103
vote of the people, submitted to	03-37
Vo-tech districts, petition for election on millage levy	88-64
Voter	
eligibility	97-45
qualifications and affidavits	83-206
registration requirements	97-3, 97-45
signature requirements in applications	14-10
ELECTRICAL LICENSE ACT	
Electrical	
construction work - defined	06-36
contractor - defined	06-36
Journeyman electrician	85-137
Minimum standards/codes	91-1
School district, not a corporation	89-56

Topic	Opinion
ELECTRONIC FUNDS TRANSFER ACT (FEDERAL)	
Electronic deposit, to banking or payroll card account	09-31
ELECTRONIC MAIL (E-MAIL)	
Open Records Act, record under	01-46, 09-12
Records Management Act, record under	01-46, 09-12
EMBALMERS AND FUNERAL DIRECTORS	
Death certificates, filing of	95-52
Educational requirements/licensure	97-38
Licenses	83-232
EMERGENCY MANAGEMENT ACT OF 2003, OKLAHOMA (<i>see</i> Civil Defense & Emergency Response Management Act)	
Governor, authority	
evacuation powers	07-11
EMERGENCY MEDICAL SERVICE DISTRICTS (EMS)	
Ambulance service, requirement to provide	02-4
Board of Trustees	
contracting	05-48
funds, authority to contract	05-48
nepotism laws, subject to	83-154
powers	89-61, 05-48
travel reimbursement	83-280
Budget approval	83-190
Charges for services	
outside district boundaries	83-88
residents and nonresidents	84-192
Eligible employer for purposes of	
Oklahoma Public Employees Retirement Act	84-149
Employees not county employees	83-154
Fees	00-19
Fiscal year	83-154
Funds	
authority to use levied funds	83-300, withdrawn by 14-12
authority to use levied funds to purchase wheelchair vans	14-13
levy, authorized amount at and voters, commitment by	02-39
Incurring debt	87-139, 10-11
Lease-purchasing	10-11
Legal Counsel, authority to employ	02-4
Municipal ambulance service	
competitive bidding	84-84
Open Meeting Act, subject to	83-154

Topic	Opinion
<i>EMS (CONT.)</i>	
Political subdivision Tort Claims Act, applicability	83-190
Political subdivisions, not applicable	83-190
Purchase procedures	83-190
School districts, required to vote	02-4
EMERGENCY ORDER OF DETENTION	
(<i>see</i> Mental Health)	
EMERGENCY RESPONSE ACT	
Authority, local law enforcement & fire department officials	07-11
Cleanup, hazardous materials on roads	00-42
EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)	
	86-32, 99-60
EMPLOYEES BENEFITS COUNCIL	
OK Health “pay incentive” program	
District Attorneys and employees may participate	06-10
District Attorneys Council may participate.	06-10
Powers and duties	95-80
State fiscal year	
change in health coverage	98-23
EMPLOYMENT SECURITY ACT OF 1980	
	83-189
EMPLOYMENT SECURITY COMMISSION	
Assessment of surcharge to employers.	83-189, 83-208
Health insurance supplemental, employees	03-14
Indians	
conditional exemption under Federal Unemployment Tax Act	06-4
obligation under	06-4
Labor	82-45
Unemployment trust fund.	83-99
Workforce Investment Act	00-47
ENABLING ACT, OKLAHOMA	
Education, governing boards of regents of the higher	86-110
Land Office, Commissioners	02-36
School land.	02-47
ENTERPRISE ZONE ACT	
Constitutionality of.	83-218
ENVIRONMENTAL CONSIDERATIONS	
Wetlands, acquisition of land	92-26

Topic	Opinion
ENVIRONMENTAL LAW	
Department of Agriculture	
regulate animal waste	97-95
Due process rights of landowners	
vicinity proposed hog feed yard	96-76, 98-40
Feed yards, private actions against	97-30
Hog feed yard license procedure	96-76, 98-40
Oklahoma Waste Tire Recycling Act	00-1, 05-47
Waste tire recycling and interstate commerce	05-47
Waste Tire Recycling Indemnity Fund	00-1
Water quality standards	
role of Department of Agriculture	97-95
ENVIRONMENTAL QUALITY	
Board	
conflict of interest	04-40
disposal sites	
biomedical waste disposal facilities	96-94
financial assurance for landfills	97-57
duties	04-40
Ethics Commission Rules	04-40
Cleanup, hazardous materials on roads	00-42
Department	
disposal sites, location of scales at landfills	97-57
Regulate, explosives and blasting	00-17
EQUALIZATION, STATE BOARD OF	
Assessment, public service property	84-2
Balanced budget	05-28
Constitution, interpretation of	98-32
General revenue cash-flow fund, no duty to certify	91-19
Powers and duties	05-28
Receipt of financial information	05-28
Revenue reduction, certification of	91-19
Valuation protests, public service companies	88-31
ETHICS COMMISSION, OKLAHOMA	
Civil penalties	04-40
Constitutional authority	06-35, 08-17
Electronic filing	06-35
Employment, state board or commission from hiring former members	09-28
Executive Director, vacancy	87-67
Faxes, admissibility	95-78
Financial disclosure statement	87-91
Investigations, request OSBI	87-26

Topic	Opinion
<i>ETHICS COMMISSION (CONT.)</i>	
Open Records Act, duties	06-35
Penalties, discretion to impose	87-27
Political fund-raiser, use of Governor’s mansion	96-27
Powers, implied	08-17
Prohibition on two members of State Ethics Commission representing the same congressional district	03-2
Records inspection and copying	06-35
Rules	
authority to withdraw promulgated rules	08-17
constitutionality of	04-40
enforcement of	04-40
Legislature’s separate consideration of each proposed rule	94-7
lobbyist conduct, limited power to promulgate	93-25
political fund-raiser, use of Governor’s mansion	96-27
promulgation of	04-40, 06-35
 ETHICS COMMISSION ACT, OKLAHOMA	
Travel by state officer	86-148
 EXECUTIONS	
Attendance	96-86
 EXECUTIVE BRANCH REFORM ACT	
Cabinet Secretaries	88-3, 00-54
Governor	
appointments	
interim service	00-54
renomination	00-54
Veterans Affairs, Department of	95-26
Salary of the Cabinet Secretary	95-26
 EXECUTIVE ORDERS	
Agencies, creation of by Governor	02-29
Creation of entities	96-31
Governor, authority	88-32, 02-5
Hiring freeze, professional/personal service contracts	95-36
 EXECUTIVE SESSIONS	
Economic Development, discussion of	11-22
Employee salary, discussion of (withdraws 78-201)	96-40
Public body under Open Meeting Act (withdraws 78-201)	96-40
Real property, sale of	07-32

Topic	Opinion
EXPLOSIVES AND COMBUSTIBLES	
Explosives and Blasting Regulation Act	00-17
Regulation duty of the Department of Mines, Public Safety, Environmental Quality and the Fire Marshal's office	00-17
FAIR LABOR STANDARDS ACT	
County employees work week or hourly wages	87-4
Electronic deposit, to banking or payroll card account	09-31
FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT	99-39
FAMILY PLANNING SERVICES AND POPULATION RESEARCH ACT	
Health Services for Minors, no parental consent	85-73
FARM EQUIPMENT	
Ad valorem taxes	99-42
Revenue and taxation	99-42
Sales tax exemption	89-33
FARMERS HOME ADMINISTRATION	
Repossessed property, tax immunity	86-34
FAXES	
Admissibility to Ethics Commission	95-78
FEDERAL DEFENSE OF MARRIAGE ACT	
Marriages, same-gender - other states	04-10
States, not required to recognize	04-10
FEDERAL DEPOSIT INSURANCE CORPORATION (F.D.I.C.)	
Documentary Stamp Tax, exemption	90-17
FEDERAL DISASTER RELIEF ACT	
Emergency Temporary Housing Assistance Program	85-70
FEDERAL GOVERNMENT	
Confidentiality information gathered by State	01-7
Exclusive jurisdiction over federal land within State procedure for State's consent	96-11
Right to acquire Land within State without State's consent	96-11
FEDERAL REVENUE SHARING ACT	86-26

Topic	Opinion
FEDERAL VETERANS' REEMPLOYMENT RIGHTS	
Military service credit.	90-28
FEED YARDS	
Board of Agriculture's authority.	97-95
Hog feed yard license procedure	
hearing rights of vicinity landowners	96-76, 98-40
notice to local landowners.	96-76, 98-40
Setback requirements	
public water supplies.	97-107
recreational sites	98-40
FEES	
Certification fee for mortgage tax.	95-84
Community Sentencing Act, administrative.	00-55
Corporation Commission, storage tanks.	93-9
County Assessor	96-26
County Clerk	83-26, 83-77
additional (writ, summons).	93-12
authority to collect	03-48
copies, providing paper and electronic	05-21
private process server licensing fee	03-48
Records Management and Preservation Fund.	05-8
Court costs	
criminal case	89-79
exemption for certain guardianship proceedings	13-15
protective order.	98-41
Court Reporter, transcripts	88-113
Documentary stamps	83-271
Mileage fees, State employee.	83-114
Municipalities, right to impose for licensure	99-7
Rural Electric Cooperatives, membership fees	95-44
Sale of computer data.	96-26
Veterinary Examiners, Board of	
deposit to general revenue fund	97-42
Witness fees, State employee.	83-114
FINANCE, OFFICE OF STATE	
Contracts, thirty-day limit on filing	83-310
Data processing functions, coordination of	04-18
Director	
authority of	88-32, 88-75
implementing revenue shortfall	91-19
Federal funds held in State Treasury	83-310
Information, providing to Board of Equalization.	05-28

Topic	Opinion
<i>FINANCE, OFFICE OF STATE (CONT.)</i>	
Mansion account	83-18
State agency, acceptance of gift/donation	84-34
State Budget Office, payment of encumbered funds	83-221
FINANCIAL DISCLOSURE ACT	
Board of Regents of Oklahoma Colleges	85-163
Financial Disclosure Statement	87-91
FINANCIAL RESPONSIBILITY ACT	83-203
FIRE AND POLICE ARBITRATION ACT	87-20
FIREARMS	
Concealed (<i>see</i> Self-Defense Act)	
District Attorney & assistant district attorney, statutory right to carry . .	13-17
Possession of	
convicted felon (<i>see</i> statutory amendment 1992)	84-101
pardon from sister state	85-26
parking lots	
prisons	04-38
school property	04-39
Self-Defense Act (<i>see</i> Self-Defense Act)	
Traffic violation, transporting during moving	03-46
Transportation and storage	04-39
FIREFIGHTERS	
Age restrictions	01-10
Arbitration	83-287
Collective bargaining with fire protection districts	01-51
Deferred Option Plan	
volunteer firefighter	01-10
work, return after retirement	01-10
Dual office prohibition	
fire chief	08-15
school board/volunteer fire chief	77-188, 97-55
Emergencies, notification of	07-15
Employment qualifications, age	84-10
Municipal fire departments - coverage	
revenue sharing - municipal boundaries	01-35
Pension & Retirement System - salary continuation	08-4
Protective gear	
masks/hoods, not prohibited	99-33
Responding to alarms & emergencies, lead official	07-15
Retirement system	83-167, 83-202, 08-4

Topic	Opinion
<i>FIREFIGHTERS (CONT.)</i>	
Salary payments, when temporarily sick or disabled	85-5
Shift exchange practices	97-78
Volunteer Fire Chief	
dual office/school board member	97-55
Volunteer firefighter	
dual office/city councilman or member of school board	77-188
felony conviction	99-45
responding to alarms & emergencies, lead official	07-15
retirement	01-10
Volunteers, use of private automobile	83-81
 FIRE MARSHAL	
Age	96-83
Inspection of schools (modifies 65-428) (withdrawn by 98-2)	83-292
Regulate, explosives and blasting	00-17
Rules and regulations	
building codes	91-1
Volunteer firefighter	
felony conviction	99-45
 FIRE PROTECTION DISTRICTS	
Annual assessments	81-9, 83-226
Board of Directors	
authority	84-199
dual office holding	
chief, etc.	03-47
school board	83-220
vacancy	81-22
Ceiling on mills assessed	84-15
Collective bargaining, no	01-51
Conflict of interest/chief, etc.	03-47
County Commissioners, agreements	96-70
District Fire Company	81-163
Equipment, lease-purchase	83-27
Governmental Tort Claims Act (withdrawn by 89-65)	86-95
Incurring debt	87-139
Purchase of property	83-282
Revaluation costs	85-78
Services, Board of County Commissioners, authority	
charitable corporations	14-5
to contract	14-5
to provide in the county	14-5

Topic	Opinion
FIRE PROTECTION PERSONNEL STANDARDS AND EDUCATION COMMISSION	
Review of records	83-122
FLAGS	
Displaying Confederate Flag	87-59
FORENSIC REVIEW BOARD	
Judicial Nominating Commission to provide nominees to Governor . .	09-21
FUNERAL DIRECTORS	
Death certificates, responsibility to file	95-52
Educational requirements/licensure	97-38
Licenses	83-232
GAMBLING	
Casino nights, illegal	95-6
Federal Interstate Horse Racing Act	
telephone or internet wagering in Oklahoma is not legal	02-25
Horse Racing Act	
calculation of purses, wagers at off-track wagering facilities.	96-37
county option, pari-mutuel wagering under Tribal-State Compact. .	97-106
tax on multiple wagers accepted by Fair Association	00-50
Horse Racing Commission	
racetracks, cannot accept wagers on previously run races	01-54
Indian Gaming Regulation Act.	93-1
Indian Tribes as retailer for Oklahoma Education Lottery	
off Indian Lands requires compact	11-12
on Indian Lands, subject to State regulation.	11-12
Internet wagering in Oklahoma is not legal	02-25
Lottery	
laws against amusement and carnival games	95-6
Oklahoma Education Lottery	11-12
Money Hunts	99-5
Pari-mutuel wagering	87-102
Phone card sweepstakes machines are illegal slot machines	09-24
Poker tournaments	05-18
Slot machines	
Phone card sweepstakes machines are illegal slot machines	09-24
Telephone wagering in Oklahoma is not legal	02-25
Tribal-State Gaming Compacts	
agreement to abide by Interstate Horse Racing Act	99-2
alcoholic beverages.	07-2

Topic	Opinion
GENERAL CORPORATION ACT, OKLAHOMA	
Change of status, non-profit (withdraws 71-114)	87-135
Corporation, interest in real property	88-55
Municipalities, does not authorize the creation of	13-5
Voluntary dissolution	88-57
GENERAL OBLIGATION PUBLIC SECURITIES REFUNDING ACT	85-184
GIFTS AND DONATIONS	
County free fair, property gifted to county	13-4
Donation, confidentiality of	02-27
State Agency, acceptance of	84-34, 07-39
GOVERNMENTAL TORT CLAIMS ACT	
(POLITICAL SUBDIVISION TORT CLAIMS ACT)	
Cities and towns/municipalities acquisition of insurance	02-45
Counties, insurance	83-164
County conservation districts	05-35
County, Dispute Resolution Program	
independent contractors, not covered	97-83
Damages	
punitive or exemplary	98-4
Emergency Medical Service Districts	83-190
Fire protection districts (withdrawn by 89-65)	86-95
Physicians	
Department of Corrections	89-75, 04-19
faculty members/medical schools	91-21, 01-39, 04-19
liability, sovereign immunity	01-39, 04-19
Political subdivisions, sovereign immunity	
hospitals	85-93
Premises, liability - tort	05-35
Rural water, sewer, gas and solid waste	
management districts	85-177, 88-16
School districts, insurance for students	89-58
State employee	
ability to sue governmental employer under the Act	00-51
definition of Employer's Liability Act ⁷	00-51
immunity from suit	89-75
use of personal automobile	88-13
Voluntary employees	85-135
Volunteer firemen (withdraws 86-95)	89-65
GOVERNOR	
Appointees	
Cabinet Secretaries	00-54, 02-29

Topic	Opinion
<i>GOVERNOR (CONT.)</i>	
full term and interim basis	98-22, 00-54
subsequent disqualifications	87-43
vacancy, full term or interim basis	99-71
Appointment powers	88-5, 88-91
county commissioners, vacancies	83-303
interim service	00-54
list of names from associations	90-22
power to fill vacancy	87-67, 02-24
renomination	00-54
separation of powers	90-31
vacancy, full term or interim basis (withdraws 72-256)	98-22, 99-71
Authority	
cooperative agreements, Indian Tribal Governments	93-1
(93-1 partially withdraws 89-41)	
enter into agreements with Indian tribes	04-27
evacuation orders, civil defense	07-11
grant parole	12-17
hiring freeze - contracting power	95-36
limitation on power to grant parole	13-11
Separation of Powers, violation for Legislature	04-27
Cabinet	
salary of Cabinet Secretary	95-26, 00-54, 02-29
Conflict of interest, spouse	
ability to do legal work	
for CompSource	11-14
for the University of Oklahoma	11-14
Executive orders	88-32
Governor, authority	88-32
hiring freeze, professional/personal service contracts	95-36
Extraordinary session, subject matter of	88-96
Gifts, to the State, has authority to accept	02-27
Hiring freeze in State Personnel Act	
implementation, limited scope of	95-12
professional or personal service contracts, not applicable to	95-36
Line item veto	89-55
Mansion	
account	83-18
use of for political fund-raiser	96-27
Pension systems	
include actuarial accrued liability in budget	96-21
Political fund-raiser, use of Governor's mansion	96-27
Separation of powers, appointments	90-31

Topic	Opinion
<i>GOVERNOR (CONT.)</i>	
Special elections	
authority to call	85-24, 85-55, 86-151
limits on calling special elections	
held not fewer than sixty days from date called	03-37
must be on a Tuesday.	03-37
vote of the people, submitted to	03-37
Spouse,	
ability to do	
legal work for CompSource.	11-14
legal work for the University of Oklahoma.	11-14
State agencies, power to create.	96-31, 02-29
Transportation of, as public purpose	97-72
GOVERNOR’S SECURITY AND PREPAREDNESS EXECUTIVE PANEL	
Open Meeting Act, whether subject to	02-5
Open Records Act, whether subject to	02-5
Public body, whether a	02-5
GRAND JURY	
Legal Counsel for School District	96-43
Petitions Calling For.	88-47
GRAND RIVER DAM AUTHORITY (“GRDA”)	
Board of Directors	
nominating committee	
representation of rural electric cooperatives	97-20
residency of <i>ex officio</i> members	98-43
Chief Executive Officer/Director of Investments.	11-7
Docks, rules and regulations.	03-25
Dual office holding.	83-105
Insurance	
additional insurance, customers	07-41
constitutional issues	07-41
indemnification	07-41
public purpose.	07-41
Reservoir construction, zoning regulations	86-21
Rules and regulations	02-44, 04-35
Supplemental retirement systems, authority to create	02-23
GROSS PRODUCTION TAX (see REVENUE AND TAXATION)	

Topic	Opinion
HANDICAPPED PERSONS (<i>see</i> EDUCATION, HANDICAPPED CHILDREN)	
Blind	
employees, guide dogs	85-14
vendors	85-2
Employment of	83-2
Group homes	87-90
J.D. McCarty Center	84-82
HEALTH CARE AUTHORITY	
Advisory Commission on Medical Care	
public assistance recipients	02-16
Appropriations, insufficient	00-33
Delegation of administrative functions to private entity	01-15
Duties	
and powers, re: employment	95-80
Drug Utilization Review Board	02-16
Employee Benefits Council	95-80
Hearing, right to by Health Care Providers	01-15
Medicaid payments, assignment of, subrogation	
and right to recover	05-4
Overpayments, recoupment of, right to hearing	01-15
HEALTH, DEPARTMENT OF	
Abortions, regulation of	83-182, 91-10
Boxing Commission, to give administrative support	03-53
Commissioner	
Blood Exchange Council member	83-180
Central Oklahoma Juvenile Center, inspection of	83-292
(withdrawn by 98-2)	
Disinter, permit to	83-25
Disposal sites	
requirements, bonding/filing/notice	83-274
solid waste disposal sites	85-28
Electrical License Act	
authority under	85-137
minimum standards	91-1
Electrician, licensing	83-78
Emission control, visual inspection	84-174
Grade A milk and milk products, regulation of	85-83
Jail standards	
temporary tent jails	98-12
License, required for mechanical work on process piping,	
with exceptions	00-31

Topic	Opinion
<i>HEALTH, DEPARTMENT OF (CONT.)</i>	
Long Term Care Facility, consulting pharmacist	86-63
Mechanical licensing, minimum standards	91-1
Nurses	
health care practitioner, advanced unlicensed assistive person.	98-24
nursing aide registry, Open Records Act.	01-7
Permits, authority to issue to discharge into State waters	90-2
Plats, approval of	84-61
Plumbers, rules and regulations governing	91-1
Plumbing Licensing Act (modifies 67-348)	83-236
Rules and regulations	
public toilet facilities.	83-145
smoking in public places.	87-121
Water recreation attraction	07-33
 HEALTH INSURANCE HIGH RISK POOL	
Records not subject to the Open Records Act	05-39
 HEALTH MAINTENANCE ORGANIZATIONS	
Chiropractic services	87-76
Employee Benefits Council	95-80
Indemnity plan defined.	95-60
 HEALTH PLANNING COMMISSION	
Institutional Health Services.	83-193
 HELIPORTS	
Funding by Aeronautics Commission (withdraws 80-122)	88-53
 HIGHWAY ADVERTISING CONTROL ACT	
Billboards, to be erected within so many feet of other billboards	09-8
Signs visible from highway, control size, etc.	85-75
 HIGHWAY SAFETY CODE, OKLAHOMA	
Cleanup, injurious substances on roads	00-42
Funeral processions	95-99
Vehicle Weight Limits	92-12, 10-2
exceptions	95-88, 10-2
 HIGHWAY SYSTEM, INTERSTATE	
Advertising, outdoor, placement of signs.	09-8
 HISTORICAL SOCIETY, OKLAHOMA	
Contracts.	withdrawn by 07-31 - 85-157
Floor reports, nonbinding effect.	83-258

Topic	Opinion	
<i>HISTORICAL SOCIETY (CONT.)</i>		
Membership list, an open record	95-15	
Real Estate Leases	84-167	
HORSE RACING ACT, OKLAHOMA		
Commission		
authority to		
assess multiple fines.	84-179	
fine licensees for failure to secure Worker's Compensation	13-3	
examination of organization license applications.	85-1	
law enforcement director		
licensure investigative reports, disclosure of.	85-51	
members/conflict of interest, Breeding Development Fund.	87-73	
County		
election	83-283, 85-18	
pari-mutuel wagering under Tribal-State Compact.	97-106	
Fair Association		
tax on multiple wagers accepted by	00-50	
Fair Meet		
license fee exemption, when applicable	95-107	
tax		
exemption from license fee	95-101	
on multiple wagers accepted by Fair Association	00-50	
Federal Interstate Horse Racing Act		
applicability to Indian Tribes	99-2	
telephone or Internet wagering in Oklahoma is not legal.	02-25	
Gambling		
Horse Racing Commission		
racetracks, cannot accept wagers on previously run races	01-54	
pari-mutuel wagering	87-102	
telephone or internet wagering in Oklahoma is not legal.	02-25	
Indian Gaming Regulatory Act, Tribal-State		
compact under.	99-2	
Internet or telephone wagering in Oklahoma is not legal.		02-25
License Fee		
exemption for fair meets	95-107	
fair meet tax exemption.	95-101	
Lotteries, pari-mutuel tracks.	91-38	
Multiple wagers		
tax on multiple wagers accepted by Fair Association	00-50	
Off-track wagering facilities, calculation of purses		96-37
Organization license/licensee		
burden of proof	86-18	
denial, unfit character	92-24	

Topic	Opinion
<i>HORSE RACING ACT (CONT.)</i>	
eligibility for	92-24
exclusive right or privilege	86-18
five-year moratorium.	86-20
Indian land, license required	84-172
televised races, pari-mutuel wagering.	95-107
Pari-mutuel	
inter-track and simulcast races	95-101
racing facilities financed by public trusts	87-58
wagering (93-1 partially withdraws 89-41)	93-1
Race track license, eligibility for	92-24
Rules and regulations, not irrevocable	86-44
Simulcast wagering	
out-of-state full racing programs, limits on	97-115
Successor corporation, eligibility for license review	85-175
Telephone or internet wagering in Oklahoma is not legal	02-25
HORSE RACING COMMISSION	
Gambling	
racetracks, cannot accept wagers on previously run races	01-54
Organizational license, bond requirements	95-19
HOSPITAL AUTHORITY, REGIONAL	
Member, dual office holding.	85-58
HOUSING AND ECONOMIC RECOVERY ACT OF 2008.	08-29
HOUSING AUTHORITIES	
Indian housing	
commissioners, compensation	01-3
disposing of real property	01-53
Open Records Act - State-created must release	03-28
taxation of real property formerly held by Indian Housing Authority	09-23
Municipal, annual audits	88-18
HOUSING AUTHORITY ACT, OKLAHOMA	87-6, 01-53, 03-28
HOUSING FINANCE AGENCY, OKLAHOMA	
Interlocal agreements	86-71
Rules -- “Local Governing Body”	07-5
State Budget Act, not subject to	90-23
HUMAN REMAINS	
Burial transit permit	11-21
Transport, out-of-state - investigations.	11-21

Topic	Opinion
HUMAN RIGHTS COMMISSION	
Voluntary employees	85-135
HUMAN SERVICES COMMISSION	
Regional Administration System	87-46
HUMAN SERVICES, DEPARTMENT OF	
Child Support Enforcement Actions	00-53
Contracts	
educational services in Department of Human Services'	
contracted group homes	09-15
rental of space	withdrawn by 07-31 - 84-76
Contractual agreements with other State agencies	83-240
County offices, authority to relocate	83-199
Department of Central Services	00-49
Educational services in Department of Human Services'	
contracted group homes	09-15
Faith-Based & Community Initiatives, Office of	08-2
Federal Social Security contributions, collection of	83-240
Furloughing employees	83-127
Lease-purchase, local units	88-89
Medicaid Vendor Drug Program (modifies 85-38)	87-30
Office space leasing	00-49
Offices furnished by counties	83-210
Payroll deductions, private charities	83-139
Public Welfare Commission	82-45
Director	82-143
Regional Administration System	87-46
Tort claims procedure	83-186
HUNTING	
Money hunts	99-5
HYDRATION AND NUTRITION FOR INCOMPETENT PATIENTS ACT	
Constitutional law	06-7
<i>Five Wishes</i> [®] - advance directive form	06-7
Withdrawal of hydration/nutrition	06-7, 06-32
IMMIGRATION	
Alien, authorization of lawful presence	08-16
Citizenship, proof of	08-16
IMPROVEMENT DISTRICT ACT	
	85-133
INCENTIVE AWARDS FOR STATE EMPLOYEES ACT	
	85-17

Topic	Opinion
INDEMNIFICATION	
Civil Rights Damages, punitive or exemplary	98-4
INDIAN GAMING REGULATION ACT	
Tribal-state Compacts (93-1 partially withdraws 89-41)	93-1
INDIANS	
Alcoholic beverages	
distribution or possession on Indian land	83-125
State-Tribal Gaming Act, serving alcohol.	07-2
Assistant District Attorney	
tribal judge or justice.	99-41
Boxing	
Indian tribes power to regulate	06-39
Oklahoma Professional Boxing Commission to regulate.	06-39
Court of Indian Offenses	
85-94	
Compacts	
Governor empowered to enter into agreements	04-27, 06-39
Oklahoma Professional Boxing Commission cannot enter.	06-39
Separation of Powers, violation for Legislature to approve	04-27
Cross-deputization agreements with Indian tribes	
between government entities not officers	97-43
duration of.	97-43
Federal Interstate Horse Racing Act	
applicability to Indian Tribes	99-2
Gaming regulation (partially withdraws 89-41).	
93-1	
Governing body member	
Board of Education membership.	00-39
Governor	
authority to enter into agreements with Indian tribes	04-27
separation of powers, violation for Legislature	04-27
Horse racing	
gambling laws (partially withdraws 89-41)	93-1
organization license required	84-172
Pari-mutuel wagering, county option under Tribal-State Compact	97-106
Housing authorities	
commissioners, compensation	01-3
disposing of real property	01-53
Open Records Act - State-created must release	03-28
taxation of real property formerly held by Indian Housing Authority	09-23
Indian Child Welfare Act	
85-94	
Indian country, as “reservation” in Professional Boxing Safety Act	
06-39	
Indian Gaming Regulatory Act, Tribal-State	
compact under.	99-2

Topic	Opinion
<i>INDIANS (CONT.)</i>	
Lottery, retailer for the Oklahoma Education Lottery	
off Indian land, requires compact	11-12
on Indian land, subject to State regulation	11-12
Motor Vehicle Licenses	06-6
Native American burial sites	86-43
Professional Boxing Safety Act	
Indian tribes	
power under	06-39
regulate, lack of authority on other tribe's boxing.	06-39
reservation under.	06-39
Slot machines, lotteries on Indian land.	85-23
State-Tribal Gaming Act	
alcoholic beverages, must be licensed, no complimentary.	07-2
card games, may have	05-18
Taxation, collection of excise/sales taxes, cigarettes	92-25
Tribal Governments	
participation in Oklahoma Development Finance Authority Act	88-28
Tribal Peace Officer, dual office holding (90-32 withdraws 84-108).	90-32
Tribal-State Compacts (partially withdrawn by 93-1)	89-41
Tribal-State Gaming Compacts,	
agreement to abide by Interstate Horse Racing Act	99-2
Unemployment Insurance	
Indian tribes	
Federal Unemployment Tax Act, conditional exemption	06-4
State Employment Securities Act, obligation under	06-4
Workers' Compensation Act/Benefits	
federally recognized Indian tribes	
insurer who provides insurance to, is subject to jurisdiction of	06-4
not "employer" under Act.	06-4
not required to provide coverage or subject to jurisdiction of.	06-4
INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT ("IDEA")	
Confidentiality of records	99-39
Core curriculum	99-64
Due process hearing	
must have licensed attorney	06-27
representation of parents	06-27
Educational services in Department of Human Services'	
contracted group homes	09-15
Local education Agency	97-89
Responsibility for assigned students	97-89

Topic	Opinion
INDUSTRIAL FINANCE AUTHORITY, OKLAHOMA	
Rules and regulations	83-150
INITIATIVE PETITION PROCESS	
Municipalities	03-12
Repeal of taxes	91-19
INITIATIVE/REFERENDUM	
Irrepealable Statutes	95-86
Legislative referendum election	
held not later than 60 days after it is called	03-37
must be on a Tuesday	03-37
not subject to referendum petition	03-36
Municipalities	03-12
Public Funds, expenditure of	91-27, 95-14, 96-23
solid waste collection and disposal	97-47
Supermajority not required	03-1
INSPECTORS ACT, OKLAHOMA	89-60
INSURANCE	
Automobile, State employee	88-13
Bail Bond	
deposit required for insurance companies	00-22
Cafeteria Plan	
county employees	88-21
school districts	88-43, 99-53, 03-4
Chiropractic coverage	89-6
Cities and towns/municipalities acquisition of insurance	02-45
Claim forms, uniform	84-130
Competitively bid for, cities and towns/municipalities	02-45
Corporations, stock ownership	89-14, 90-39
County	
acquisition of insurance, competitive bid not required	85-45
insurance program by Interlocal Cooperation Act	83-164, 99-37
property, destroyed county	99-26
Dental plan, covered services	13-21
Department	03-9
Disability insurance program	
benefit offsets	02-46
constitutionality of rule	02-46
county and State employees	89-74
termination	02-46
Domestic insurers, surplus requirements	85-19, 85-145

Topic	Opinion
<i>INSURANCE (CONT.)</i>	
Employee Benefits Council	95-80
Employee Welfare Benefit Plans	86-32, 99-60
Employment Security Commission	03-14
Freedom of choice laws	89-6
Grand River Dam Authority	07-41
Group insurance, termination of employment	82-52
Health Care Authority	95-80
Health Insurance High Risk Pool	
records not subject to the Open Records Act	05-39
Health insurance, school districts	89-58, 90-3, 99-53, 03-4
Indemnity plan defined	95-60
Insurance companies, sales tax imposed	88-34
Insurance premiums, use of building fund	87-49
Liability coverage	
exclusionary endorsements	85-34, 85-159
vehicle, to cover removal of insured's wrecked or damaged	02-3
Licensing	
licensing, federal savings and loan associations	83-264
medical claim reviewer does not have to be licensed	02-19
telephone representatives of insurance companies	99-43
Long-Term Care Insurance	
approval of renewal premium increases by	
Insurance Commissioner	14-2
Medical claims reviewer	
license, does not need	02-19
Military - "State Sponsored life Insurance"	06-13
Motor vehicle liability Insurance, schools	82-80
Municipalities as insurers under Interlocal Cooperation Act	06-24
Policies, assignability of	83-205
Real Estate Appraiser's Act	03-9
Reinsured risk, foreign insurer	82-49
School districts	
health insurance	
nonclassified employees	99-53
students	89-58
support personnel	03-4
teachers	90-3
use of building fund, insurance premiums	87-49
Solicitation by phone	99-43
State agencies	
alternatives to purchasing insurance from	99-49
constitutional issues	07-41

Topic	Opinion
<i>INSURANCE (CONT.)</i>	
gifts prohibited	07-41
indemnification	07-41
State Board for Property and Casualty Rates	82-101
State Employees Group Health, Dental and Life Insurance	
feasibility study	84-14
health insurance, supplemental	03-14
required enrollment, State employees	84-72
uniform claim forms	84-130
“State Sponsored life Insurance”	06-13
Surplus lines tax, policies sold to the State	07-38
Teachers’ Retirement System	
health insurance, accrued rights	88-51
payment of insurance premiums	88-11
Third-party administrator act	
Employee Retirement Income Security Act	99-60
Title	
all-inclusive rate	86-102
insurance	82-46
policies, after title examination	83-281
Unemployment Insurance	
Indians	
conditional exemption under Federal Unemployment Tax Act	06-4
obligation under	06-4
Workers compensation	99-28, 99-34
Indians	
insurer who provides insurance to, is subject to jurisdiction of	06-4
not “employer” under Act.	06-4
not required to provide coverage or subject to jurisdiction of	06-4
reinsurance	99-3
state agencies, requirement to purchase	99-49
INSURANCE AGENTS LICENSING ACT.	89-14, 90-39
INSURANCE FUND, STATE	
Agencies	
purchasing insurance.	99-49
Central Purchasing Act, subject to	88-41/61
Conflict of interest	
board member/doctor	87-147
Hiring freeze in State Personnel Act, not applicable to SIF.	95-36
Special indemnity fund	
authorized expenditures from	98-44
protection of	91-36

Topic	Opinion
<i>INSURANCE FUND (CONT.)</i>	
Workers compensation	99-28, 99-34
Workers Compensation Insurance Fund reinsurance	99-3
INTERLOCAL COOPERATION ACT	
County authority	00-5
Inmate incarceration	00-5
Municipalities as insurers under Interlocal Cooperation Act	06-24
Public Trust Compact	86-70
INTERLOCAL COOPERATIVE AGREEMENTS	
Authority to expend monies	83-150
Independent School Districts	96-3
Nonprofit sheltered workshops	83-295
Powers, no new powers created	08-33
Purchase of insurance, counties	83-164
State Beneficiary Public Trusts	86-71
INTERNET	
Dentist, jurisdiction over out-of-state	00-41
Libraries, access to minors	97-46
INTERSTATE COMPACTS	
Form of	99-62
Modification of	99-62
State border	99-62
INTERSTATE HIGHWAY SYSTEM	
Weight limits, permits (92-12 withdraws 86-139)	92-12
INTERSTATE HORSE RACING ACT	
Applicability to Indian tribes	99-2
INVESTIGATION, OKLAHOMA STATE BUREAU OF (OSBI)	
Authority to request investigation persons authorized to receive investigative reports or information	95-77
Confidentiality duty to maintain	95-77
investigative reports	98-27
Destruction of controlled dangerous substances	88-86
Director authority to commission peace officer	84-108
retirement, OLERS or OPERS-on or after July 1, 2003	03-38
Ethics Commission, assistance to	87-26
Personnel file, disclosure of	86-39

Topic	Opinion
<i>OSBI (CONT.)</i>	
Reports, disclosure	
Child Death Review Board	96-10
civil or criminal prosecutorial authority	98-27
licensure, Horse Racing Commission	85-51
Retirement system membership	95-85, 03-38
Turnpikes	06-25
Self-Defense Act, licensure, authority to issue.	03-46
Transferred officers, authority of	85-112
Uniform Electronic Transactions Act, effect on records	01-13
INVESTIGATORS	
Authority under Dental Act	83-8
INVESTIGATORY AUTHORITY	
Merit Protection Commission, under Oklahoma Personnel Act	93-35
Mortgage Brokers, by Department of Consumer Credit	03-32
JAILS	
Bail bondsmen	
access to	
jails.	99-74
prisoner information	99-74
admitting prisoners surrendered by bondsmen	03-33
Construction, inspection of - Dep't of Labor	10-1
County Jail Trust Authority	
duties of county sheriff	99-15
Criminal Justice Districts, unconstitutional	88-44
Facility	
defined.	04-32
district attorney's offices, not included	04-32
financing	04-32
public trust, lease to	04-32
Incarceration costs	
Community Service Sentence Program	06-41
prisoners	00-11
Jail Trust Authority	
duties of.	04-17
formation and authority.	00-2, 04-17
sheriff as chair - conflict of interest.	00-2
Occupational Safety & Health Review Act ("OSHA")	10-1
Prisoners	
bail schedules, use of	00-61
duty to accept	04-17

Topic	Opinion
<i>JAILS (CONT.)</i>	
Schools, located near	98-47
Standards	
temporary tent jails	98-12
Youths	07-20
J.M. DAVIS ARMS AND HISTORICAL MUSEUM	07-39
J.M. DAVIS MEMORIAL COMMISSION	07-39
JOINT TENANCY	
Termination of	83-159
JUDICIARY	
Administrative authority vested in Supreme Court	01-16
Bail hearing	00-61
Board of Governors	
duty of Board to consider merits of complaint from the Council on Judicial Complaints before exercising its discretion whether to file a petition with the Court of Judiciary	00-20
Council on Judicial Complaints	
confidentiality of proceedings	00-15
empowered to hire secretary	98-1
executive branch agency	98-1
Open Meeting Act, not subject to	00-15
power to impose fines	00-15
Judges	
justices, employment, limitations of	82-111
performance of administrative function	08-30
Judicial Nominating Commission	
qualifications	10-15
submit nominees to Governor for Forensic Review Board	09-21
submitting names to Governor to fill vacancy of district judge	02-24
Judicial Nominating Committee	
background investigations, confidentiality	97-16
submitting names to Governor to fill vacancy of district judge	02-24, 06-2
Jury selection, list of jurors	01-24
Nepotism, court reporter	05-46
Post retirement assignment, judiciary duties	93-16, 03-18
Practice of law, regulates	03-26
Qualifications	
“licensed to practice in this state”	88-25
Residency Requirement	84-9
Retired Judge’s service	
ability of retired justice to serve, without loss of retirement pay	07-40

Topic	Opinion
<i>JUDICIARY (CONT.)</i>	
CompSource Oklahoma	03-18
Pardon and Parole Board.	93-16
Salary, Associate District Judges	94-10
Special Judges	
appointment by district judges	07-3
employees at will	07-3
power of district judges to terminate employment of	07-3
Supreme Court disciplinary rules	84-117
JURISDICTION	
Dual agency authority.	07-33
Exclusive jurisdiction over federal land within State	
procedure for State’s consent	96-11
Internet, regulation of out-of-state dentist	00-41
Long-arm jurisdiction.	00-41
JUVENILE BUREAUS	
County function, performing	08-30
District Attorney, representation by	08-30
Employee of county	08-30
History of	08-30
JUVENILE JUSTICE, DEPARTMENT OF	
Acquisitions, establish or maintain facilities	11-9
Contract	
authority to bid with designated youth services agencies	05-44
Powers & authority.	11-9
JUVENILE SYSTEM OVERSIGHT, OFFICE OF	
J. D. McCarty Center for Handicapped Children is a part of	84-82
Jails	07-20
Youths	07-20
LABOR COMMISSIONER/DEPARTMENT	
Administrative Procedures Act.	87-97, 07-36
Amusement rides	07-33
Asbestos abatement	09-35
Authority.	82-5
Certificate of non-coverage	
public record	99-55
repealed, effects of	05-22
Construction inspections, jails	10-1
Dual agency authority.	07-33
Electronic deposit, to banking or payroll card account	09-31

Topic	Opinion
<i>LABOR COMMISSIONER/DEPARTMENT (CONT.)</i>	
Hot water supply heaters, inspection of	83-111
Insurance	
workers compensation	99-34
Legal fees for representation	07-36
Open records policy	99-55
Physical examinations for employees	
not applicable to State	84-168
Power to publicize safety consultation services	98-44
Powers	97-94
Prevailing wage law	87-97
Protection of Labor Act	83-126
Salary increase	97-69
Workers Compensation Act, exclusive entity to impose civil penalties	13-3
 LABOR RELATIONS	
Collective bargaining	
fire protection districts, no	01-51
local school district	87-85
Fair representation	87-85
Negotiators for school boards	97-70
“Right to Work”	85-54
Vacation pay, employee entitlement	85-47
 LAND (see PROPERTY)	
Covenants running with land, do not create a municipality	13-5
Exclusive jurisdiction over federal land within State	
procedure for State’s consent	96-11
Jurisdiction, federal land within State	02-34
Right to acquire land within State without State’s consent	96-11
 LAND OFFICE, COMMISSIONERS OF THE	
Agriculture lease	
reducing payments during term of lease	02-47
Auctions, school lands	96-1
Conveyance procedures, school lands	96-1
Depletion, management and sale fund	
legislative appropriations from (withdraws 81-306)	87-88
Easements, conveyance of, procedures for school lands	93-15
Lessee preference, right to purchase	96-1
Oil and gas leases, bidding procedures for leases	95-43
Permanent Common School Fund, investment of	89-21
School fund, investment of purchase of timberland	02-36
Trust property	
obtaining maximum return	02-47

Topic	Opinion
LANDLORD/TENANT	
Payment under emergency temporary Housing Assistance Program . . .	85-70
LAKE AREA PLANNING COMMISSION	
Validity of	12-2
LAW ENFORCEMENT EDUCATION AND TRAINING	
Certification	
campus police officers	95-74
municipal officers	98-13
reserve officers	95-74
LAW ENFORCEMENT OFFICERS	
Cross-Deputization agreements with Indian tribes	
between government entities not officers	97-43
duration of	97-43
Dual office holding (<i>see also</i> cities, municipalities, etc.)	
simultaneous service, federal or state office	00-58
Mental patients	
Reserve officers, retired	
concealed weapons, ability to carry weapon	05-45
Self-Defense Act	96-60
Sheriff's Department, bomb squad	96-9
Sheriff's reserve deputy, interest in wrecker service	06-20
State vehicles	
personal transportation, travel exception - OBNDD agents	95-34
Travel reimbursement - transporting mental patients	06-29, 08-1
VIN inspection authority to correct out-of-state title	01-48
Weapons, carrying off duty	04-23, 05-45
LAW ENFORCEMENT OFFICERS RENEWAL TRAINING FUND	
Fines	82-37
LEASE/LEASE-PURCHASE AGREEMENTS	
Acquisition	
buildings or equipment, school districts	02-43
real property, State agency	withdrawn by 07-31 89-36
Ad valorem taxation	88-73, partially withdrawn by 05-14
Colleges and universities	
bond oversight	02-41
student housing	02-41
Construction of student housing	83-171
Emergency Medical Service Districts, ambulances	10-11
Fire protection district, equipment	83-27
General obligation bond proceeds, use for installments	02-43

Topic	Opinion
<i>LEASE/LEASE-PURCHASE AGREEMENTS (CONT.)</i>	
Interest on equipment	83-120
Interest payments	07-42
Municipal utilities	84-37
Public trusts	07-42
Real property	
authority of Department of Human Services	88-89
County Commissioners	83-65
Road Machinery	83-212
School districts	07-42
LEGISLATION	
Appropriation	
power to spend on existing program	96-73
yearly, expires at end of fiscal year	04-3
Veto, effect on separate appropriation to fund vetoed program	96-73
LEGISLATIVE CODE OF ETHICS	
Committee assignments, commitment to vote	83-22
Legislator, conflict of interest, bank	87-8
LEGISLATORS	
Appointment, ineligible to receive from Legislature	13-20
Campaign Contribution Act	
during legislative session	09-11, 09-37
from	
lobbyist and lobbyists principals	09-11, 09-37
political action committees (PAC)	09-11, 09-37
Compensation commences 15 days after general election, subject to	
Certificate of Election & taking official oath of office	13-8
Conflict of interest	
bank director	87-8
contracting with State, spouse	87-40
Constituent communications, birthday greetings	05-32
Contracting with State	05-13
Employment by a state agency	04-25, 05-13
Ex-legislator	
contracting with State	05-13
eligibility for appointment	85-22
employment by a state agency	04-25, 05-13
Felony conviction	83-235
eligibility to run for office	98-34
Nepotism	95-104
Open Records	08-19

Topic	Opinion
<i>LEGISLATORS (CONT.)</i>	
Public office	84-90
Qualifications	
term limitation, 12-year	03-51
School land lessee	83-302
Speaker, term of special session	13-8
Suspension, compensation	84-89
Term limitation, 12-year	90-37, 03-51, 13-8
Vote influence	83-22
LEGISLATURE	
Accrued liability of pension systems, obligation to fund	96-21
Appointments	
Cabinet Secretaries	00-54
consent	83-185
legislator, ineligible to receive from Legislature	13-20
renomination	00-54
separation of powers	90-31
Appropriations	
American Recovery and Reinvestment Act of 2009 funds	09-17
continuing	09-9
line-item	10-14
Office of Juvenile Affairs, contracts with youth service agencies	05-44
Authority	
lack of to restrict contracts of Emergency Medical Service District	05-48
state pension systems (to oversee)	03-5
to call special election	85-24
to sell water for use in another state	93-20
to transfer funds	00-40, 14-17
Clean Campaign Act of 2008	09-25
Concurrent resolutions	83-101, 99-6, 99-53
Contributions from lobbyists	09-25
Creation of state agencies, power of the Governor	96-31
Decennial codification of statutes	96-84
Delegation of power	
adoption of nongovernmental standards	95-28
limitations of authority	09-21
to administrative agency	99-62
Emergency clause	
nature of emergency, not required	84-63
subject to initiative	84-36
Enactment of law	99-53
Ethics Rules, separate consideration of each proposed rule	94-7
Extraordinary session, subject matter of	88-96

Topic	Opinion
<i>LEGISLATURE (CONT.)</i>	
Governance of colleges/universities	
authority	99-47
Governor, authority to enter into agreements with Indian Tribes.	04-27
Irrepealable statutes	95-86
Joint resolutions	93-20
Lack of power to set salary schedule	
Department of Wildlife Conservation employees.	96-71
Legislative intent	96-84
“Legislative silence” gives rise to implication of legislative intent . . .	08-5
Legislative procedure	
read at length.	98-38
Legislative referendum	
election	
held not later than 60 days after it is called	03-37
must be on a Tuesday.	03-37
not subject to referendum petition	03-36
special elections on measures to vote of the people	03-37
Legislator, appointment, ineligible to receive from	13-20
Legislature’s organization day	01-8
Limitations of authority	
pension rights - OPERS	95-45, 05-40
Local law requirement	
file with Secretary of State	93-20
publish.	93-20
Nepotism	
branches, separate entities.	95-104
“One-House Veto”	86-17
Open Records	08-19
Pension systems, State’s obligation to fund	96-21
Qualifications to serve	
term limitation, 12-year.	03-51
Read at length.	98-38
Separation of powers	87-100
appointments	90-31
violation of, for Legislature to approve each compact agreement . . .	04-27
Special laws	87-100
vs. general laws.	93-20
Staff member, also member board of education.	83-177
Vacancies	83-235

Topic	Opinion
LIBRARIES, DEPARTMENT OF	
Approval of budget	93-34
Contracts with municipalities	04-36
Multi-County library system	86-135
Tax levies	04-36
LIBRARIES/LIBRARY SYSTEMS	
Board membership, reappointment	95-53
Board of Trustees, powers	97-5
Concealed weapons, power to prohibit	95-96
Confidentiality, registries, showing	05-19
Internet access	
general public	05-19
minors	97-46
Tax levies	01-22
LICENSED DIETITIAN ACT	85-21
LICENSED SOCIAL WORKERS	
Exemptions from licensure, State agency employees	95-27
Licensed Health Care Facility, defined.	95-27
LICENSING	
Advanced unlicensed assistive person	
respiratory care	98-24
Affidavit, required for new or renewal license.	08-16
Alarm and Locksmith Industry Act	13-12
Auctioneers.	84-114
Bingo	83-309
Childcare facility licensing, background check	96-56
Concurrent jurisdiction.	99-7
Dentists	
internet, use of.	00-41
specialty license	95-112, 00-8
Electrical License Act.	85-137
electrical code	91-1
Electricians	83-78
Hog feed yard license procedure	96-76, 98-40
Horse racing	
fair meet	95-101, 95-107
organizational license, bond requirements	95-19
Horse Racing Commission	
organizational license bond requirements.	95-19
racetracks, cannot accept wagers on previously run races	01-54
Insurance Agents Licensing Act.	89-14, 90-39

Topic	Opinion
<i>LICENSING (CONT.)</i>	
Licensed Dietitian Act	85-21
Licensed social workers	95-27
Mechanical Licensing Act	91-1
Motor license agent/agencies	87-40
Municipalities, concurrent jurisdiction.	99-7
Optometrists, procedures required for license actions	04-21
Pawnbrokers and employees	82-270
Plumbers	83-236
rules and regulations/codes	91-1
Race track license, eligibility for	92-24
Requirements for new or renewal license, - affidavit	08-16
Respiratory care	
advanced unlicensed assistive person	98-24
Vehicle License and Registration Act, Oklahoma	86-109
Vocational training	
private prisons	00-3
 LICENSING, PROFESSIONAL	
Attorney	06-27
Advanced unlicensed assistive person	
respiratory care	98-24
Architects, licensed required for certain buildings of education	06-38
Boiler and pressure vessels.	99-7
Concurrent jurisdiction.	99-7
Dental practice, ownership	97-82
Dentists	
internet, use of.	00-41
investigations of	
HIPAA, application of	05-31
information, obtaining protected health, verbal requests.	05-31
specialty, must have general license	95-112, 00-8
Embalmers and funeral directors, requirements	97-38
Healing Arts	
medical claims reviewer does not need license	02-19
tattooing, permanent cosmetics.	00-16
License, requirements for new or renewal - affidavit.	08-16
Medical	
claims reviewer does not need license	02-19
licensure	98-5
Motor vehicle dealers	
false or misleading advertising, discipline of	99-48
Municipalities, concurrent jurisdiction.	99-7

Topic	Opinion
<i>LICENSING, PROFESSIONAL (CONT.)</i>	
Polygraph examiners	
Citizenship requirement - United States	04-16
Physical therapists	
referral from physician assistant	04-5
rules for foreign trained.	96-35
Psychologists	
exemption for State employees	96-80
Licensing Act, school psychologist, scope of practice	95-38
Veterinary Examiners, Board of-fees to general revenue fund.	97-42
Veterinary medical license qualifications.	98-9
 LIENS	
Agister's, Feedman's	85-171
Child support	85-178, 00-53
Judgment and lien notices	05-8
Mechanic's and materialmen's	83-89, 83-203
Oil and gas, leaseholds	83-38
Personal property tax lien.	11-1
Tax certificate, tax resales.	84-131
 LIMITED LIABILITY COMPANY ACT	
Mergers	96-38
 LIVING WILLS	
Advance Directive Act	
validity of instruments executed prior to Act	06-32
Constitutional law.	06-7
<i>Five Wishes</i> [®] - advance directive form.	06-7
Power of Attorney (<i>see</i> 06-7 withdrew 91-2)	91-2, 06-7
Withdrawal of nutrition/hydration	06-7, 06-32
 LOBBYING	
Campaign Contribution Act	
during legislative session	09-11, 09-25
from	
lobbyist and lobbyists principals	09-11, 09-25
political action committees (PAC).	09-11
School districts through private associations	95-14
 LOCAL DEVELOPMENT ACT	
Tax increment financing	09-13, 09-39

Topic	Opinion
LOTTERIES	
Football sweepstakes	85-15
Indian land, held on	85-23
Oklahoma Education Lottery	
Indian tribe as retailer for	
off Indian land, requires compact	11-12
on Indian land, subject to State regulation	11-12
Pari-mutuel tracks, contest promotions	91-38
Social Security sweepstakes	85-15
MANDATORY SEAT BELT USE ACT, OKLAHOMA	
Child passenger restraint requirements	95-76
County law enforcement officers may enforce in district court	07-1
Federal Motor Vehicle Safety Standard 208	86-142
Municipal or city courts may assess fines not to exceed cap	07-1
Pick-up trucks, not exempt unless farm vehicles	00-44
Use in automobiles not trucks and vans	85-85
MANUFACTURED GOODS	
Vendors 5% preference law	88-24
MANUFACTURED HOMES	
Department of Public Safety permit to move	
ad valorem tax receipt	95-47
Property tax relief	84-198
MANUFACTURING FACILITY	
Ad Valorem Taxation	85-122
MARRIAGE	
Definition	04-10
State's laws, recognition of other	04-10
Who may marry	04-10
MASTER CONSERVANCY DISTRICTS	
Delegation of authority to manager	07-24
Nepotism laws, subject to	07-24
MASTER LEASE PROGRAM	
Property, personal and real	12-23
MCCURTAIN COUNTY WILDERNESS AREA	
Management of wildlife and habitat	04-26
Prescribed burns	04-26

Topic	Opinion
MECHANICAL LICENSING ACT	
Applicability to Welding Contractors	12-25
License required for mechanical work on process piping	00-31
Minimum standards/codes	91-1
MEDICAID VENDOR DRUG PROGRAM (MODIFIES 85-38)	87-30
MEDICAL ASSISTANCE	
Medicaid programs	
benefits and right to recover	05-4
funding of	00-33
MEDICAL EXAMINERS, OFFICE OF THE CHIEF	
Transport, out-of-state - investigations.	11-21
MEDICAL EXAMINERS, STATE BOARD OF	
Licensed Dietitian Act, administration of.	85-21
Physician assistants	86-42
MEDICAL LICENSURE AND SUPERVISION, STATE BOARD OF (FORMERLY MEDICAL EXAMINERS, STATE BOARD OF)	
Licensure examination	
necessity for full, unrestricted licensure	98-5
Physical therapist	
referral from physician assistant	04-5
rules for foreign trained.	96-35
Physician Assistant authority	00-34, 04-5
MEDICAL RECORDS	
Confidentiality	
consent required to identify grave of mental health patient	00-43
disclosure to Child Death Review Board under HIPAA	04-28
Copies	86-85
fees	95-93
doctors, hospitals or medical institutions	97-100
sufficiency	01-25
Fees, deposits	01-25
HIPAA confidentiality	
application for administrative investigations	05-31
Patient access	
fees, “handling” charges	97-100
right to originals	01-25
MEDICAL TECHNOLOGY AND RESEARCH AUTHORITY	
Powers and duties, local nature	95-67

Topic	Opinion
MENTAL HEALTH	
Adult detention facilities	83-211
Custody and detention, procedures, for	08-1
Detention of children	83-211
Emergency detention	08-1
Programs, administration of by Health Care Authority	01-15
Protective custody, detention	84-16
Substance abuse	
treatment services	
certification standards	03-49
drug- or alcohol-dependent persons	03-49
Transportation	
duties of officer responding.	08-1
reimbursement of costs	08-1
Unified Community Mental Health Services Act.	84-22
Victims crisis counseling	97-66
MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES	
Appointment to Board	
newly created office, vacancy	99-71
Certification of facilities by Board of.	03-49
Confidentiality	
consent required to identify grave of mental health patient	00-43
Custody and detention, procedures for.	08-1
Emergency detention, manual for.	08-1
Transportation of patients, reimbursement for mileage	06-29, 08-1
MERIT PROTECTION COMMISSION	
Alternative Dispute Resolution Program	09-30
Authority under Oklahoma Personnel Act	93-35
Oklahoma State shared mediation program, conflict or dispute	09-30
MERIT SYSTEM (see PERSONNEL MANAGEMENT)	
METROPOLITAN AREA PLANNING COMMISSIONS	
Cities over 200,000 in population may form	13-13
Creation of	12-2
Function of	12-2
Jurisdiction	83-194, 98-6
Jurisdiction & authority of	12-2
MICROFILMING	
County Records	83-34

Topic	Opinion
MILITARY	
Insurance, “State Sponsored life Insurance”	06-13
Jurisdiction, of military police	02-34
Leave	
cities organized under home rule charter, must comply	10-3
pay, determined by normal compensation.	10-3
political subdivision includes cities	10-3
National Guard	
forfeitures, sharing in proceeds of federal drug-related	07-21
weekend drills	83-32
Paid leave of absence	88-103
Posse Comitatus, use as	02-34
Vehicle tags.	08-28
MINES, DEPARTMENT OF	
Abandoned Mines Reclamation Act.	82-32
Civil Rights Act	82-162
Regulate, explosives and blasting.	00-17
Small Operator Assistance Program (SOAP)	85-96
MINIMUM WAGE ACT, OKLAHOMA	
County employees	87-4
Minimum wage on public works	84-13
Notice, posting of.	97-94
MORTGAGE BROKER LICENSURE ACT, OKLAHOMA	
Business transactions, investigation of.	03-32
Enforcement of.	06-5
Fees, loan origination	06-5
Nonprofit organizations	10-9
Real Estate Settlement Procedures Act, relation to	06-5
MOTOR LICENSE AGENT/AGENCIES	
Compensation	87-40
County Treasurer	88-10
License tag fees	84-42
Qualifications and requirements.	87-40
School district, serve as tag agent.	86-109
MOTOR VEHICLES	
Abandoned	99-18
Black non-use sticker	
driving with	99-18

Topic	Opinion
<i>MOTOR VEHICLES (CONT.)</i>	
Child passenger restraint requirements	95-76
County bridge, weight limit, liability	82-2
County owned vehicles, use of	99-68
Dealers	
false or misleading advertising, discipline of	99-48
Driver's license, minor child	82-21
Emission control, visual inspection	84-174
Financial Responsibility Act.	83-203
Liability coverage, exclusionary endorsements	85-34, 85-159
License	
Indian tribe issuance	06-6
tag fee, automobile vs. van	84-42
Mandatory Seat Belt Use Act	85-85, 86-142
Neon tag lights	96-74
Nuisance	99-18
Pick-up trucks	
licensing and registration	82-83
not exempt from seatbelts unless farm vehicles	00-44
Private automobile as emergency vehicle	83-81
Safety inspection sticker	
driving without	99-18
State fuel taxes, exemption.	85-172
State owned vehicles	
identified	83-86
use of.	95-34
Title, inspection of out-of-state vehicles to obtain	01-48
Trucks, weight & load limits	10-2
exceptions	10-2
Used Motor Vehicle and Parts Commission	
approval of dealership location	83-35
bond requirement	99-67
scope of bond	99-67
Valid tag	
driving without	99-18
Vehicle Identification Number, authority to inspect.	01-48
Weight limits.	01-41
MUNICIPAL BUDGET ACT.	04-15
MUNICIPAL CODE, OKLAHOMA	
Rural residential subdivision	13-5

Topic	Opinion
MUNICIPAL PLANNING COMMISSIONS	
City/County Commission, authority to act independently	98-6
City over 200,000 may form metropolitan area planning commission .	13-13
MUNICIPALITIES (see CITIES AND TOWNS)	
NARCOTICS AND DANGEROUS DRUGS CONTROL, OKLAHOMA STATE BUREAU OF (OBNDD)	
Director, OLERS or OPERS-on or after July 1, 2003	03-38
Indemnifying U.S. Government	
indefinite term and uncertain amount prohibited	96-7
State vehicles, use of, official duty	95-34
personal use, transporting family members	95-34
NATIONAL FORESTS	
Counties, distribution of payments	03-11
NATIONAL GUARD, OKLAHOMA	
Forfeitures, sharing in proceeds of federal drug-related	07-21
Protective gear, masks/hoods, not prohibited	99-33
Security guards, training of	86-46
Weekend drills	83-32
NATIONAL LABOR RELATIONS ACT	
Boards of Education	
collective bargaining agreements	
binding arbitration	87-20
extra-duty compensation (withdraws 81-126)	87-21
NATURAL DEATH ACT (see STATUTORY AMENDMENTS 1992)	
Directives to physicians	86-108, 91-2
NEPOTISM	
Affinity, third degree, unadopted step-child	84-8
City councilman, son	83-176
Classified employee	87-19
County employees	
continued employment (withdraws 72-202)	88-45
county commissioner, nepotism, prohibition	03-44
raises/transfers/promotions (modifies 88-45)	90-25
Department of Human Services, county supervisor	82-143
District Attorney, niece	87-19
Emergency Medical Service Districts, subject to	83-154
Employment prohibition, legislature	95-104

Topic	Opinion
<i>NEPOTISM (CONT.)</i>	
Judiciary	
associate district judge and district judge not in “same agency”	05-46
court reporter	05-46
Legislature	
family member	95-104
spouse	82-73
Master conservancy districts, subject to	07-24
Municipal officials	82-221
Rural Water, Sewer, Gas and Solid Waste Management Districts	01-38
School Board Member	
elections	92-19
teacher	87-55
 NEWSPAPERS	
Circulated, what is sufficient	02-10
Legal newspaper in county	02-10
Legal notice	
ability to publish	02-10
publish, ability to from adjoining counties	02-10
requirements to publish	85-65, 02-10
Mail, requirements for admittance to	02-10
Newspaper racks, exempt from taxation	88-39
Published	
what constitutes	02-10
 NINE-ONE-ONE EMERGENCY NUMBER ACT	
Analysis of Section 2814(E)	07-22
Constitutional issues	07-22
Emergency telephone fee for cellular customers	97-24
Fee to public agencies, sub-state planning districts may not charge	08-5
Governing Body defined	07-22
Purpose of 911 System	07-22
 NONINTOXICATING BEVERAGES	
Delivery to residence	86-15
Designated bar area, under age persons	85-131
Low-point beer (3.2%)	
ABLE to regulate, legislature may give authority (<i>overturned</i>)	00-57
licensing of clubs	98-15
Minors	82-88, 82-150
Regulation on state-owned and operated lands	06-30
Wine coolers	87-2

Topic	Opinion
NOTARY PUBLIC	
Capacity	96-112
Employer's ability to limit notarial acts	00-28
Prisoners	96-112
Travel expense reimbursement	87-65
NUISANCE	
Motor vehicles	99-18
What constitutes	99-18
NURSE LICENSURE COMPACT	11-4
NURSING AIDE REGISTRY	
Open Records Act information available under	01-7
NURSING, BOARD OF	
Rules/rulemaking (analgesia, anesthesia)	12-21
NURSING HOMES	
Architect required (partially modifies 64-108)	93-36
Board of Examiners administrator - one administrator-one nursing	05-26
powers	04-1
restrictions, waiver of	04-1, 05-26
Controlled dangerous substances, destruction of	88-86
Facilities searched, number of	04-1
Licensing criteria	04-1
Nursing aides, registry of	01-7
NURSING PRACTICE ACT	
Certified Registered Nurse Anesthetist ("CRNA") anesthesia administration	08-26, 12-21
supervision of	08-26, 12-21
timely onsite consultation, with supervising practitioner	12-21
OCCUPATIONAL HEALTH AND SAFETY STANDARDS ACT OF 1970 ("OSHA")	
Asbestos abatement	09-35
County employees work week	87-4
Jurisdiction	10-1
Political subdivisions exempt	10-1
OFFICE OF JUVENILE AFFAIRS	
Contract authority to bid with designated youth services agencies	05-44

Topic	Opinion
<i>OFFICE OF JUVENILE AFFAIRS (CONT.)</i>	
Facilities, construction and/or acquisition suitable facility to house juveniles	11-9
Organized health care delivery system service providers, use of	04-3
OFFICERS	
Cabinet Secretaries status as	00-54, 02-29
Chief Deputy County Commissioner power to exercise Commissioner’s function	96-15
Civil rights violations, liability for	82-153
Congressional district	03-2
Convicted felon eligibility to run for office	98-34
Cross-Deputization agreements with Indian tribes between government entities not officers duration of	97-43 97-43
Department of Human Services, public access	82-69
Designees	98-43
Dual office prohibition school board member/volunteer fire chief	97-55
Ethics Commission, Oklahoma Prohibition on two members representing the same congressional district	03-2
Ethics rules, lobbyists	93-25
<i>Ex Officio</i>	98-43
Governor, transportation of use of public property and funds for	97-72
Judicial Nominating Commission members	10-15
Judiciary, nepotism	05-46
Meetings, absence from Municipal governing body	96-98
Municipal officer/employee police officer duties, limits mandatory participation in OPERS purchasing officer	01-23 82-133 07-27 01-37
Nepotism, judiciary	05-46
Notary public, ministerial officer	00-28
Oaths of office authority to administer failure to file by municipal official	82-188 97-9
Officers de facto	97-9, 11-6
Oklahoma Security Commission, dual holdings	82-199

Topic	Opinion
<i>OFFICERS (CONT.)</i>	
Police power	
contractors by municipal officials	99-24
defined	99-24
must Sheriff accept arrestee from	01-12
supervision of private investigation	99-24
Political Subdivision Tort Claims Act	82-80, 82-119
Prohibition on two members of State Ethics Commission	
representing the same congressional district	03-2
Public records, free access	82-109
Residency requirements, <i>ex officio</i> designee	98-43
Scenic Rivers Commission, dual office holding	82-19
State Beneficiary Trust	
appointment of trustees, when subject to senate confirmation	95-79
Urban Renewal Authority, trustee dual holdings	82-35
Vacancy in Municipal office, how determined	96-98
 <i>OIL AND GAS</i>	
Ad valorem taxation	
equipment exemption	84-44
land actually used in production, subject to	83-142
personal property, subject to	83-123
property exemption	89-54
Computing royalty interests	88-76
Corporation Commission	
abatement of pollution	83-178
constitutionality of regulation	84-105
Drilling, regulation of	86-37
Gross production tax	83-123, 83-142, 84-44, 89-54
Gross receipts requirement	84-171
Interest due on proceeds	89-53
Municipal regulations	06-12
Nontestamentary Transfer of Property Act	09-6
Operator, surety bond, letter of credit	82-232
Payment of proceeds	82-108, 08-31
Pipeline safety regulations	99-70
Pollution Control Coordinating Board	83-178
Probate procedure for lease	84-81
Remittance requirements, effect on existing leases/contracts	95-109
Seismographic operations, violations	82-10, 82-91
Soil contamination, removal of	86-59
Statutory lien on leasehold	83-38
Surface Damages Act	09-5
Tank batteries, ad valorem tax gross production	82-75

Topic	Opinion
OKLAHOMA ALCOHOL AND DRUG ABUSE SERVICES ACT	03-49
OKLAHOMA BAR ASSOCIATION	
Arm of Supreme Court	95-77, 03-26
Board of Governors	
duty of Board to consider merits of complaint from the Council	
on Judicial Complaints before exercising its discretion whether	
to file a petition with the Court of Judiciary	00-20
Practice of law, active members may	03-26
Prosecutorial agency.	95-77
OKLAHOMA CAPITOL COMPLEX CENTENNIAL COMMISSION	
Capitol complex, defined	97-62
OKLAHOMA CENTER FOR ADVANCEMENT OF SCIENCE AND TECHNOLOGY (OCAST)	
Seed-Capital Revolving Fund.	90-15
OKLAHOMA DEVELOPMENT FINANCE AUTHORITY ACT (ODFA)	
Credit Enhancement Reserve Fund General Obligation Bonds	
Commissioners of the Land Office, investment	89-21
Indians, participation by tribal governments	88-28
President, serve as Chief Executive Officer, OIFA.	91-22
OKLAHOMA HEALTH CARE AUTHORITY	
Prior authorization program	13-7
OKLAHOMA HISTORICAL SOCIETIES AND ASSOCIATIONS	
Copyright, infringement, registration.	82-167
Trade or Exchange of Real Property	82-14
OKLAHOMA INDUSTRIAL FINANCE AUTHORITY (OIFA)	91-22
OKLAHOMA LAKE REDEVELOPMENT AUTHORITY	83-291
OKLAHOMA SCHOOL CODE	12-14
OKLAHOMA SCHOOL TESTING PROGRAM ACT	12-14
OPEN MEETING ACT	
Agendas	
creates record for Open Records Act	02-27
executive sessions, must show purpose	97-61
posting.	97-98
sufficiency of notice	00-7, 02-26
Boards of Education	96-100
approval of actions	00-32
topics of discussion in executive session (withdraws 78-201)	96-40

Topic	Opinion
<i>OPEN MEETING ACT (CONT.)</i>	
Budget Council, OU	82-63
Commissions	
Corporation Commission	12-24
subject to	84-189
Construe, how to.	02-5
Consultation of Public Body with Attorney	83-290
Council on Judicial Complaints	
Open Meeting Act, not subject to	00-15
County Commissioners	
Emergency Medical Services, Board of Trustees	83-154
insurance program by Interlocal Cooperation Act	99-37
Executive sessions	85-89
applies to discussing particular current or prospective employee.	06-17
Article II of the Administrative Procedures Act, exemption.	14-14
“confidential communications” with attorney.	05-29
County Commissioners, appointment to fill vacancy	92-23
discuss salary of employee (withdraws 78-201)	96-40
economic development, discussion of	11-22
“employment,” meaning of, as permitted topic (withdraws 78-201).	96-40
ex officio members, attendance.	09-26
informal discussion, study session	82-212
minutes	96-100
new business, litigation.	82-114
notice and agenda requirement	82-114
“pending investigation, claim, or action,” meaning of	05-29
“public officer or employee,” meaning of	05-29
purpose, may not keep confidential	97-61
real property, sale of	07-32
school boards.	82-209
Free speech	
citizen’s right to be heard	98-45, 02-44
Grand River Dam Authority	04-35
Grand River Dam Authority Lakes Advisory Commission	02-44, 04-35
Linked Deposit Review Board, subject to	88-52
Minute Clerk, employed by school board	96-100
Minutes of meeting.	12-24
Private organizations, subject to.	02-37
Proxy vote, willful violation.	82-7
Public	
body	
characteristics of	02-5
informal discussion, study session.	82-212
what constitutes	02-5

Topic	Opinion
<i>OPEN MEETING ACT (CONT.)</i>	
policy	97-98
trust, notice and agenda	82-81
Quasi-judicial hearings	83-290
Rural ambulance service districts	86-27
Silver Haired Legislature	02-42
State Agency Commissioner, proxy vote	82-7
Subordinate entity, subject to	84-53, 84-128
Workers' Compensation Commission, exception	14-14
 <i>OPEN RECORDS ACT, OKLAHOMA</i>	
Background investigations, Confidentiality of	97-16
Bank, public funds	01-29
Capital Investment Board, Oklahoma	12-1
Commissions, subject to	84-189
Communications, legislators & Legislature or from public bodies	08-19
Complaints, confidentiality	88-79
Construe, how to	02-5
Contract not required to obtain records	99-55
County Assessor	96-26
confidential records	05-50
electronic/digital records	12-4
County Clerk	
copies, providing paper and electronic	05-21, 09-27
County Commissioners	
insurance program by Interlocal Cooperation Act	99-37
Court Clerk	
audio or sound recordings, Open Records Act	14-1
district, copies, fees for records	09-27
Criminal pleadings as public records	99-58
Definition	
Indian housing authorities, State-created - disclosure of records	03-28
public body, State-created Indian housing authority	03-28
record	05-19
Directory information, former students	86-152
Electronic communications as records	09-12
Electronic mail (e-mail) as records	01-46, 09-12
Employee	
service evaluations, release by employer	97-48
service ratings	95-68
Exceptions to	02-5
Federal requirements, applicability to	01-7
Form in which public can be granted access	01-46
Gifts and donations, confidentiality of	02-27

Topic	Opinion
<i>OPEN RECORDS ACT (CONT.)</i>	
Grand River Dam Authority Lakes Advisory Commission	02-44
Health insurance high risk pool, not subject to Act	05-39
Historical Society, membership list	95-15
Information required of requestor	99-55
Juror list	01-24
Legislators, communications are not open records	08-19
Legislature, expenses incurred by legislators are open records	08-19
Nursing Aide Registry, confidentiality of	01-7
Open Records Act, audio or sound recordings	14-1
Openness, presumption of	01-7
Pardon and Parole Board, letters to	88-87
Police records, subject to	84-119, 99-58
Public body	
characteristics of	02-5
duties	06-35
what constitutes	02-5
Public official, denied	02-5
Purpose and policy of Act	06-35
Records	
access, place of	05-3
characteristics of	02-5
cost of records retrieval and copying	06-35, 12-22
format	06-35, 12-22
inspection and copying	06-35
law enforcement records	
confidentiality of	96-9, 12-22
openness, presumption of mug shots	12-22
personnel records	
access by employee	86-39/86-69
clearly unwarranted, invasion of personal privacy	09-33
confidential	99-30
drug test results	97-79
public records	12-22
storing	05-3
what constitutes	02-5
School directory information	85-167
Search fees	88-35, 96-26
Silver Haired Legislature	02-42
Special requirements	99-30
Tape recordings, State Treasurer	93-2
Tax Commission, Workers' Compensation Assessment Rebate Fund,	
not subject to - confidential	03-31
Telephone bills	95-97

Topic	Opinion
<i>OPEN RECORDS ACT (CONT.)</i>	
Verification of license status by CLEET.	88-33
Workers' Compensation	
claims, specific provision of Title 85,	
access to open and closed claim files.	10-8
executive sessions	14-14
Rebate Fund, assessment, at Tax Commission - not subject to.	03-31
ORDNANCE WORKS AUTHORITY, OKLAHOMA	86-131
(partially withdraws 81-120)	
OSTEOPATHIC EXAMINERS, BOARD OF	
Formal hearings, assessment of costs.	85-64
Insurer settlement reports	03-8
Legislative reports	
malpractice claim reporting	03-8
Penalty fees, reinstatement.	83-307
OVERWEIGHT VEHICLES	
Weight limit exceptions	95-88
PARDON AND PAROLE BOARD	
Alien, illegal - parole	09-34
Legislature, application for commutation minimum	
terms of confinement - power to restrict.	13-19
Letters, confidentiality	88-87
Parole consideration	
authority to recommend	11-15
consecutive sentences	01-47
earned credits	86-36
felonies, three or more	01-47
Governor's authority to grant (85% statute).	12-17
Pardon & Parole authority to recommend.	12-17
Retired Judge appointment.	93-16
PARTNERSHIP	
Certificate of limited partnership	82-188
PEACE OFFICERS	
Beer, low-point, limited scope of authority	06-33
Concealed carry (weapons)	96-60, 99-32
Defined	83-8, 99-32
Fire Marshal Agents, scope of authority.	98-10
Full-time, what constitutes	99-32
Game Wardens, limit and scope of power	95-16

Topic	Opinion
<i>PEACE OFFICERS (CONT.)</i>	
Highway Patrol	
ability	
to investigate	06-14
to search vehicles.	99-35
Park Rangers	
certified as	05-16
jurisdiction over all parts of the parks.	05-16
Parole consideration, authority to grant parole.	13-11
Police power	
defined.	99-24
municipal officials, contractors.	99-24
municipalities	99-7
private investigation, supervision of.	99-24
Protective gear	
masks/hoods, not prohibited	99-33
Reserve Game Wardens	
Director of Wildlife Conservation Department, power to appoint . . .	95-16
Reserve officer	
defined.	99-32
retired reserve officer	
ability to carry concealed weapons	99-32, 05-45
Retired, what constitutes	99-32
Self-Defense Act.	96-60
 <i>PEANUT COMMISSION, OKLAHOMA</i>	
Authority to collect fees (withdraws 79-39).	88-102
Interagency reimbursements of deposits	97-14
Legal representation, Attorney General	87-83
Open Meeting Act/Open Records Act, subject to.	84-189
 <i>PERFORMANCE-BASED EFFICIENCY CONTRACTS.</i>	 09-32
 <i>PERSONNEL ACT, OKLAHOMA</i>	
District Attorney and employees under	06-10
Duties, administrator to approve salary increase above mid-point	09-30
Employee individual service rating	93-35, 95-68
Hiring procedures.	88-78
Longevity pay plan	
eligible for.	08-7
Judicial Branch employees not eligible	08-7
Merit Protection Commission Authority	93-35
“Whistle Blower” provisions	88-15, 00-51

Topic	Opinion
PERSONNEL MANAGEMENT, OFFICE OF	
Director of Courts not required to file affirmative action plan	01-16
Employee Benefits Council	
Health Care Authority	95-80
Employee service	
evaluations release by employer	97-48
rating system	95-68
Health Care Authority, Employee Benefits Council	95-80
Hiring freeze in State Personnel Act	
implementation, limited scope of	95-12
not applicable to	
higher education institutions w/constitutional board of regents . . .	95-12
professional or personal service contracts	95-12, 95-36
public trust (withdraws 80-145)	96-47
State Insurance Fund	95-36
Merit system	
authority under Oklahoma Personnel Act	93-35
closed register	84-48
veterans preference	86-1
Posting notice of position vacancies	95-68
Public trust not agency of State	
under Oklahoma Personnel Act (withdraws 80-145)	96-47
Reduction-in-force	86-30
PET BREEDERS, OKLAHOMA COMMERCIAL	
Board of,	11-2
Creation of State Agency	11-2
Veterinary Medical Examiners, relationship to	11-2
PHARMACIST	
Drugs	
administering not authorized	01-28
generic drug	85-38
pseudoephedrine, may dispense certain quantities without a prescription	11-10
Ocular topical pharmaceutical agents, dispensing	83-173
Pharmacy, State Board of, authority to levy fines	83-17
Substitution of prescribed drug	85-38
Third Party Prescription Act	83-314
Titles, use of	83-63
PHARMACY ACT	
Dispense	
authority	
sell veterinary prescription drugs	01-21 superseded by 01-45

Topic	Opinion
<i>PHARMACY ACT (CONT.)</i>	
sell veterinary prescription drugs - after 11-01-01	01-45
wholesale/retail dispensing of veterinary prescription drugs	01-21, 01-45
Optometrist	
authority to prescribe drugs	84-62
ocular topical pharmaceutical agents	83-173
Pharmacy, practice of	
administering drugs - not authorized	01-28
Veterinarian	
authority to dispense dangerous drugs	00-46
Veterinary prescription drug	
prescription, certification of	02-7
wholesaler or distributor	02-7
 PHYSICAL THERAPY PRACTICE ACT	
Foreign trained applicants	96-35
Physical therapist assistant, may render therapy under limitations	88-30
Physical therapist may not treat under referral	
from a physician assistant	04-5
 PHYSICIAN MANPOWER TRAINING COMMISSION	
Funding Medical Residency Training Programs	95-61
 PLUMBESMO TEST	
Visual inspection, emission control	84-174
 POLITICAL ACTION COMMITTEES	
Lotteries/raffles	86-40
 POLITICAL SUBDIVISION TORT CLAIMS ACT (<i>see</i> GOVERNMENTAL TORT CLAIMS ACT)	
 POLITICAL SUBDIVISIONS	
Municipalities, generally	10-1
Open Records Act, applicability to	01-46
Public Trusts Under Occupational Safety & Health Review Act (“OSHA”)	10-1
Records Management Act, applicability to	01-46, 02-13
School districts considered to be Institution of Higher Education	09-2
 POLLUTION CONTROL COORDINATING BOARD	
Authority to eliminate duplication of effort	90-2
Condensate from industrial plant air conditioning	83-262
Oil and gas, abatement of pollution	83-178
Punitive damages award, deposit with State Treasurer	83-263

Topic	Opinion
POLLUTION REMEDIES ACT, OKLAHOMA	85-87
POLYGRAPH EXAMINERS ACT	
Polygraph examiners	
Citizenship requirement - United States	04-16
POSSE COMITATUS	
Military police may not transport a civilian without violating	02-34
National Guard in State service - non-applicability to	07-21
PRESERVATION OF ESSENTIAL RECORDS ACT	83-191
PRESIDENTIAL ELECTORS	88-68
PRESIDENTIAL PREFERENTIAL PRIMARY ACT	86-73
PRICES	
Selling health-care goods or services at less than cost	97-18
PRISON OVERCROWDING EMERGENCY POWERS ACT	
Certification of bed space	99-56
Emergency time credit	84-71
Security levels, what constitutes “capacity”	99-56
PRISONS AND REFORMATORIES	
Bail bondsmen	
access to prisoners	99-74
Canteen fund, use of	86-23
Certification of bed space	99-56
Community Service Sentencing Program	
county jail nighttime/weekend incarceration	90-40
reimbursement of medical care expenses	06-41
Executions, attendance	96-86
Financial responsibility	
inmate medical expenses	98-46, 11-19
Firearms, parking lots	04-38
Internal management	99-56
Maintenance of prisoners, municipality vs. county	84-93
Parole	
consideration	86-36
Governor’s authority to grant (85% statute)	12-17
Pardon & Parole	
authority to grant	13-11
authority to recommend	12-17

Topic	Opinion
<i>PRISONS AND REFORMATORIES (CONT.)</i>	
Prisoners/inmates	
goods and service production	99-27
labor	99-27, 05-33
Private prison	
contractors	
housing federal pre-trial detainees.	01-50
monitoring, inmates from out-of-state jurisdictions	05-33
industries	
availability	99-27
Reimbursement from Department of Corrections	11-8, 11-19
Security levels, transfer between	99-5
Vocational training	
licensure requirements	00-3
 PROBATE	
Sale of oil and gas lease	84-81
Stepchild, nonexemption from estate tax	84-97
Unclaimed property held by State	06-21
 PROBATION OFFICERS (FEDERAL)	
Oklahoma Self-Defense Act.	96-60
 PROCESS SERVER	
Authority of	83-3
Deputy Sheriff as	83-141
Licensing fee	03-48
 PRODUCTION REVENUE STANDARDS ACT	
Remittance Requirements	
effect on existing leases/contracts.	95-109
 PROFESSIONAL BOXING ACT, OKLAHOMA	
Indian tribes	06-39
 PROFESSIONAL CORPORATION ACT	
Registered office/registered agent	88-38
Related professional services	86-111
 PROFESSIONS AND OCCUPATIONS	
Abstractors	
certificate from, evidence of judgment	83-203
charges.	86-102
title insurance	83-281

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
Accountants	
Bachelor of Commercial Science degree	83-131
Board of Public Accountancy	
fees, transfer to General Revenue Fund.	90-19
open meeting/hearings.	83-290
professional corporation	86-111
Advertising agency, contracting with State	88-70
Architects	87-12, 99-59, 05-34, 06-38, 07-19
Association membership, appointments to boards and commissions	90-22
Attorneys	
court appointed, criminal cases.	85-98
dual employment/State agencies.	92-22
examination of abstracts	83-281
lawyer's trust accounts program	84-117
licensed, requirement	06-27
Scenic Rivers Commission	83-58
Small Claims Court, use of in	03-26
Turnpike Authority	87-60
Veterans Affairs, Department of	83-155
War Veterans Commission	83-155
Auctioneers, real estate.	84-114
Audiologists	83-76, 02-20
corporation, advertising	02-20
employment relationship.	02-20
Auditors, contracting with Boards of Regents	88-9
Bail bondsman	85-11, 85-118, 99-74, 02-6, 09-16
Blind vendors	85-2
Bond counsel, financial advisors and underwriters	87-99
Chiropractors	87-76
accreditation of postgraduate program	83-90
insurance coverage	89-6
nominations to advisory committee	83-19
practice to include	
family practice.	92-13
orthopedics.	92-13
pediatrics	92-13
physical therapy.	92-13
Court Clerk, bail bondsman, forfeiture.	82-40
Court Reporters	88-113
Data Processing Technician, county	85-187
Dental Assistants	88-79
duties and supervision.	97-44

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
Dental Hygienists	88-79
Dentists	
Board of Governors of Registered	82-27
charitable remainder trust	97-82
complaints, Open Records Act	88-79
internet, out-of-state	00-41
investigator, peace officer	83-8
specialty license	95-112, 00-8
Doctoral Designation	
healing arts	99-17
Electrician	
electrical contractors	85-137
licenses	83-78
rules and regulations/codes	91-1
Embalmers and Funeral Directors	
Board of	82-74
filing death certificates	95-52
licenses	83-232
requirements	97-38
Employee Retirement Income Security Act, preemption of	99-60
Employment agencies, fees	88-78
Engineers and Land Surveyors	83-266
Entertainers, bar areas, age requirement	85-102
Firefighters	
age as employment factor	83-167, 84-10
arbitration with municipalities	83-287
retirement	
age as employment factor	83-167
benefits	89-15
vested rights (overruled by <i>York v. Turpen</i> 1984)	83-202
shift exchange practices	97-78
temporarily sick or disabled	85-5
Healing Arts	99-17, 06-16
permanent cosmetics, tattooing	00-16
Health care practitioner, advanced unlicensed assistive person	98-24
Hearing aid dealers and fitters	83-76
Independent Contractor	
under protection of Labor Act	83-126
Inspectors, plumbing and electrical	89-60
Insurance administrators, third-party	99-60

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
Investment counselors	
central purchasing act	
professional services	83-198
Public Employees Retirement System.	withdrawn by 07-31 - 84-66
Landscape architects, all government entities must abide	05-34
License	
Alarm & Locksmith Industry Act	13-12
medical claims reviewer does not need.	02-19
professional counselors	87-81, 88-58
State Board of Licensure,	
relationship to the Board of Commercial Breeders	11-2
tax on occupation and profession	
imposed by city or town.	83-297
Veterinary Medical Examiners	11-2
Loan brokers	87-126
Medical claims reviewer does not need license	02-19
Motor vehicle dealers	
false or misleading advertising, discipline of	99-48
Notary Public	84-38
Nurses	
CRNAs, scope of practice.	08-26, 12-21
health care practitioner, advanced unlicensed assistive person.	98-24
nursing aide registry, Open Records Act.	01-7
Nursing, Board of	
advanced unlicensed assistive person	98-24
eligibility for licensing, conviction required	
deferred sentence not a conviction	04-34
suspended sentence constitutes conviction	04-34
licensure compact	11-4
nursing aides, registry of.	01-7
Ophthalmologist	85-136
Optical supplier	
contact lenses	85-136
sublease space to Optometrist, prohibited.	91-14
Optician, contact lenses	85-136
Optometrist	
authority to prescribe drugs.	84-62
contact lenses	85-136
license actions, procedures required for	04-21
office space, sublease	91-14
surgeries authorized	04-9
use of ocular topical pharmaceutical agents	83-173
(partially vacated by 84-62)	

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
Osteopaths, penalty fee for reinstatement	83-307
Pawnbrokers and employees, licensing	82-270
Pharmacist	
board of, authority to levy fines	83-17
consulting, long term care facilities	86-63
drugs	
administering not authorized	01-28
dispensing	
generic prescription drugs (modifies 85-38)	87-30
ocular topical pharmaceutical agents (<i>see</i> 84-62)	83-173
pseudoephedrine, may supervise dispensing of certain quantities	
without prescription	11-10
sale of exempt narcotics	86-58
substitution of prescribed drug (generic drug)	85-38
third party prescription act	83-314
use of title P.D.	83-63
Physical Therapists	
assistant	88-30
foreign-trained	96-35
referral from physician assistant	04-5
Physician Assistants	
prescribing medications	86-42
Physicians	
CRNAs, supervises	08-26
death	82-115
Governmental Tort Claims Act	
Department of Corrections	89-75
interns/faculty members/medical schools	91-21, 01-39
Healing Arts	06-16
liability, sovereign immunity	01-39, 04-19
malpractice claim reporting	03-8
medical records	
copies of	86-85
fees	95-93
Natural Death Act	86-108
oxygen prescribed by	88-59
prescriptions, pseudoephedrine, may supervise dispensing of certain quantities	
without prescription	11-10
Plumbers	
drain cleaning	96-78
licensing (modifies 67-348)	83-236
rules and regulations/codes	91-1

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
Police Officers	
age as employment factor	83-167
airport, lake and park rangers	89-8
arbitration with municipalities	83-287
certification	85-29
mandatory participation in OPERS	07-27
psychological exams	08-25
vested rights (overruled by <i>York v. Turpen</i> 1984)	83-202
Polygraph examiners, U.S. citizenship requirement	04-16
Private Investigators	
municipality does not have the power to license and regulate	87-112
private investigators and armed security guards may carry firearms into state courthouses	14-3
Psychologists	
licensing exemption State employees	96-80
psychological exams for police officers	08-25
school psychologists, scope of practice	95-38
use of title	87-81
Psychometry, no statutory practice or licensure provisions	95-38
Psychotherapist, reporting child abuse	95-18
Real Estate	
appraisers certification requirements	95-11
brokers	82-222, 84-186, 04-37, 06-1, 09-38, 11-17
commission	
broker relationship	04-37
revenue and Taxation	03-19
licensee	
advertising - private organizations	95-30
continuing education requirements	86-83
license fees	03-19
School nurse	
dispensing medication	83-117
Secretary-bailiffs, retirement	89-62
Security guards	87-112
Shorthand reporters, subpoena witnesses	84-38
Speech-language pathologist	
corporation, advertising	02-20
employment relationship	02-20
Teachers (<i>see</i> EDUCATION)	
Veterinarian	
authority, to dispense dangerous drugs	00-46
veterinary-client-patient relationship	00-46

Topic	Opinion
<i>PROFESSIONS AND OCCUPATIONS (CONT.)</i>	
veterinary prescription drug	
prescription, certification of.	02-7
wholesaler or distributor	02-7
PROGRAM PERFORMANCE BUDGETING AND ACCOUNTABILITY ACT	
Ardmore Higher Education Center.	07-7
PROPERTY	
Assessment, exemption from	07-10
Asset reduction & cost savings program	12-5
Authority of State agency to acquire	99-6
Competitive bidding, urban renewal authority.	82-33
Conversion, prosthetic devices & implants	09-10
County Assessors right to enter private property	05-49
Easements, qualified immunity	05-35
National Guard, Oklahoma	
forfeitures, sharing in proceeds of federal drug-related	07-21
Premises, liability - tort	05-35
Private property rights	
retention when State border changes	99-62
Property inspection.	82-59, 05-49
Public trust	
retail outlet, financing of.	82-81
revenue bond financing	82-34
Real property	
discussion of in executive session.	07-32
procedures for disposing of.	01-53
Rental property, registration programs.	11-17
Restrictive covenants, homeowner association's power to amend.	00-38
Taxes	
assessment, valuation and collection	04-24, 07-10
sale of, for delinquent taxes	00-21
Tourism & Recreation Department	
leasing municipal land for use as public park.	14-6
no restriction on lease	08-22
Trespass	02-31, 05-49
Urban Renewal Authority, commissioner.	82-35
PROPERTY AND CASUALTY RATES, BOARD FOR	
Rates, determination of.	85-111
PUBLIC AFFAIRS, OFFICE OF	
<i>(see CENTRAL SERVICES, DEPARTMENT OF)</i>	
Acquisition of real property, lease purchase.	withdrawn by 07-31- 89-36
Auctions, school lands	96-1

Topic	Opinion
<i>PUBLIC AFFAIRS, OFFICE OF (CONT.)</i>	
Bond counsel, financial advisors and underwriters, selection of	87-99
Central Oklahoma Juvenile Center, subject to (modifies 65-428)	83-292
(withdrawn by 98-2)	
Competitive bidding, Central Purchasing Act	
cities and towns/municipalities insurance	02-45
county	
employee insurance	85-45
highway equipment — “Total Net Cost”	85-31
Department of Transportation, subject to	84-194
Historical Society	withdrawn by 07-31 - 85-157
municipalities	86-26. 02-45
public	
notice	85-165
trusts, subject to	87-79
school lands	96-1
Construction and Properties Division	
Historical Society, subject to	84-167
sale of State lodges	83-291
Construction management	09-19
Contracts, rental of office space	
Department of Human Services	withdrawn by 07-31 - 84-76, 00-49
Oklahoma Police Pension and Retirement Board	84-165
Oklahoma Public Employees Retirement System	84-146
Data processing equipment, competitive bids	withdrawn by 07-31 - 87-7
(withdraws 11/9/59 to Roy T. Hill)	
Disposing of real property	88-84
school lands	96-1
Health insurance plans	
school districts, “comparable” private plans	90-3
Professional Services Contract	
former State employee	87-11
Purchasing division	
vendors 5% preference law	88-24
Sale of land	
Tourism and Recreation Department	84-86
Sale of school land trust property	96-1
State agencies	
acceptance gifts/donations	84-34
PUBLIC BUILDINGS AND PUBLIC WORKS	
Assignment of contracts	82-12
Commissioner of Labor, wages and payment	82-5
Competitive Bidding Act	82-158

Topic	Opinion
<i>PUBLIC BUILDINGS AND PUBLIC WORKS (CONT.)</i>	
construction management	09-19
partial contracts to avoid bid splitting.	09-19
school districts -- janitorial services	08-3
surety bonds	95-31
Guidelines for allotting space.	98-30
Public Building Construction & Planning Act	
construction contracts for state agencies.	07-31
Public contracts, resident bidders.	82-129
Schools	
construction	
manager	10-13
using force account	10-13
 PUBLIC COMPETITIVE BIDDING ACT OF 1974	
Construction	
management	09-19
projects, public	08-33
Contracts, partial contracts to avoid bid splitting.	09-19
Purchasing agreements, cooperative	08-33
 PUBLIC FINANCE	
Board of Public Affairs, authorization orders.	82-158
County Payroll Account	82-103
Department of Veterans Affairs	82-99
Legislature	
appropriations	
insufficiency of	00-33
surplus revenues	82-166
transfer of funds	00-40
Revenue sharing funds	82-112
Schools & lease of property	12-3
State Board of Equalization	82-121
State Department of Education.	82-169
State Pension Commission - duties	03-5
 PUBLIC FUNDS	
Advertising with	98-44
Ambulance services	
providing services is generally understood to be a public purpose. . .	04-15
purchase of wheelchair van.	14-13
Conflict of interest	
city council member	
ambulance service	95-41
“direct or indirect interest” in any contract.	04-11

Topic	Opinion
<i>PUBLIC FUNDS (CONT.)</i>	
municipal beneficiary public trust	95-41
Crime Victims Compensation Board	
expenditure by	98-3
Elections, expenditure of public funds	91-27, 96-23
Governor's transportation	
use of is lawful public purpose	97-72
Investment	
by OPERS, exchange-trade options	91-11
of Seed-Capital Revolving Fund	89-15
Labor Commissioner	
expenditure on television campaign	98-44
Legislator	
constituent communications, birthday greetings	05-32
employed by state agency	04-25, 05-13
legislator, former	
employed by state agency	04-25
employment, source of funds	05-13
Lobbying	95-14
Municipal Bonds, political subdivision	84-184
Private organizations, supported by	02-37, 08-10
Public purpose	98-44, 04-15, 08-10, 13-16
REAP	03-35
Refunding funds	85-184
Registered Public Obligations Act	84-83
School districts	
activity funds	03-21
bond reduction, sinking funds	92-2
classroom space, renting	99-73
contract proceeds	03-21
judgments, sinking fund	00-60
permissible investments	89-64
swaps or derivative financial product agreements	05-43
Transfer, indemnity fund	00-40
PUBLIC HEALTH AND SAFETY	
Chief Medical Examiner, investigation of death	82-115
Child passenger restraint requirements	95-76
Civil defense, federal financial assistance	82-45
License required for mechanical work on process piping	00-31
Preventive services, revenue sharing	82-112
Sale of exempt narcotics	86-58
Selling health-care goods or services at less than cost	97-18

Topic	Opinion
PUBLIC HOUSING AUTHORITIES	
Boilers and pressure vessels	99-7
Franchise fee, payment of	87-6
Real Property, disposing of	01-53
Taxation, in lieu of payments	86-13
PUBLIC LAND (see PUBLIC PROPERTY)	
Auctions, school land trust property	96-1
Exclusive jurisdiction over federal land within State procedure for State's consent	96-11
Municipal taxes	99-40
Right to acquire land, within State without State's consent	96-11
Sale of, preference to purchase, lessee	96-1
Sale or disposal of real property	98-18
School Land Trusts	96-77
Tourism and Recreation Department Property State park	98-18
PUBLIC OFFICERS AND EMPLOYEES	
A and M Regents	
Board of Regent's power to supervise construction	01-49
statutory procedures, inapplicability for contracting services	01-49
Alcoholic Beverage Laws Enforcement	
duty legislature may give to Commission to regulate low-point beer	<i>(overturned)</i> 00-57
political restrictions	00-18
vehicles, use of	06-42
Appointment of	
full term and interim basis (withdraws 72-256)	98-22
interim service	00-54
renomination	00-54
Board of Governors	
duty of Board to consider merits of complaint from the Council on Judicial Complaints before exercising its discretion whether to file a petition with the Court of Judiciary	00-20
Chief Deputies, authority and responsibility	96-15
Cities, towns or municipalities	
qualifications for state or federal employees to run for elected office	09-18
Consumer Credit Commission	
appointment process, qualifications, removal from office	07-12
Department of Central Services	
statutory procedures, inapplicability for contracting services	01-49
Employee benefit allowance	02-18
Environmental Quality, Department of	
regulate, explosives and blasting	00-17

Topic	Opinion
<i>PUBLIC OFFICERS AND EMPLOYEES (CONT.)</i>	
Ethics Commission, Oklahoma prohibition on two members representing the same congressional district	03-2
Executive Session of public body discuss salary of employee (withdraws 78-201)	96-40
distinguished from independent contractors	05-29
Fire Marshal regulate, explosives and blasting	00-17
Indemnification, civil rights damages.	98-4
Legislator - ineligibility from receiving any appointment from Legislature	13-20
Legislature may give Alcoholic Beverage Laws Enforcement Commission additional duty of regulating low-point beer.	<i>(overturned)</i> 00-57
Low-point beer, ABLE can regulate.	<i>(overturned)</i> 00-57
Meetings, absence from Municipal governing body, effect of.	96-98
Mines, Department of regulate, explosives and blasting	00-17
Municipal officer/employee	01-23
Public Safety, Department of regulate, explosives and blasting	00-17
Prohibition on two members of State Ethics Commission representing the same congressional district	03-2
State Commissioner of Health's, issue supplemental birth certificates . .	04-8
Vacancy appointments full term and interim basis (withdraws 72-256)	98-22
Municipal Office, how determined	96-98
PUBLIC PROPERTY	
Displaying Confederate flag.	87-59
Governor's mansion, use for political fund-raiser	96-27
transportation use of public funds for is lawful public purpose	97-72
Lessee preference right to purchase	96-1
Sale of school land trust property.	96-1
Sale of state agency real estate	98-8
lodges	83-291
School land trust Commissioners of land office bond guarantee program legality of	96-77
inviolable nature of.	96-77

Topic	Opinion
PUBLIC RECORDS	
Computer data	96-26
Computerized files, access	85-36, 96-26
Counties, availability of	83-219
Faxes, admissibility as evidence.	95-78
Mansion account.	83-18
Preservation of essential records act.	83-191
PUBLIC ROADS	
County Commissioners	
powers and duties - construction and	
maintenance of county highways	03-10
PUBLIC SAFETY, DEPARTMENT OF	
Attorneys, dual employment	92-22
Boating, Recreational Safety Program	
Grand River Dam Authority, federal grant funds	02-11
Commissioner	
deputy commissioners, authority to appoint	91-24
retirement, may participate in either OPERS or OLERS	03-38
Governor’s transportation, use of department’s property for	97-72
Highway	
cleanup provision	
vehicle removal	
liability insurance responsibility	02-3
storage fees is liability insurance responsibility.	02-3
Patrol, ability to investigate	06-14
Jurisdiction	06-14, 06-25
License/commercial driver school	
educational institutions	97-8
Manufactured home	
permit to move/ad valorem tax	95-47
National Crime Information Center (NCIC), coordinates	01-12
Overweight permits, rules (92-12 withdraws 86-139)	92-12
Regulate, explosives and blasting.	00-17
Regulatory powers, wrecker and towing services	84-115
Rules, authority.	95-88
Seat Belt Law, mandatory application to pick-up trucks	00-44
Underground storage tank fees.	93-9
Uniform Electronic Transactions Act, effect on records	01-13
Weight limits, exceptions	95-88

Topic	Opinion
PUBLIC SERVICE CORPORATIONS	
Ad valorem tax	84-40
Assessment	
fire protection districts	83-226
methodology	83-296
Late payment penalties, state agencies	83-188
Rural Electric Co-op	
collection of city sales tax	85-155
(see <i>Branch Trucking v. Oklahoma Tax Comm'n</i> (Okla. 1990))	
transmission lines	84-26
Telephone companies, authorization to provide service	06-15
Uniformity of sales or franchise tax	83-20
Utility systems, lease-purchase arrangement	84-37
Valuation protest	88-31
PUBLIC TRUSTS	
Ambulance service, may be created to provide	02-39
Amendments	04-6
Authority from trust documents	04-6
Beneficial interest, acceptance by county	83-254
Beneficiaries, approved by	04-20
Central Purchasing Act, subject to	84-135
Competitive bidding, subject to	87-79
Conflict of interest	
bank loans	85-138
bonds/trustee	85-109
conflict of interest	99-54
municipal beneficiary public trust	
city council member, ambulance service	95-41
school board member/trustee	88-88
County hospitals	83-129
business entities	98-36
management agreement	97-63
subleases	98-36
Education, higher - gift	04-6
Extraterritorial activities	07-42
Generally, limitation on powers & <i>Warram</i> test	07-42
Geographic boundaries, limitations on	07-42
Gifts, authority to make	04-6
Hiring freeze of State Personnel Act	
not applicable to public trust (withdraws 80-145)	96-47
Housing	
tax exempt financing	01-56

Topic	Opinion
<i>PUBLIC TRUSTS (CONT.)</i>	
Interlocal agreements	86-71
Lease-purchase agreements, interest, principal and installments	07-42
Minimum wages on Public Works Act	84-13
Oklahoma Development Authority	
purchase of nonpayable warrants	84-5
Ownership of capital stock (partially withdraws 81-120)	86-131
Pari-mutuel racing facilities, financing of	87-58
Powers	04-6, 04-15, 04-20, 08-8
Prevailing wage law	87-97
Public Trust Compact	86-70
Public trust not agency of State	
under Oklahoma Personnel Act (withdraws 80-145)	96-47
REAP grants, use of proceeds	04-20
Reimbursement of Trustees	85-148
Revenue bonds, prohibited use of	
livestock auction market	85-129
projects outside beneficiary	00-26
refinancing, use of excess proceeds	85-184
School districts, lease-purchase agreements	07-42
School Land Trust	
Commissioners of Land Office Bond Guarantee Program	
legality of	96-77
inviolable nature of	96-77
State Beneficiary Public Trusts	
appointment of trustees	
when subject to senate confirmation	95-79
not subject to State Budget Act	90-23
Transfer of assets	
county-beneficiary	85-173
Trust	
documents	04-6, 08-8
instrument	04-6, 08-8
Trustees	
compensation of	
personal liability for unauthorized payment	03-43
prohibition in 60 O.S. § 178(A)	03-43
duty to report	99-54
general discretionary powers	08-8
“Prudent Person” standard	08-8
intent of	04-6
Unit Collateral System	83-64
YMCA project, funding of	83-227

Topic	Opinion
PUBLIC WELFARE COMMISSION	
<i>(see HUMAN SERVICES, DEPARTMENT OF)</i>	
PUBLIC WORKS ACT	
Availability	
municipalities	99-27
state agencies.	99-27
Public purposes.	99-27
PURCHASING PROCEDURES ACT	
Emergency Medical Services Districts.	83-190
QUALIFIED IMMUNITY	
Indemnification.	98-4
QUI TAM STATUTES.	09-7
REAL ESTATE	
Agency	02-9
Agency real estate, sale of	98-8
Appraisers Act	95-11, 03-9
Broker	
duties	
municipal license fee, rental property	11-17
single-party brokers	06-1
transaction brokers.	06-1
relationships	
single-party brokers	02-8, 02-9, 02-32, 06-1
transaction brokers.	02-8, 02-9, 02-32, 06-1
Charitable corporation, acquiring.	01-11
Commission, State	
advertising, private organizations	95-30
auctioneers, licensing of	84-114
membership, qualifications	88-18
Contract for deed on real property	87-103
Discount Coupon Books.	84-186
Discussion of in executive session	07-31
Homestead Exemption	87-103
Licensee, continuing education	86-83
Metropolitan Area Planning Commission	
approval of subdivision of property	88-1
Mortgage tax, exemption of federal credit unions	86-53
Municipality	
acquisition by eminent domain	01-19
disposition of real estate	01-19

Topic	Opinion
<i>REAL ESTATE (CONT.)</i>	
Nontestamentary Transfer of Property Act	09-6
Private property rights, retention of when State border changes	99-62
Real Estate Settlement Procedures Act (“RESPA”)	06-5
Repossessed property - Farmers Home Administration	86-34
Revolving fund	03-9
School district	
conveyance to municipality/local political subdivision	98-17
Statutory right to use granted to State agency	96-58
Urban renewal	01-19
REAL ESTATE COMMISSION	
Advertising - private organizations	95-30
Auctioneers, licensing of	84-114
Cabin rentals	09-38
Membership, qualifications	88-18
Real estate, broker relationships	04-37
Rental property, broker duties	11-17
RECORDS MANAGEMENT ACT, OKLAHOMA	
Electronic	
communications as records	09-12
mail (e-mail)	
form in which must be kept for storage	01-46
inter- and intra-agency storage	01-46
record	01-46, 09-12
Political subdivisions, applicability to	01-46, 02-13
Records, destruction and disposition of	
electronic mail (e-mail)	01-46
Sheriff’s records	02-13
tape recordings, State Treasurer	93-2
REENTRY POLICY COUNCIL	
Power and duties	07-37
REGENTS, BOARDS OF	
Agricultural and Mechanical Colleges	
Board of Regent’s power to supervise construction	01-49
board membership, majority be farmers	85-106, 01-27
Equal Protection Clause	85-106
institutions subject to governance	99-47
purchasing through Office of Public Affairs	withdrawn by 07-31 - 87-7
(withdraws 11/9/59 to Roy T. Hill)	
statutory procedures, inapplicability for contracting services	01-49
Auditing services, 5 year limitation	88-9

Topic	Opinion
<i>REGENTS, BOARDS OF (CONT.)</i>	
College foundations, financial disclosure	06-28
Contract forms, construction	83-234
Debt	12-23
Executive session	85-89
Financial disclosure	85-163
Hiring freeze in State Personnel Act applicable to	
higher education institutions w/constitutional board of regents . . .	95-12
limited scope of effect	95-12
not applicable to	
higher education institutions w/statutory board of regents	95-12
Leave benefits, employees, State system of higher education	91-6
Moving expenses, payment of	92-10
Murray State College	
construction of student housing	83-171
Oklahoma Colleges	
contributions to Teachers' Retirement System	87-109
financial disclosure	85-163, 06-28
gifts from municipalities	04-6
institutions subject to governance	99-47
Oklahoma higher Learning Access Fund - Oklahoma's Promise	14-7
Oklahoma, University of	
contracts	98-20
use of facility	83-149
Physician Manpower Training Commission	
funding medical residency training programs	95-61
Master Lease Program	12-23
Rogers State College, reimbursement for travel	83-228
Seminole Junior College, executive session	85-89
State Regents for Higher Education	
accreditation	83-131
constitutional & statutory auth. to determine functions & courses . . .	09-40
employee longevity plan	83-103
feasibility study	84-14
funding to State-supported institutions	88-109
honorary degrees	88-6
(modifies 8/10/49 to R.T. Stuart and 12/12/41 to John Oliver)	
leave benefits, employees	91-6
relationship to Ardmore Higher Education Center	07-7
section 13 funds	86-110
trust fund, authority to establish	88-12
Tuition rates, blended and limits on	97-84
University of Oklahoma	99-47

Topic	Opinion
<i>REGENTS, BOARDS OF (CONT.)</i>	
University of Science and Arts of Oklahoma	
leave benefits, employees	91-6
Western Oklahoma State College	
board membership	83-185
REGIONAL PLANNING COMMISSIONS	83-293
REPURCHASE/REVERSE REPURCHASE AGREEMENTS	
Authority of State Treasurer to enter	90-34
RESPIRATORY CARE PRACTICE ACT	
advanced unlicensed assistive person	98-24
RETIREMENT SYSTEMS	
Accrued liability of pension systems	96-21
Benefit transfers between systems	98-11
Counties (<i>see</i> County Government)	
disability retirement	83-252
military service credit	97-35
re-election to consecutive terms of office	93-18
reemployment of retired employee	88-71
secretary of county election board	83-230
ERISA	86-32
Federal Employee Retirement Income Act of 1974	83-314
Firefighters Pension and Retirement System	
accumulated contributions	85-166
age as employment factor	83-167, 01-10
continued benefits prohibited upon reemployment	89-15
deferred option plan retiree	01-10
final average salary	87-129
vested rights (overruled by <i>York v. Turpen</i> 1984)	83-202
work, ability to return to	01-10
Judiciary	
ability of retired justice to serve, without loss of retirement pay	07-40
contributions and benefits	
allowances	04-13
emoluments distinguished	04-13
salary, what constitutes	04-13
Uniform Retirement System	93-16, 04-13
Law Enforcement Retirement System (OLERS)	
attorney, employment of	92-22
bank as custodian of investments	83-184

Topic	Opinion
<i>RETIREMENT SYSTEMS (CONT.)</i>	
benefits	
calculation	85-186
collection of	03-38
contributions during leave of absence	85-32
covered position	03-38
credited service from OPERS	88-112
disability benefits, transferability	98-11
DROP	
longevity pay plan and retention points	03-41
reemployment after retirement	03-38
eligibility, hired from another system	84-32
employment, different agency	89-62
longevity pay plan and retention points	03-41
membership	
OSBI employee	95-85
police officer, definition	85-56
prior service	82-43
reemployment	
of members retired from DROP	03-38
of retired member	85-68, 03-38
required	84-32
retired member, supplemental contributions	82-29
retirement date computed	87-48
service credit, unused sick leave	90-30
survivor's benefits calculation	84-118
Military	
pensions, as marital property	85-128
service credit	01-42
Police Pension and Retirement System (OPERS)	
age as employment factor	83-167
civilian employee, municipal police department	85-56
credited service, break in service	85-144
disability allowance	87-125
district attorney investigator	85-141
mandatory participation in OPERS	07-27
membership of OSBI employee	95-85
office building, construction of	84-165
physical-medical examination	89-8
prior service credit	84-181
salary increases, authority to give	88-75
surviving spouse	86-28
transferring time	87-143
vested rights (overruled by <i>York v. Turpen</i> 1984)	83-202

Topic	Opinion
<i>RETIREMENT SYSTEMS (CONT.)</i>	
Post Retirement Assignment	
judiciary duties and service on Pardon and Parole Board.	93-16
Public Employees Retirement System (OPERS)	
administration of supplemental retirement plans	02-23
authority to amend certification	88-113
benefits	
calculation	83-52, 83-59, 84-23, 84-110, 85-63, 85-126
collection of.	03-38
Central Purchasing Act	
subject to contracts	withdrawn by 07-31 - 84-66
collection of benefits	03-38
credited service	84-178, 01-42
deferred compensation plan	90-38
district attorney	09-3
district attorney investigator	85-141
eligibility	83-56, 83-230, 84-95
eligible employer.	84-149
employment, retired OLEERS.	03-38
investment authority, exchange-traded options.	91-11
investments, limited partnership	89-1
longevity pay plan and retention points	03-41
membership of OSBI employee	95-85
military service credit	90-28
nature of pension rights.	95-45
office space, purchase/construct	84-146
omitted participation, employer cost.	95-94
participating service credit	
rested benefit	12-8
sick leave, unused	12-8
prior service credit for unused sick leave	09-3
secretary-bailiffs	89-62
State Pension Commission	03-5
State's obligation to fund	96-21, 05-40
State's retirement systems	
actuarial soundness	
funds, diversion of.	05-40
Legislature, changes in benefits.	05-40
contracts, impairment of	05-40
funding, changes in	05-40
pension obligations, nature of.	05-40
unfunded pension liabilities	05-40
Supplement retirement systems, authority of agencies to create	02-23

Topic	Opinion
<i>RETIREMENT SYSTEMS (CONT.)</i>	
Teachers' Retirement System	
additional	
contribution, "window retirement"	87-109
retirement allowances, school boards	89-67
benefit transfers, restrictions	98-11
calculation of "average salary"	87-144
composition of Board of Trustees	14-8
contributions credit, State Board of Education & Career Tech.	10-14
death benefits coverage	83-101, 85-6
payment of death benefit	83-102
effective date of retirement	83-13
eligibility of increase in benefits	85-7, 13-9
feasibility study	84-14
general revenue fund, allocation	01-52
health insurance, accrued rights	88-51
interest, payment of.	91-8
payment of insurance premiums	88-11
rules, authority to promulgate	14-8
School Consolidation Assistance Fund	13-9
Wildlife Conservation Commission (withdrawn by 95-45)	86-54
 <i>REVENUE AND TAXATION</i>	
Ad valorem taxes	
assessment ratio, permissible deviations.	83-44
banking associations and credit unions	85-142
comprehensive revaluation, public service property	84-40
constitutional amendment, effect of	05-17
county hospital, mill levies	90-7
court clerk, funding	83-39
educational/building millages, equal protection clause	95-83
elderly/low income	97-27, 05-17
increase limitations	97-27
improvements to property	97-27
enforcement.	04-24
Equalization, State Board of	
authority	97-74, 98-32
exemptions	
application deadline	13-24
farm and ranch land	85-67
homestead	87-103
household	83-160
household goods	95-7

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
livestock	95-7
oil and gas property	89-54
public property	83-96
religious use	01-9
Rural Electric Cooperatives	00-56
farm equipment and machinery	99-42
formula for state aid, school districts	
legislative intent to alter formula	83-44
salary incentive aid formula	84-7
land actually necessary, subject to	83-142
lease-purchase agreements	
payment under 88-73, partially withdrawn by	05-14
state agency	95-92
manufactured home	84-41
permit to move	95-47
manufacturing facility, replacement/expansion	85-122
millage	
adjustment factor, household goods/livestock exemption	95-22
rate adjustment	03-22
notice	88-14
oil and gas wells, equipment	83-123, 84-44
omitted property, procedure to add	00-23
payment schedule	88-110
platted lots, valuation	01-4
property, grossly undervalued	04-24
public trusts, leases	98-28
real or personal, taxpayer information	85-40
reimbursement from Department of Corrections	11-8, 11-19
revaluation	84-100
revaluation budget	
fire protection districts	85-78
process	99-46
school districts	85-4
school bonds (levies)	92-2
sinking funds, tax increment financing	11-5
tax increment financing	11-5
taxation of real property formerly held by Indian Housing Authority	09-23
timberland	99-20
time deposit	84-106
unit appraisal valuation	84-2

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
valuation	
appeal by taxpayer	02-30
County Equalization Board	02-30
increases	01-36, 02-30
laws	95-89
limitations to increase	03-39
platted lots	01-4
protest, public service companies	88-31
tools & implements	08-21
transfers to another person	03-39
use value	99-8
visual inspection program	
assessor expenses	99-46
private counsel	04-24
Aircraft registration fees	87-150
Alcoholic beverage sales & excise taxes, allocation from	11-3
Assessments, paving (withdraws 73-158)	84-126
Bingo	83-309
Certificate of tax sale	
who can purchase	00-21
Cigarette tax, county ability to impose	14-12
Cities and Towns	
franchise tax, uniformity	83-20
hotel room tax	02-35, 08-27
sales tax	
approved by voters	12-16
exemptions	83-299
imposition of tax can start after county commissioners'	
terms of office	12-16
sharing sales tax for consensual annexation	11-20
uniformity	83-20
use for voter approved purpose only	
change in purpose requires voter approval	12-16
extension of time period in which tax is collected requires	
voter approval	12-16
Tax Rebate Agreements	10-4
Collection by Municipalities	
exchange of information	85-182
Contributions and independent expenditures	
by non-profit corporations	13-1
by 501(c)(6) qualified business leagues, Chamber of Commerce, etc..	13-1
County Excise Board	
application of millage rate	83-160

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
County Highway Fund, interest	93-32
County Resale Property Fund.	94-14
County Sales Tax	
approval by voters.	12-16, 14-15
county sales tax act	83-217
emergency services, firefighting	01-35
hotel room tax	08-27
imposition of	83-132
interest on (partially withdraws 83-284).	93-32
limitations on goods and services	03-29
municipality	
multiple boundaries	01-35
permissive goods and services.	03-29
rural fire district contracts	96-70
use for voter approved purpose only	
change in purpose requires voter approval	12-16
distinct and specific purpose of the financing, etc.	14-15
extension of time period in which tax is collected requires	
voter approval	12-16
imposition of tax can start after county commissioners'	
terms of office	12-16
valid statutory purpose	87-66
Dedicated funds, interest (partially withdraws 83-284)	93-32
Delinquent taxes, sale.	02-12
Documentary stamp tax/F.D.I.C.	83-271, 90-17
Emergency telephone tax (911)	87-110
Enforcement, use of private counsel	04-24
Equalization, State Board of, repeal of tax, recertification.	91-19, 14-7
Estate tax	
exemption from.	84-97
lineal vs. collateral heirs	99-11
Excise tax	
alcoholic beverages.	84-197
cigarettes, Indian tribes' sale.	92-25
vending machines	88-39
Exemptions	
ad valorem application deadline	13-24
political subdivisions.	02-35
religions and non-profit organizations	02-35
Gasoline tax, appropriation & distributions of proceeds from.	11-3
General Revenue Fund, self-sustaining boards contribution	10-6
Gross production, payments of.	83-123, 83-142, 84-44, 89-54
Grossly undervalued property, reassessment	04-24

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
Homestead exemption	87-103
Horse racing	
tax on multiple wagers accepted by Fair Association	00-50
Housing authorities, in lieu of payments	86-13
Income tax	
mineral interest proceeds	00-62
nonresidents	00-62
tax structures	07-25
Insurance, surplus lines tax, policies sold to the State	07-38
License tag fees	
factory delivered prices	84-42
Real Estate Commission	03-19
Local taxes, legislatively imposed, prohibited	87-100
Motel and hotel room tax	86-7, 02-35, 08-27
Municipalities	
exempt property outside county	99-40
license fee, real estate agents	11-17
Pari-mutuel wagering	
exemption and fair meets	95-101
Personal property tax lien	11-1
Property taxes	
sale of land to satisfy	00-21
tax deed for non-payment	04-12
tax relief, manufactured homes	84-198
Real estate	
filing - release of mortgage	95-84
mortgage tax	86-53
tax resales, tax certificate	84-131
Repeal of tax, effect on appropriations	91-19
Retirement income/exemption	
State and federal employees	89-39
Revenue raising bill defined	95-58, 03-54
Sales tax	
alcoholic beverages	84-197
cigarettes, Indian tribes' sale	92-25
exemptions	
church contractors	95-75
collection by Rural Electric Co-op	85-155
contractors	
Department of Central Services not exempt, & subcontractors	07-31
Department of Veterans Affairs, with	07-31
county sales tax	83-132, 83-217, 87-66
farm machine, truck bed-lifting device	89-33

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
interest on	93-22
statutes constitutional	83-299
subcontractors with Department of Veterans Affairs.	07-31
support of medial facility.	00-14
gross receipts, user fee	00-4
insurance company, as purchaser subject to	88-34
irrepealable pledge	95-86
labor and delivery	
caterers.	99-13
Municipal Budget Act, transfer of tax revenues	84-183
municipality	
elimination	99-12
rural fire district contracts	96-70
out-of-state vendors.	86-64
oxygen, exempt.	88-59
permits.	87-53
returnable containers (withdraws 81-191)	83-24
School	
bonds (levies)	92-2
support.	03-6
Special assessment vs. ad valorem tax	88-44
Spousal tax relief	
offers to compromise.	02-2
State fuel taxes, exemption from	85-172
Statutory filing deadlines	03-23
Streamlined Sales & Use Tax Administration Act	09-39
Tax	
certificate sale	
drawing among prospective purchasers.	02-12
“First-Come, First-Served” rule	02-12
parcels individually sold	02-12
time of registration.	02-12
Commission	
administration of tax code	83-201
allocation of liability among taxpayers	02-2
analyze corporation’s structure	07-25
compromise of tax liability	02-2
“Innocent Spouse” relief	02-2
methodology of assessing public service property	83-296
sales tax collection, returnable containers (withdraws 81-191).	83-24
settlement of controversies	98-33
credits	
Oklahoma Development finance Authority	88-20,

Topic	Opinion
<i>REVENUE AND TAXATION (CONT.)</i>	
Oklahoma Tax Commission to determine if it falls into	10-10
requirements, economic development & transferable tax credits . .	10-16
deed, notice	04-12
immunity	
federal and state governments	02-35
repossessed property	86-34
increment financing.	09-13, 09-39, 11-5
liens	11-1
purpose	14-17
Tobacco product tax, county's ability to impose	14-12
Tourism tax	
restaurant, definition of	94-8
Uniformity of Taxation.	88-20
Use tax, election	00-35
Vehicle License & Registration Act, apportionment of proceeds.	11-3
Visual inspection program, private counsel	04-24
Waste Tire Recycling Act	95-58
Workers' Compensation Fund	14-16
RISK MANAGEMENT	
Liability insurance, automobile	88-13
ROADS AND BRIDGES	
Agreements to construct, maintain, improve, & repair municipal streets & roads.	11-23
Authority to acquire land/secure federal funds	92-26
Cleanup, injurious substances on roads	00-42
Construction & maintenance, funding for municipal projects	08-9
Deterioration.	01-41
Federal aid secondary highway system	85-80
Highway clean-up provision	
vehicle removal is liability coverage's responsibility	02-3
storage fees is liability coverage's responsibility	02-3
Motor vehicles, exemption State fuel taxes	85-172
Public road, definition	95-108
Weight limits.	01-41
RURAL AMBULANCE SERVICE DISTRICT	
Incurring of indebtedness	86-27
RURAL ECONOMIC ACTION PLAN ("REAP")	
Expenditure of REAP funds	03-35, 04-20
Public purpose requirement	03-35, 04-20

Topic	Opinion
RURAL ELECTRIC COOPERATIVE	
By-laws	95-44
Collection of city sales tax	85-155
<i>(see Branch Trucking v. Oklahoma Tax Comm'n 1984)</i>	
Customer deposits/membership fees	95-44
RUSA loans, financial requirements.	95-44
Trustee, not an officer (withdraws 83-158)	89-72
RURAL FIRE DEPARTMENTS	
Grants/Department of Agriculture	89-77
RURAL VENTURE CAPITAL FORMATION INCENTIVE ACT	10-16
RURAL WATER, SEWER, GAS AND SOLID WASTE MANAGEMENT DISTRICTS	
Governmental Tort Claims Act.	85-177
Nepotism.	01-38
Payment of tort claims	88-16
Sale of assets.	86-112
Securing deposits	87-15
SALARIES	
Boxing administrator	99-16
Cabinet Secretaries	04-33
Components of vs. emoluments (withdraws 78-224)	99-1
Corporation Commissioner	97-21
adjustment restriction	95-59
County Commissioners	96-14
use of Highway Funds.	84-21
County Election Board	95-92
County officers	
equality	00-63
who determines (withdraws 78-224)	99-1
County Superintendent of Schools	83-69
Department of Wildlife Conservation	96-71
Discussion of, in executive sessions (withdraws 78-201)	96-40
District Attorneys	
approval by District Attorneys Council	98-26
use of county resale property fund	94-14
Executive sessions, discussion of salaries (withdraws 78-201)	96-40
GRDA, Chief Executive Officer/Director of Investments	11-7
Judiciary, Uniform Judiciary Retirement Fund	
contributions and benefits	
allowances	04-13
emoluments distinguished	04-13
salary, what constitutes	04-13

Topic	Opinion
<i>SALARIES (CONT.)</i>	
Labor Commissioner	97-69
Municipal	
judge, funding for	96-68
officer/employee	01-23
Pay raises, state employees and state agency directors	04-33
Teachers salary schedule	96-73
Tobacco Settlement Endowment Trust Fund, board of directors	05-38
Veterans Affairs, Secretary of, salary	95-26
 SALES	
Selling health-care goods or services at less than cost	97-18
 SAVINGS AND LOAN ASSOCIATIONS	
Loans to Officers	85-121
 SAVINGS AND LOAN CODE	
Merger and consolidation, out-of-state institutions	87-116
 SCENIC RIVERS ACT	
Barren Fork Creek Scenic River Area	83-275
Commission, authority	
canoe fees	83-157
election of commissioners	83-275
legal counsel	83-58
regulation	
of recreational activities and safety hazards	01-1
on state-owned and operated lands	06-30
zoning	83-16
 SCENIC RIVERS COMMISSION, OKLAHOMA	
Authority	
regulation	
of recreational activities and safety hazards	01-1
on state-owned and operated lands	06-30
 SCHOOL DISTRICTS	
Ad valorem taxes	92-2
apportionment of invested funds	84-35
comprehensive revaluation	84-40
revaluation budget	85-4
State aid formula	83-44
salary incentive	84-7
Administrators, evaluation of	12-7

Topic	Opinion
<i>SCHOOL DISTRICTS (CONT.)</i>	
Annexation	
annexation	88-37
federal installation	83-109
to municipality (partially withdraws 70-150)	94-15
Approval of actions	00-32
Attorney, employ	96-43
Awards	95-33
Bargaining agents, negotiations	98-14
Board member (<i>see</i> Board of Education)	
Bond reduction	92-2
Bonds	
constitutional limits on amount	02-14
general obligation bond proceeds, use of	02-43, 07-42
incurrence, time of	02-14
indebtedness authorized	02-14
interest rate swaps	05-43
method of issuance and retirement	02-14
sinking fund	02-14
source of payment	02-14
swaps or derivative financial product agreements	05-43
voter approval	02-14
Building	
financing methods	07-42
fund, use for insurance premiums	87-49
permits required (modifies 65-428)	83-292
(withdrawn by 98-2)	
Buildings and equipment, financing	02-43
“Cafeteria plan”/insurance benefits	88-43, 99-53, 03-4
Cash management programs, participation in	91-3
Certificates of indebtedness, issuance of	91-3
Charter schools	12-12
Classroom space, renting	99-73
Construction	
manager	10-13
using force account	10-13
Consultants	99-31
Contiguous to adjacent state, cooperative contracts	95-2
Contracts	
adequate consideration	03-42
board member’s	
“direct or Indirect interest” in any contract	04-11
interest in	03-17
building construction and Maintenance	05-12

Topic	Opinion
<i>SCHOOL DISTRICTS (CONT.)</i>	
conflicts of interest	03-17
cooperative	
agreements between.	96-3
contracts, contiguous School Districts.	95-2
interest rate swaps	05-43
janitorial & cleaning services	08-3
local foundations	98-7, 98-25, 99-31
multi-year lease contract	05-14
non-appropriation clauses, mutual ratification of renewal multi-year	05-14
pay periods, teachers	03-42
roofing	05-12
school pictures.	03-21
swaps or derivative financial product agreements	05-43
vending machines	03-21
Corporation, defined as to school district	89-56
Credit cards	
obtain and use	01-30
District Boards of Education, powers	
encumbrance/expenditure of funds	00-32
Educational services in Department of Human Services'	
contracted group homes	09-15
Election boundaries, federal installations.	83-109
Elementary districts	00-24
Employees	
collective bargaining	88-95, 98-14
health insurance.	95-57, 99-53, 01-37, 03-4, 03-15
part-time	99-53
travel reimbursement.	98-42
Employers.	99-31
Expenditure of funds, school bond election	83-115
Firearms policy.	04-39
General fund revenue	
current expenses	02-14
expenditures authorized	02-14
repayment of bonded indebtedness.	02-14
Grand jury.	96-43
Health insurance, private plans.	90-3
Independent districts.	96-3, 00-24
Insurance of students	89-58
Interest rate swaps	05-43
Investments.	84-39
sinking/building funds.	00-48

Topic	Opinion
<i>SCHOOL DISTRICTS (CONT.)</i>	
Land/real property	
conveyance to municipality/local political subdivision	98-17
Lease	
obtain financing, to	12-3
purchase agreements	02-43, 07-42
school property or facilities.	12-3
Midterm supplement.	95-111
Motor	
license agent	86-109
vehicles, identification of	83-86
Nonpayable warrants, issuance of	84-5, 84-39
Parent-teacher conferences.	83-152
Picture contract proceeds	03-21
Public funds	
contract proceeds.	03-21
meals, refreshments and dues	01-30
school district judgments, sinking fund	00-60
Public trust lease-purchase financing	07-42
Purchases, credit cards	01-30
School general obligation bonds	02-43, 07-42
Shared sick leave programs, sick leave banks	96-20
Special assessments, payment of	85-133
State aid	
distribution of	88-95
overpayment of	99-36
Supplemental appropriations	83-215
Support personnel, personal business leave	13-26
Surplus real property, conveyance without consideration	09-2
Taxes, municipalities, school support.	00-59
Technology center districts.	09-2
Transfers	
fees	87-134
grade not offered	84-144
Transportation area, dependent/independent	84-144
Treasurer	
authority	84-39
duty to invest funds.	89-64
permissible investments	89-64
warrants.	84-39
Swaps or derivative financial product agreements	05-43
Vending machines, contracts	03-21
Virtual Charter School Board, Statewide	12-12
Workers' Compensation coverage	90-9

Topic	Opinion
SCHOOL FOR THE DEAF, OKLAHOMA	
Transportation (withdraws 84-88)	84-164
SCHOOL LAND COMMISSION	
Commissioners of Land Office	
Bond Guarantee Program, legality of	96-77
constitutionality of statutes regulating	04-31
duties	
irrevocable trust for schools	04-31
regulation by Legislature	04-31
fiduciary standards	04-31
investment of	04-31
Conveyance	
easements, procedures for school lands	93-15
procedures, auction	96-1
Employees, salary/legislative appropriation (withdraws 81-306)	87-88
Lease with Legislator	83-302
Oil and gas leases	
bidding procedures for leases	95-43
School Land Trust	
inviolable nature of	96-77
property, currently leased land, sale procedures	96-1
SCHOOL TEACHERS	
Arbitration, grievance.	87-20
Certification	00-6
Commission for teacher preparation duties and powers.	00-6
Consultant.	99-31
Contracts	
Board of Vocational and Technical Education (modifies 71-299)	83-247
contracts	99-31
pay periods	03-42
temporary distinguished from continuing	83-253
Department of Corrections	84-20
Dispensing of medications	83-117
Evaluation	
policies criteria	86-146, 00-6, 12-7
system, Oklahoma Teacher & Leader Effectiveness.	12-7
Extra-duty compensation	
subject of bargaining (withdraws 81-126)	87-21
Health insurance	90-3, 01-37, 03-15
Leave of absence/personal business leave	83-51, 87-80
Municipal support.	03-6
National Board Certification.	13-23

Topic	Opinion
<i>SCHOOL TEACHERS (CONT.)</i>	
Negotiating representative	84-59
Parent-teacher conferences	83-152
Preparation Act, Oklahoma Teacher	99-63, 00-6
Retirement system	83-13, 83-101, 83-102, 98-11
Salary	
benefits	84-12
mandated salary increase	07-4
payment at beginning of month	84-87
schedule, State Board of Education's power to adopt	96-73
school district cannot substitute non-salary benefit	07-4
sick leave bank	83-33, 96-20
Sick leave, transferability	13-26
Tenure	
administrator	83-143
temporary contracts affecting	83-253
<i>SCHOOLS (see also EDUCATION)</i>	
Activities	87-18
Activity funds	
parent teacher groups/associations	95-54
public funds	03-21
school picture contract proceeds	03-21
student fund raising	97-6
vending concession contract proceeds	03-21
Attendance, married high school students, mandatory	95-8
Building	
architects, licensed required for certain buildings	06-38
fund use of municipal revenues for	01-40
Charter schools	
alternative education	00-12
core curriculum mandates	99-64
Classroom space, renting	99-73
District Boards of Education, powers	
encumbrance/expenditure of funds	00-32
Firearms policy	04-39
Funding, use of municipal revenues for	01-40, 05-2
Jails, located near	98-47
Lunch program, National school	83-221
Municipal funds, used to support	01-40, 03-6
School	
administrators, evaluation	12-7
boards (<i>see</i> Board of Education)	
day, defined	83-152

Topic	Opinion
<i>SCHOOLS (CONT.)</i>	
districts (<i>see</i> School Districts)	
land	
conveyance to Municipality/Local Political Subdivision	98-17
sale of - auction, preference to purchase, lessee	96-1
nurse, dispensing of medication	83-117
psychologist, scope of practice	95-38
superintendent	
benefits	95-57
display of campaign sticker on vehicle	86-22
teachers (<i>see</i> School Teachers)	
year, defined	83-253
Sex offenders, restrictions living near	05-11
Student	
offender, separation, Juvenile Sex Offender Registration Act	08-14
victims, requirements to notify	08-14
SEARCH AND SEIZURE	
Officer, protection of the	03-46
Plain view	03-46
Probable cause	03-46
Search incident to arrest	03-46
SEAT BELTS	
Child passenger restraint requirements	95-76
Pick-up trucks, mandatory application	00-44
SECRETARY OF STATE	
Control of state seal	
statutory authority	97-68
Depository of Governor’s interim appointments	00-54
Public trust conflict of interest and report filing	99-54
Real Estate Investment Trust “REIT, requirement to register”	
corporation	08-11
limited liability company	08-11
trust	08-11
unincorporated associations	08-11
SECURE AND FAIR ENFORCEMENT FOR MORTGAGE LICENSURE ACT, OKLAHOMA	
Mortgage brokers/loan originators	10-9
Nonprofit organizations	10-9
SECURE RURAL SCHOOLS AND COMMUNITY	
Self-Determination Act of 2000	03-11

Topic	Opinion
SECURITY GUARD AND PRIVATE INVESTIGATOR ACT.	87-112, 03-45
SECURITY OF COMMUNICATIONS ACT, OKLAHOMA.	00-45
SEED-CAPITAL REVOLVING FUND (<i>see</i> OCAST)	90-15
SELF-DEFENSE ACT, OKLAHOMA	
Concealed weapons	
ammunition, caliber	12-15
establishments, where low-point beer and alcoholic beverages are sold	12-15
parking lots, locked in vehicles	
prisons	04-38
schools	04-38
public libraries may ban	95-96
Federal probation officers	96-60
Law enforcement officers	96-60
Licensure, Oklahoma State Bureau of Investigation may issue	03-46
Private investigators, no superior rights from the Act	14-3
Reserve officers, retired	
concealed weapons, ability to carry weapon	05-45
Traffic violation, weapon may be seized	03-46
SEPARATION OF POWERS DOCTRINE	
Judiciary may not invade the constitutional province of the Legislature to regulate firearms	13-17
SERVICE RATING, EMPLOYEE INDIVIDUAL	
Agency use	95-68
Appeals	93-35
SEVERABILITY CLAUSES.	88-96
SEX OFFENDERS	
Children, schools, zone of safety -- school activities	08-24
Foreign conduct which if committed in Oklahoma would be a crime	08-20
Registration requirements	08-20
SEX OFFENDERS REGISTRATION ACT	
Days, 5 day rule defined for residency	05-36
Offenders, “aggravated sex offenders” directs classification	12-13
Oklahoma Child Care Facilities licensing Act	96-56,
Parent, application to	08-24
Protective zones around schools	03-24, 05-36
Registration requirements for foreign convictions	08-20
Residency restrictions	05-11, 05-36

Topic	Opinion
<i>SEX OFFENDERS REGISTRATION ACT (CONT.)</i>	
Safety, zone of	08-24
School or educational institutions05-36, 08-24
Victim - under 13 years of age	08-24
SHEEP AND WOOL COMMISSION	
Elections, statewide and district	86-76
SILVER HAIRED LEGISLATURE	
Open Meeting Act.	02-42
Open Records Act.	02-42
SMALL BUSINESS CAPITAL FORMATION INCENTIVE ACT	10-16
SMALL BUSINESS LINKED DEPOSIT ACT, OKLAHOMA	
Linked Deposit Review Board, duties of	88-52
SMALL CLAIMS PROCEDURE ACT	
Collection agency	86-55
Court costs	99-25
Transfer to district court	
court costs	99-25
SMALL OPERATOR ASSISTANCE PROGRAM (SOAP)	85-96
(modifies 79-299, 79-108, 79-44)	
SMOKING IN PUBLIC PLACES ACT.	87-121, 02-40
SOCIAL SECURITY	
Guardianship proceedings, court cost exemption for certain	13-15
Numbers, disclosure requirements	97-3
SOLICITATION OF CHARITABLE	
CONTRIBUTIONS ACT, OKLAHOMA.	88-98
SOLID WASTE MANAGEMENT ACT	85-28
Contracts for collection and disposal	97-47
Landfills	
financial assurance for.	97-57
location of scales at.	97-57
SOVEREIGN IMMUNITY	
Political subdivisions	85-93
State employee, personal automobile.	88-13
Territory, exchange of power over	99-62

Topic	Opinion
SOYBEAN COMMISSION	
Open Meeting/Open Records	84-189
SPECIAL INDEMNITY FUND	
Protection of	91-36
Taxation rate/compensation awards political and municipal subdivisions	96-50
SPECIAL PROJECTS	87-100
STANDARDS FOR WORKPLACE DRUG AND ALCOHOL TESTING	
Public Employees Drug and Alcohol Testing	98-16
STATE AND EDUCATION EMPLOYEES GROUP INSURANCE	
Health, Dental and Life Insurance Reserve Fund, transfer of funds . . .	91-17
School Districts, “comparable” private plans	90-3
STATE AUDITOR AND INSPECTOR	
Authority	82-79
Public Funds, Rural Economic Action Plan (“REAP”)	03-35
STATE BOND ADVISOR	
Grand River Dam Authority, <i>Ex Officio</i> member of	98-43
STATE BORDER	
Establishment of	99-62
Interstate compact concerning	99-62
STATE CONSTRUCTION ADMINISTRATOR	
Contracts, use of (Board of Regents)	83-234
STATE DRAINAGE ACT, OKLAHOMA	
Assessment	
method	07-10
property subject to	07-10
County Commissioners, role of	07-10
Drainage District Commissioners, role of	07-10
STATE EMPLOYEE CHARITABLE CONTRIBUTION ACT	
	89-52
STATE EMPLOYEES BENEFITS ACT	
	04-13
STATE FIRE MARSHAL	
Peace Officer Authority	98-10

Topic	Opinion
STATE OFFICERS AND EMPLOYEES	
A and M Regents	
Board of Regent's power to supervise construction	01-49
statutory procedures, inapplicability for contracting services	01-49
Advertising	98-44
Agency Directors and employees, salary increases	04-33
Alcoholic Beverage Laws Enforcement, political restrictions	00-18
Appointees	
filing of financial disclosure	87-91
interim appointments (withdraws 72-256)	98-22, 00-54
renomination	00-54
subsequent disqualification	87-43
Appointment of	
full term and interim basis (withdraws 72-256)	98-22, 00-54
renomination	00-54
Authority	
Duties, authority to perform official duties	11-6
State Textbook Committee, authority of officers	00-7
Awards for Public Employees (withdraws 79-78)	
incentive awards	87-38
.	85-17
Benefits	08-7
Boards and Commissions, executive officers, terms of office	88-91
Bureau of Investigation (OSBI), retirement system membership	95-85
Cabinet Secretaries	
pay raises	88-3, 02-29
renomination	04-33
.	00-54
Chief Executive Officer, OIFA/President, ODFA	91-22
Cities, towns or municipalities	
qualifications for state or federal employees to run for elected office	09-18
Compensation by private entities or persons	11-6
Confidentiality	
employees' home addresses, phone numbers and social	
security numbers	99-30
Conflict of interest	
board of control/county hospital	83-112
Environmental Quality Board	04-40
municipal officer	03-47
Convicted felon	
eligibility	
for employment	07-16
to run for office	98-34
Corporation Commissioners	
divestiture of oil or gas interest	91-29
salary adjustment restriction	95-59

Topic	Opinion
<i>STATE OFFICERS AND EMPLOYEES (CONT.)</i>	
Cosmetology Board, executive secretary	87-120
Court Reporters, official, fees.	88-113
Crimes, duty to report.	09-7
Department of Central Services	
statutory procedures, inapplicability for contracting services	01-49
Director of Courts not required to file affirmative action plan.	01-16
Disability Insurance Program.	89-74
Disclosures	99-44
Discrimination or favoritism prohibited.	99-44
Disqualification after criminal conviction	86-79
District Attorneys	
contract with county commissioners.	88-60
dual office holding	11-16
duties of.	84-16
payment of salary and travel expenses	87-77
Donation of salary to State	83-304
Drug and alcohol testing.	98-16
Dual	
employment	
attorneys (partially withdraws 80-213)	92-22
state employee (modifies 80-213)	88-23
office holding	
municipal officer	03-47
simultaneous service, federal or state office	00-58
Duties, authority to perform official.	11-6
Elected officials, suspension from office, abandonment of office	08-6
Elections, expenditure of public funds.	91-27, 96-23
Employee	
classified employee, nepotism.	87-19
service evaluations	
District Attorneys Council.	05-7
release by employer	97-48
taxes	99-10
Welfare Benefit Plans	86-32
Employment agencies, use of fees	88-78
Ethics Commission, Oklahoma	
Prohibition on two members representing the same congressional district	03-2
Expenditure of public funds	98-44
Finance, State Director of.	88-32, 88-75
Furloughing	83-127
Gambling, pari-mutuel wagering	87-102

Topic	Opinion
<i>STATE OFFICERS AND EMPLOYEES (CONT.)</i>	
Governmental Tort Claims Act	
ability to sue governmental employer under the Act	00-51
definition of Employer's Liability Act?	00-51
medical schools	
physicians/interns/faculty members	91-21
physicians, Department of Corrections	89-75
Governor	
authority to	
create State agencies	96-31
declare and fill vacancies of district judge	02-24
enter into agreements with Indian tribes	04-27, 06-39
cabinet secretaries	
appointment of	00-54
interim service	00-54
renomination	00-54
Grand River Dam Authority, <i>Ex Officio</i> member of	98-43
implementation of hiring freeze in State Personnel Act	95-36
Grievance procedure, reinstatement (76-114 distinguished)	83-97
Hiring freeze in State Personnel Act	
implementation, limited scope of	95-12
not applicable to	
higher education institutions with constitutional board of regents	95-12
professional or personal service contracts	95-12
public trusts (withdraws 80-145)	96-47
State Insurance Fund	95-36
House of Representatives, employment	
employee as a candidate	04-30
political affiliation and free speech	04-30
Indemnifying U.S. Government	
indefinite term and uncertain amount prohibited	96-7
Insurance, personal automobile	88-13
Judges	
removal from office creating vacancy	02-24
residency requirements	84-9
salary of Associate District Judges	94-10
Special Judges	
appointment by district judges	07-3
employees at will	07-3
power of district judges to terminate employment of	07-3
Leave benefits	
employees State System of Higher Education	91-6

Topic	Opinion
<i>STATE OFFICERS AND EMPLOYEES (CONT.)</i>	
Legislators	
appointment, ineligible to receive from Legislature	13-20
compensation commences 15 days after general election, subject to	
Certificate of Election & taking official oath of office	13-8
former Legislators, employment	05-13
Speaker, term of special session	13-8
term of office	13-8
violation of separation of powers	04-27
Liability, physician - Tort Claims Act01-39, 04-19
Longevity pay plan	
calculation	84-17
continuous service requirement	99-38
eligibility for08-7, 08-12
House of Representatives, temporary employees	07-26
judicial branch employees not eligible	08-7
past service	83-103
pay plan and retention points	03-41
Military	
leave	88-103
service credit, OPERS	90-28
Moving expenses, payment of	92-10
Oath	
of Office	86-148
violation of	09-7
Oklahoma Tax Commission, requirement to file timely tax returns . . .	99-10
Part-time employment, state employee (modifies 80-213)	88-23
Payroll deductions, charitable contributions	89-52
DHS, deductions to private charity	83-139
Pension rights - OPERS	95-45
Pensions	
omitted participation in OPERS, employer cost	95-94
pension systems, actuarial accrued liability of	96-21
Public Employees Retirement System (“OPERS”)	12-8
State’s obligation to fund	96-21
Physical examinations for employees	84-168
Physician, immunity from suit, Tort Claims Act01-39, 04-19
Professional Services Contract, former employee	87-11
Public funds	
duty to recover	09-7
expenditure of, elections91-27, 96-23
Public trust not agency of State	
under Oklahoma Personnel Act (withdraws 80-145)	96-47
Purchasing Director, State withdrawn by 07-31 -	84-66

Topic	Opinion
<i>STATE OFFICERS AND EMPLOYEES (CONT.)</i>	
Reduction-in-force	86-30
health insurance premiums	98-29
Retention points and longevity pay plan	03-41
Retirement income, exemption.	89-39
Salary	
adjustment restriction	95-59, 06-26
associate district judges.	94-10
district attorneys	06-26
reductions	83-261
Sale of property to the State	85-25
Scope of employment.	07-18
Secretary of Security and Safety, attend executions.	96-86
State employee	
exemption from psychologist licensure requirements	96-80
State Purchasing Director, invitation to bid	
authority to cancel and re-bid	96-52
issue purchase order	96-52
State whistle-blowing statute	99-44, 00-51
Travel	
expenses authorized	06-29
foreign, by State officer.	86-148
reimbursement of employees or agents.	06-29
Unclassified service	
appointing authority classification reviews.	99-44
at-will employee	99-44, 04-30
compensation, no parity requirement	99-44
discharged for political affiliation	04-30
merit rules as to classification grievances	
and authority to underfill positions	99-44
Unexpired terms	
appointed or elected to fill.	95-59
interim appointments.	98-22
Use of employee service ratings.	95-68
Vacation pay, employee entitlement.	85-47
Volunteer employees	
Financial Institution Deposit Requirements	12-9
Workers' Compensation/Governmental Tort Claims	85-135
Witness fees	83-114
 STATE PARK TRUST FUND, OKLAHOMA	
Fund	
accrued, is not limited in amount	11-13
purpose may be used for	11-13

Topic	Opinion
STATE PERSONNEL INTERCHANGE PROGRAM	05-28
STATE SEAL	
Forgery or counterfeiting	97-68
Reproduction	97-68
Secretary of State custodian and control	97-68
STATE TERRITORY	
Sovereignty	99-62
STATE-TRIBAL GAMING ACT	
Alcoholic Beverage Control Act	07-2
STATE USE COMMITTEE	06-23, 10-12
STATUTORY CONSTRUCTION	
Administrative construction cannot override	03-45
Agency interpretation given weight	03-45, 09-38
Ambiguity, interpretation of	04-4
Amendments	
meaning given to every provision	99-25
multiple, in same session	03-38
prospective application	96-85
Concurrent resolutions	83-101, 99-53, 00-43
Constitutional procedure, failure to follow	
effect on enactment	98-38
Constitutionality, presumption of	98-37
Construction	
liberal	05-42
rules of	05-42
Decennial codification of statutes	96-84
Effective date, legal effect of	06-3, 10-10
Floor reports, nonbinding effect	83-258
Footnotes	96-84
Interpreting	
authority implied	03-53
harmonizing statutes	03-38, 03-53, 06-3, 08-2, 08-25
later-enacted controls	06-3, 11-23
phraseology	03-53
specific over general	11-23
statutes that deal with same subject consistently	01-23
within constitutional framework	99-35
Judiciary	99-4

Topic	Opinion
<i>STATUTORY CONSTRUCTION (CONT.)</i>	
Last antecedent rule01-20, 01-42
Legislative	
effective date	10-10
intent03-53, 05-6, 05-8, 08-12, 08-20, 08-25, 08-31, 10-7
retroactivity	10-10
selection of restrictive title of bill	10-7
silence	03-53, 04-5, 05-6, 08-12
Plain meaning	01-23, 02-29, 04-5, 04-37, 07-36, 08-12, 08-20, 08-31, 09-8
Plain meaning (cont.)	11-24, 13-2, 13-12
Recodification	09-5
Resign-to-run	99-4
Severability Clauses	88-96
Statutes	
adopting	06-18
effect of covering same issue passed in same session	89-11
multiple amendments in same session	03-38
provisions different which deal with same subject, interpreted in a consistent manner	01-8
title of bill fixes limit on scope of bill	10-7
Words	
choice of02-29, 14-8
legislative intent	04-37
understood in ordinary sense	01-8, 04-37, 11-24, 13-12
STRIKES AND STRIKE-BREAKING	83-192
STUDENT LOAN AUTHORITY	85-3
Scholarships prohibited	97-60
State Budget Act, not subject to	90-23
SUB-STATE PLANNING DISTRICTS	
Employees, not eligible for Public Employees Retirement System	84-95
SUNSET REVIEW LAWS	
Agency authority after termination (withdraws 79-39)	88-102
Re-creation of entity, terms of executive officers	88-91
Statutory entity	
re-creation of	96-66
termination of	96-66
SUPERVISED LENDERS	
Fee for dishonored checks	84-75
Origination of phone use by	00-9
Refinancing of loans	96-84
Regulation	96-84

Topic	Opinion
SURPLUS PROPERTY	
County equipment, public auction	84-65
Historical artifacts, procedure for disposing of	07-39
Real property, procedures for disposing of.	01-53
TAR CREEK PROJECT	
Expenditure of public funds	84-4
TAX COMMISSION, OKLAHOMA (<i>see also</i> REVENUE AND TAXATION)	
Administration of tax code	83-201
Aircraft registration fees	87-150
Alcoholic beverage sales & excise taxes, allocation from	11-3
Allocation of joint liability	02-2
Commissioner, public office.	85-22
Compromise of tax liability	02-2
County highway fund, interest	93-32
County sales tax, interest	93-32
Employees	
tax returns, requirement to file timely	99-10
Dedicated funds, interest	93-32
Gasoline tax, appropriation & distributions of proceeds from	11-3
“ <i>Innocent Spouse</i> ” relief.	02-2
Municipalities, exchange of information	85-182
Open Records	
Workers’ Compensation Assessment Rebate Fund,	
at Tax Commission - confidential records	03-31
Public service property, methodology of assessing	83-296
Sales tax	
collection, returnable containers	83-24
county	05-23
exemptions	83-299
limitations on use	05-23
municipalities	06-31
permits, purchaser of ongoing business	87-53
public purpose.	06-31
Uniform Electronic Transactions Act, effect on records	01-13
Vehicle	
identification number registration, authority of agents to inspect.	01-48
License & Registration Act, apportionment of proceeds	11-3
“ <i>Wine Coolers,</i> ” jurisdiction of	87-2
Workers’ Compensation Assessment Rebate Fund,	
at Tax Commission - confidential records.	03-31

Topic	Opinion
TAX CREDITS	
Moratorium	10-10
TAXPAYERS	
Allocation of liability among joint filers	02-2
TEACHERS (see EDUCATION OR SCHOOL TEACHERS)	
TELECOMMUNICATIONS ACT, OKLAHOMA	
Constitutionality of	98-37
TELEMARKETER RESTRICTION ACT	
Text Messaging	02-38
Wireless telephone	02-38
TERMINALLY ILL AND PERSISTENTLY UNCONSCIOUS ACT, RIGHTS OF	
Constitutional law	06-7
<i>Five Wishes</i> [®] - advance directive form	06-7
Withdrawal of hydration/nutrition	06-7
TOBACCO	
Sale to minor	85-191
Smoking in public places	02-40
TOBACCO SETTLEMENT ENDOWMENT TRUST FUND ACT	
Board of Directors, power of	07-30
Budget, operating, board of directors	05-38
Earnings, definition of	11-11
Legislation directing expenditures	07-30
TORT	
Sewer backup, has no authority to pay private property damages	09-4
Trespass, hunting dog on land of another	95-37
TOURISM AND RECREATION DEPARTMENT	
Advertising, contracting for	88-70
Annual conference, partnering with private entities	13-16
Authority to enter into promotional partnerships	13-10
Duties & responsibilities, ensure public access	08-22
Leasing	
municipal land for use as public park	14-6
state park facilities to concessionaires	08-22
Sale of	
land	84-86
State park	98-18
State Park Ranger, certified police officer, jurisdiction state parks	05-16
State Park Trust Fund, may not be used for administrative expenses	11-13

Topic	Opinion
TRADEMARKS	
Counterfeit mark, definition of	01-20
TRAFFICKING IN CHILDREN	83-162
TRAFFICKING IN ILLEGAL DRUGS ACT	00-45
TRANSFORMATIONAL JUSTICE ACT	07-37, 08-10
TRANSFORMATIONAL JUSTICE INTERAGENCY TASK FORCE	
Power and duties.	07-37
TRANSPORTATION, DEPARTMENT OF	
Advertising, highway billboards, placement of signs	09-8
Arbitration agreements	87-29
Authority to	
acquire land, secure federal funds	92-26
purchase railroad lines	97-90
Bonds or obligations, swaps	05-42
Competitive Bidding Act	84-194
Industrial access roads, establishing design standards	85-134
Overweight permits, rules	92-12
Powers, express, incidental or necessary	05-42
Road machinery	83-212
Rural Transportation Assistance Program	00-10
TRAUMA SYSTEMS IMPROVEMENT AND DEVELOPMENT ACT, OKLAHOMA	
Trauma Care Assistance Revolving Fund	
Legislature’s authority, transfers, narrow power.	14-17
Municipal courts	
jurisdictional power, lack.	05-1
ordinances, may only collect fines established by	05-1
TRAVEL REIMBURSEMENT ACT, STATE	
Agency discretion	84-122
Banking Board, reimbursement of members	83-224
Board of Regents, Rogers State College	83-228
County Officer	
fixed monthly travel allowance	87-117
monthly travel allowance	99-68
reimbursement within and outside the county	83-229
travel reimbursement.	99-68
Emergency Medical Service Districts	83-280
Expenses, authorized	06-29
Mileage	06-29

Topic	Opinion
<i>TRAVEL REIMBURSEMENT ACT (CONT.)</i>	
Moving expenses, payment of	92-10
Notary Public, travel reimbursement	87-65
Out-of-State transportation, method of.	84-31
Reimbursement of Trustees	85-148
State officer, foreign	86-148
Temporary vs. permanent employee.	84-122
Witnesses, criminal proceedings	89-22
 TREASURER, OKLAHOMA STATE	
Authority to enter repurchase agreements	90-34
Duties	
members of Board of Equalization	05-28
Small Business Linked Deposit Act	88-52
<i>Ex officio</i> member of Grand River Dam Authority	98-43
Federal funds deposited in State Treasury	83-310
Guaranteed Investment Contracts	
lack of authority to invest in	95-55
Investment of State funds	
agency directed	96-19
guaranteed investment contracts, no authority to invest in	95-55
Linked deposits, new/renewal	95-29
Mechanic's and Materialmen's Liens	
affecting proof of financial responsibility	83-203
Notice under Unclaimed Property Act	
authority to publish	00-37
requirements	00-37
Punitive Damages Awards	83-263
Records, taped telephone conversations.	93-2
Unclaimed Property Act	00-37, 06-21
 TRESPASS	
County Assessors right to enter private property	05-49
Private property	02-31
 TRUST FUNDS	
Cemetery Merchandise Trust Fund Act	96-85
Perpetual Care Fund Act.	96-85
School land	
Commissioners of Land Office	04-31
Constitutional provisions	04-31
Enabling Act	04-31
investments, restrictions and administration of.	04-31
irrevocable trust for schools	04-31
Tobacco Settlement Endowment Trust Fund	05-38

Topic	Opinion
TRUTH IN SENTENCING ACT	
Burden of proof	
sentencing enhancers.	97-113
TULSA COMMUNITY COLLEGE AREA SCHOOL DISTRICT	
Local incentive levy	84-187
TURNPIKE AUTHORITY, OKLAHOMA	
Authority to engage attorney	87-60
Bonds or obligations, swaps	05-42
Condemnation	
prerequisites (withdraws 71-425).	99-66
Dual office holding	85-58
Jurisdiction, law enforcement	
Investigation, Oklahoma State Bureau of, jurisdiction	06-25
Public Safety, Dept. of, law enforcement jurisdiction	06-25
Powers, express, incidental or necessary	05-42
Public liability insurance, purchase of	84-201
Revenue bond financing	05-05
Transfer to state road system	05-05
Transportation Authority, Oklahoma	05-05
UNCLAIMED PROPERTY ACT	
Deceased persons, documents required to support claim	06-21
Notice requirements	00-37
UNFAIR SALES ACT	
Applicability to short-term promotional events	11-24
Selling health-care goods or services at less than cost	97-18
UNIFORM ACTS	
Uniform Act to secure the attendance of witnesses	
from without a State in criminal procedures	98-35
Uniform Commercial Code	11-1
Uniform Controlled Dangerous Substances Act.	88-86, 00-45, 00-46
Uniform disposition of Unclaimed Property Act	
business corporation's voluntary dissolution	86-45
unclaimed property fund/cheat	84-141
Uniform Services Employment & Reemployment Rights Act of 1994	10-3
UNIFORM BUILDING CODE COMMISSION	
Fees, not subject to 10% gross fees assessment	10-6
Revolving fund, authority over.	10-6
UNIFORM CONTROLLED DANGEROUS SUBSTANCES ACT	
	00-45, 00-46

Topic	Opinion
UNIFORM ELECTRONIC TRANSACTIONS ACT	
Effect	
Archives and Records Commission.01-13, 01-14
State	
agencies records.	01-13
banking records.	01-14
UNIFORM SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS ACT OF 1994	
Notice, oral authorized.	10-3
OKLA. CONST. art. II, § 12, not pre-empted by.	11-16
State law preempted.	10-3
UNIVERSITY OF OKLAHOMA	
Contracts.	98-20
Use of facilities.	83-149
URBAN RENEWAL	
Municipality, use of eminent domain to acquire real property.	01-19
Real property, disposition to private parties for redevelopment.	01-19
UTILITIES (see PUBLIC SERVICE CORPORATIONS)	
VEHICLE LICENSE AND REGISTRATION ACT, OKLAHOMA	
	86-109
VEHICLES, STATE	
Adoption of state policies.	07-18
Law enforcement exceptions	
ABLE Commission employees.	06-42
OBNDD agents, transporting family members, commute.	95-34
Military reduced-rate tags.	08-28
Personal Use.	95-34, 07-18
Public purpose.	07-18
VENDING MACHINES	
School activity funds.	03-21
Taxation of.	88-39
VETERANS	
Closed register.	84-48
Merit system preference.	86-1
Reemployment rights, service credit.	90-28
VETERANS AFFAIRS, DEPARTMENT OF	
Secretary for Veterans Affairs, salary.	95-26

Topic	Opinion
VETERINARIAN	
Consultant, authority to prescribe, dispense, or sell prescription drugs . . .	01-21
Definitions: dangerous drugs, legend drug, prescription drug, drug order or written order	01-21
Dispensing dangerous drugs	
authority to prescribe, dispense, or sell prescription drugs	01-21
after 11-01-01	01-45
veterinarian-client-patient relationship	00-46
Prescriptions	
authority to dispense, sell and prescribe	01-21
dispensing after 11-01-01	01-45
Veterinary prescription drug	
prescription, certification of	02-7
wholesaler or distributor	02-7
VETERINARY MEDICAL EXAMINERS, STATE BOARD OF	
Licensure	
fees	97-42
qualifications	98-9
VETERINARY PRACTICE ACT, OKLAHOMA	
Veterinary prescription drug	
dispense, need a valid veterinarian-client-patient relationship	00-46
prescription, certification of	02-7
wholesaler or distributor	02-7
VITAL STATISTICS COMMISSIONER	
Birth certificates, supplemental	04-8
VOCATIONAL-TECHNICAL EDUCATION (see also EDUCATION)	
Alternative education, requirements	00-12
Charter Schools Act	00-12
Contract teachers (modifies 71-299)	83-247
Curricula, formulation of programs (modifies 71-299)	83-247
Districts	
annexation	14-4
college districts, not a political subdivision	09-2
local incentive levy	84-187
college districts	08-32
overlap areas	08-32
mill levy (partially withdraws 84-187)	86-105
petition for election on millage levy	88-64
tuition payment by credit card	90-8
Motor Vehicles, identification of	83-86

Topic	Opinion
<i>VOCATIONAL-TECHNICAL EDUCATION (CONT.)</i>	
Private vocational schools	
private prisons	00-3
School-to-work	96-31
Tuition payment by credit card	90-8
 VOLUNTEER	
Civil liability	01-26
 VOLUNTEER FIRE DEPARTMENTS	
Government Tort Claims Act (withdraws 86-95)	89-65
Water, providing free or reduced rate	02-33
 VOTER REGISTRATION REQUIREMENTS	
Driver license number disclosure	97-3
Residence	97-45
Social Security number disclosure	97-3
 WASTE TIRE RECYCLING ACT, OKLAHOMA	
Constitutional questions	
gifts	00-1
public purpose	00-1
Waste Tire Recycling Indemnity Fund	00-1
Erosion control projects compensation	
eligibility for	97-52
Tire Recycling Fee, not revenue raising bill	95-58
Waste tire recycling and interstate commerce	05-47
 WATER QUALITY STANDARDS	
Beneficial use designation, water quality criteria	85-87
Department of Agriculture	
best management practices	97-107
Role of Board of Agriculture	97-95
 WATER RESOURCES BOARD	
Antidegradation policy	84-124
Authority	
to issue permits, discharge into State waters	90-2
to sell water for use in another state	93-20
Beneficial use	
dilution of animal waste	99-21
Central Purchasing Act	84-137
Emergency grants, administration by Executive Director	83-241
Executive Director, delegation of authority to	83-241
Non-profit Rural Water Districts	84-134

Topic	Opinion
<i>WATER RESOURCES BOARD (CONT.)</i>	
North Texas Municipal Water District	93-20
Sardis Reservoir	93-20
State Water Plan	
water storage fees to county by municipalities	01-6
Statewide Water Development Revolving Fund	
as security for investment certificates	83-1
<i>(see Reherman v. Oklahoma Water Resources Board 1984)</i>	
authority to administer grants	83-146
use for Tar Creek Project	84-4
Water quality standards	85-87
Water Storage and Control Facilities Act	83-146
fees to county by municipalities	01-6
<i>WEAPONS, CONCEALED (see also SELF-DEFENSE ACT)</i>	
Parking lots, locked in vehicles	
prisons	04-38
schools	04-38
Public libraries may ban	95-96
Oklahoma Self-Defense Act, peace officer exception	96-60
<i>WELFARE</i>	
Guardianship, exemption from court costs	13-15
Medicaid, funding of	00-33
<i>WHEAT UTILIZATION, RESEARCH AND MARKET DEVELOPMENT COMMISSION</i>	
Appointments to Commission	
power of Governor	88-5
Open Meeting, Open Records	84-189
Right to provide information	83-45
<i>WHISTEBLOWER ACT</i>	00-51
<i>WILDLIFE CONSERVATION COMMISSION, OKLAHOMA</i>	
Authority	
acquire land by exchange	88-84
cut timber/prescribed burning	04-26
Constitutional agencies	99-22
Disposing of real property, procedure for	88-84
Employees, set salary schedule for	96-71
Game Wardens, limit and scope of power	95-16
Health insurance, authority to purchase	84-72
Incentive awards to employees	85-17
McCurtain County Wilderness Area	04-26
Purchase of real property	85-25

Topic	Opinion
<i>WILDLIFE CONSERVATION COMMISSION (CONT.)</i>	
Reserve Game Wardens	
Director's power to appoint	95-16
Retirement system (withdrawn by 95-45)	86-54
Statutory grant of right to use real property	
cessation of original use	96-58
Wildlife management areas	
authority to regulate running dogs for sport	99-61
WILDLIFE CONSERVATION DEPARTMENT	
Constitutional agencies.	99-22
Hunting dog on land, with/without permission	95-37
Public road definition	95-108
Wildlife management areas	
authority to regulate running dogs for sport	99-61
WILL ROGERS MEMORIAL COMMISSION	
Contract with United Daughters of the Confederacy	85-105
WIRETAP	
Plain view interceptions	
use and disclosure by law enforcement.	00-45
WITNESSES	
Prisoner as witness, costs	98-35
Travel reimbursement, criminal proceedings	89-22
Witness fees, State employees	83-114
WORKERS' COMPENSATION ACT/BENEFITS	
Agencies	
reinsurance	99-3
requirement to purchase from State Insurance Fund	99-49
Certificates of non-coverage, repealed	05-22
Commission, Open Meeting Act, confidential deliberations	14-14
Confidential	
Assessment Rebate Fund, at Tax Commission	03-31
Employer exemptions, relation by blood or marriage	07-8
Fund, Workers' Compensation	14-16
Horse Racing Commission has authority to fine licensees.	13-3
Indians	
insurer who provides insurance to, is subject to jurisdiction of	06-4
not	
"employer" under Act	06-4
required to provide coverage or subject to jurisdiction of.	06-4

Topic	Opinion
<i>WORKERS' COMPENSATION ACT/BENEFITS (CONT.)</i>	
Labor, Department of	
assess civil penalties for noncompliance	13-3
workplace safety services	99-34
Longevity pay	84-17
“Necessary and integral” test	01-55
Open Records, access to open & closed claims - files under specific provision in Title 85	10-8
Owner-employee exemption.	97-110
Premium rates	85-111
Principal employer, secondary liability	01-55
School districts	90-9
Single family residential dwelling exemption	01-55
Taxation rate/compensation awards	
political and municipal subdivisions.	96-50
Teacher’s sick leave	84-12
Volunteer employees.	85-135
WORKERS' COMPENSATION COURT	
License requirement for appointment to court	88-25
Open Meeting Act, Executive sessions, confidential deliberations	14-14
Open Records, access to open & closed claims - files under specific provision in Title 85	10-8
Physician Advisory Committee	
insurance, workers compensation	99-28
WORKFORCE INVESTMENT ACT OF 1998.	00-47
WORKPLACE DRUG AND ALCOHOL TESTING ACT	
Confidentiality	97-79
Testing facility	06-3
WRECKER AND TOWING SERVICES	
Regulation of	84-115
YOUTHS	
Jails	07-20
ZONING	
Capitol-Medical Center Improvement and Zoning Commission	83-91, 03-27
City-County regulations, reservoir	86-21
Concentrated animal feeding operations	98-31
Contracts purporting to limit zoning powers	98-19
Metropolitan Area Planning Commission	
jurisdiction of land exclusively in municipality limits	98-6

Topic	Opinion
<i>ZONING (CONT.)</i>	
Municipality right to enforce on State-owned land	98-2
Scenic Rivers Commission.	83-16
Used Motor Vehicle and Parts Commission.	83-35

Cumulative Opinions Construed 1968 – 2014

Construed = Definitions

- C = Clarification
- D = Distinguished
- L = Legislation
- M = Modified
- O = Overruled
- OI = Overruled by Implication (Opinion not mentioned)
- PW = Partially Withdrawn
- W = Withdrawn
- * = This Opinion not specifically withdrawn but may have been withdrawn by implication. *See or compare* Opinion or case indicated.

Cumulative Opinions Construed 1968 – 2014

Opinion	Construed	Cited In
09-13	M	09-39
08-26	C	2012-21
07-8	(L)	Statute repealed
06-7	(L)	Statutory amendment (2006)
06-11	(O)	2012-18
02-9	(L)	Statutory amendment (2003)
01-2	(O)	2012-18
01-21	*	See 01-45 (superseding in index)
00-57	(O)	<i>M & W Rest., Inc. v. Okla. Alcoholic Beverage Laws Enforcement Comm'n</i> , 63 P.3d 559 (Okla. Ct. App. 2003)
99-29	(M)	99-29A
98-15	(O)	<i>M & W Rest., Inc. v. Okla. Alcoholic Beverage Laws Enforcement Comm'n</i> , 63 P.3d 559 (Okla. Ct. App. 2003)
98-15	(PW)	00-57
91-1	(M)	Statutory amendment (1991)
91-2	(W)	06-7
91-10	(M)	<i>Davis v. Fieker</i> , 952 P.2d 505 (Okla. 1997)
91-14	*	See <i>Lenscrafters v. Okla. Bd. of Exam'rs in Optometry</i> , Dist. Ct. of Oklahoma County Case No. CJ-94-6873
89-36	(W)	07-31
89-41	(PW)	93-1
89-53	*	See <i>Quinlan v. Koch Oil</i> , 25 F.3d 936 (10th Cir. 1994)
88-10	(M)	04-6
88-45	(M)	90-25
88-61 & 88-41	(W)	07-31
88-73	(PW)	05-14
88-110	(M)	Statutory amendment
87-7	(W)	07-31
86-1	(M)*	Statutory amendment
86-54	(W)	95-45
86-95	(W)	89-65

Opinion	Construed	Cited In
86-139	(W)	92-12
85-19	(D)	85-145
85-38	(M)	87-30
85-155	(O)	<i>Branch Trucking v. Okla. Tax Comm'n</i> , 801 P.2d 686 (Okla. 1990)
85-157	(W)	07-31
84-66	(W)	07-31
84-76	(W)	07-31
84-88	(W)	84-164
84-102	(W)	01-18
84-108	(W)	90-32
84-187	(PW)	86-105
84-197	(W)	11-3
83-1	(O)	<i>Reherman v. Okla. Water Res. Bd.</i> , 679 P.2d 1296 (Okla. 1984)
83-58	(D)	83-155
83-158	(W)	89-72
83-173	(PW)	84-62
83-182	(O)	<i>Davis v. Fieker</i> , 952 P.2d 505 (Okla. 1997)
83-202	(O)	<i>York v. Turpen</i> , 861 P.2d 763 (Okla. 1984)
83-284	(W)	93-32
83-292	(W)	98-2
83-300	(W)	14-12
82-6	(O)(W)	95-14
82-11	(W)	95-45
82-68	(M)	82-169
82-81	(L)	25 O.S.Supp.1995, § 311(11), notice of special meeting does not require agenda
82-155	(O)	<i>Woods Dev. v. Meurer Abstract</i> , 712 P.2d 30 (Okla. 1985)
82-186	(O)	Workers' Compensation Court
82-251	(W)	2014-5
81-120	(PW)	86-131
81-126	(W)	87-21
81-148	(W)	92-26
81-159	(W)	00-47 <i>State ex rel. Dep't of Transp.</i> , 646 P.2d 605 (Okla. 1982)
81-183	(M)	90-34
81-189	(M)	90-34
81-191	(W)	83-24
81-214	(O)	<i>Int'l Ass'n. of Firefighters, Local No. 2479 v. Thorpe</i> , 632 P.2d 408 (Okla. 1981)

Opinion	Construed	Cited In
81-225	(PW)	86-151
81-256	(O)	<i>Allen v. Okla. Unif. Ret. Sys. for Justices and Judges</i> , 769 P.2d 1302 (Okla. 1988)
81-306	(W)	87-88
81-318	(M)	81-318
80-15	(W)	2014-5
80-21	(OI)	<i>See</i> 89-65
80-51	(D)	<i>Grand River Dam Auth. v. State</i> , 645 P.2d 1011 (Okla. 1982)
80-63	*	<i>See State ex rel. Dep't of Human Serv. v. Malibie</i> , 630 P.2d 310 (Okla. 1981)
80-68	(W)	83-138
80-100	(W)	01-18
80-102	(OI)	<i>See</i> 83-115
80-122	(W)	88-53
80-145	(W)	96-47
80-213	(M)	88-23
80-213	(W)	92-22
80-215	(M)	02-37
80-218	(O)	<i>City of Kingfisher v. State</i> , 958 P.2d 170 (Okla. Ct.App. 1998)
80-269	(M)	83-200
80-272	(O)	OKLA. CONST. art. X, § 26 (1996)
80-295	(M)	83-200
80-302	(L)	<i>See</i> 89-65
80-310	(M)	91-27
79-32	(M)	83-290
79-39	(W)	88-102
79-44	(M)	82-169; 85-96
79-78	(W)	87-38
79-108	(M)	82-169; 85-96
79-143	(W)	88-54
79-168	(OI)	<i>Rockwell v. Clay</i> , 780 P.2d 700 (Okla. 1989)
79-216	(M)	90-32
79-286	(O)	<i>Cartwright v. Hillcrest Inv.</i> , 630 P.2d 1253 (Okla. 1981)
79-299	(M)	82-169; 85-96
79-311	(O)	<i>Draper v. State</i> , 621 P.2d 1142 (Okla. 1980)
79-313B	(O)	<i>Draper v. State</i> , 621 P.2d 1142 (Okla. 1980)
79-337	(O)	<i>Davidson Oil Country Supply v. Pioneer Oil</i> , 689 P.2d 1279 (Okla. 1984)
79-356	(M)	82-169

Opinion	Construed	Cited In
78-122 (unpublished)	(W)	79-76
78-132	(M)	83-290
78-159	(W)	79-129
78-168	(W)	79-243
78-186	(W)	79-35
78-201	(W)	96-40
78-206	(M) (W)	See 80-127; 80-158
78-208	(M)	See <i>Int'l Ass'n of Firefighters, Local No. 2479 v. Thorpe</i> , 632 P.2d 408 (Okla. 1981)
78-224	(W)	99-1
78-256	(O)	2012-18
78-276	(M)	81-226
78-312	*	See 89-39
77-158	(W)	80-298
77-193	(W)	83-138
77-222	(O)	<i>Okla. Ass'n of Mun. Attorneys. v. State</i> , 577 P.2d 1310 (Okla. 1978)
77-254	(PW)	77-310; also see 96-71
77-259	(O)	<i>Monson v. Okla. Corp. Comm'n</i> , 673 P.2d 839 (Okla. 1983)
77-260	(M)	See <i>Int'l Ass'n of Firefighters, Local No. 2479 v. Thorpe</i> , 632 P.2d 408 (Okla. 1981)
76-110	*	See 89-39
76-114	(D)	83-97
76-123	*	See 89-75
76-209	*	See 85-17
76-210	*	Statutory amendment 11 O.S.1991, § 39-106
76-303	(PW)	95-94 (statutory modifications)
76-311	(W)	81-112
76-372	*	See 87-150
75-155	(W)	79-28
75-206	(W)	76-249
75-236	*	See 89-65
75-264	(M)	77-262
75-265	(M)	76-182
75-282	(W)	92-12
75-298		See 86-32; 83-314
75-311	(W)	77-222 (see above)
74-149	OI	<i>Musgrove Mill, LLC v. Capitol-Med. Ctr. Improvement</i> , 2009 OK 19 (Okla. 2009)
74-184	(W)	81-39

Opinion	Construed	Cited In
74-190	(W)	81-148
74-214	(W)	79-286
74-229	(W)	81-7
74-221	(M)	09-2
73-143	*	75-291
73-158	(W)	84-126
73-177	(M)	76-324
73-289	*	<i>See</i> 76-132
73-327	(W)	98-2
72-105	(W)	07-40
72-119	*	75-291
72-202	(W)	88-45 (modified, see above)
72-222	(M)	77-105
72-256	(W)	98-22
71-114	(W)	82-185; 87-135
71-128	(M)	82-169
71-155	(W)	71-224
71-171	(W)	81-102
71-176	(W)	Statutory change <i>see</i> 84-41; 84-198
71-217	(W)	81-102
71-219	(W)	76-168
71-231	(W)	77-241
71-299	(M)	83-247
71-396	(W)	73-297
71-396	(O)	2010-3
71-403	*	<i>See</i> 83-120
71-422	(W)	80-223
71-425	(W)	99-66
71-446	(W)	81-286
70-115	(W)	78-175
70-135	(W)	70-135A
70-150	(PW)	94-15
70-210	(W)	81-7
70-266	*	<i>See</i> 72-110
70-301	(W)	71-103
69-106	(W)	69-191
69-125	(W)	69-236
69-156	(W)	79-168
69-156	*	<i>State v. Dunbar</i> , 618 P.2d 900 (Okla. 1980)
69-181	(W)	70-201
69-185	*	<i>See Grand Jury of McCurtain County v. Cecil</i> , 679 P.2d 1308 (Okla.Ct.App.1983)

Opinion	Construed	Cited In
69-197	(W)	69-245
69-231	(W)	75-248
69-236	*	<i>See</i> 75-291
69-318	(PW)	69-359
69-340	(W)	72-163
69-360	(M)	70-348
68-111	(W)	72-208
68-116	*	<i>See</i> 85-114 (<i>also see</i> 76-374)
68-142	(W)	76-380
68-161	(W)	68-295
68-172	(W)	69-304
68-176	(W)	76-168
68-185	(W)	71-316
68-211	(W)	71-115
68-215	(W)	7-127 (<i>also see</i> 78-134)
68-230	(W)	81-225
68-250	(W)	68-342
68-267	(W)	75-250
68-287	(W)	77-127 (<i>also see</i> 78-134)
68-293	(PW)	68-346
68-326	(M)	77-186
68-326	(W)	72-144
68-344	(W)	68-349
68-357	(W)	88-38
67-102	(W)	68-248
67-200	(M)	77-151
67-295	(W)	68-329
67-331	(PW)	71-170
67-346	(W)	70-242
67-348	(M)	83-236
67-377	(W)	68-102
67-392	(W)	69-203
67-420	(W)	71-317
67-448	(W)	68-110
66-156	(W)	76-161
66-460	(W)	70-161
65-115	(W)	74-188
65-185	(O)	<i>Hurd v. Freeland</i> , 442 P.2d 344 (Okla. 1966)
65-302	(W)	79-60
65-428	(M)	83-292

Opinion	Construed	Cited In
64-108	(PM)	93-36
64-129	(W)	70-161
64-196	(W)	76-168
64-242	(W)	75-157
64-360	(W)	70-161
63-258	(PW)	74-168
63-304	(W)	82-109
63-443	(W)	67-155
63-499	(W)	70-161
63-523	(W)	70-161
62-236	*	<i>See 75-291</i>
2/24/61	(M)	76-182
7/27/61 to Dir. of Pers. Board	(W)	77-192
10/19/61 to S.F. Lester	(W)	78-207
2/11/60 to Sen. G. Miskovsky	(W)	67-155
4/25/60 to W.M. Smith	(W)	69-172A
9/13/60 to W.L. Keating	(W)	67-155
11/1/60 to Hodge	(W)	83-119
11/9/59 to Roy T. Hill	(W)	87-7
1/31/58	(W)	74-273
2/21/58 to James Berry	(W)	82-109
8/4/58	(W)	71-244
5/11/57 to R.F. Barry	(W)	70-161
12/20/57 to Harry Pitchford	(W)	69-288
2/16/56	(M)	76-182
3/2/56 to George Alge	(W)	72-271
12/3/55 to Board of Public Affairs	(W)	84-126
6/5/54 to Helen Sittel	(W)	84-126
2/13/54 to G.F. Matthews	(PW)	71-288
3/4/53 to Charles G. Morris	(W)	72-180
7/22/53	(M)	76-182
3/15/52 to Loyd W. Hadwiger	(M)	70-277

Opinion	Construed	Cited In
4/21/51	(W)	71-244
8/10/49 to Joseph McClellan	(W)	84-126
8/10/49 to R.T. Stuart	(M)	88-6
2/18/46 & 3/6/46 dealing with interim financing	(W)	71-331
9/13/44 to John Rogers	(W)	69-288
12/12/41 to John Oliver	(M)	88-6
2/17/36	(PW)	74-168
3/14/35	(PW)	74-168
8/21/35	(W)	69-288

