

# OPINIONS OF THE ATTORNEY GENERAL

**2015 OPINIONS  
OF THE  
ATTORNEY GENERAL  
E. SCOTT PRUITT**

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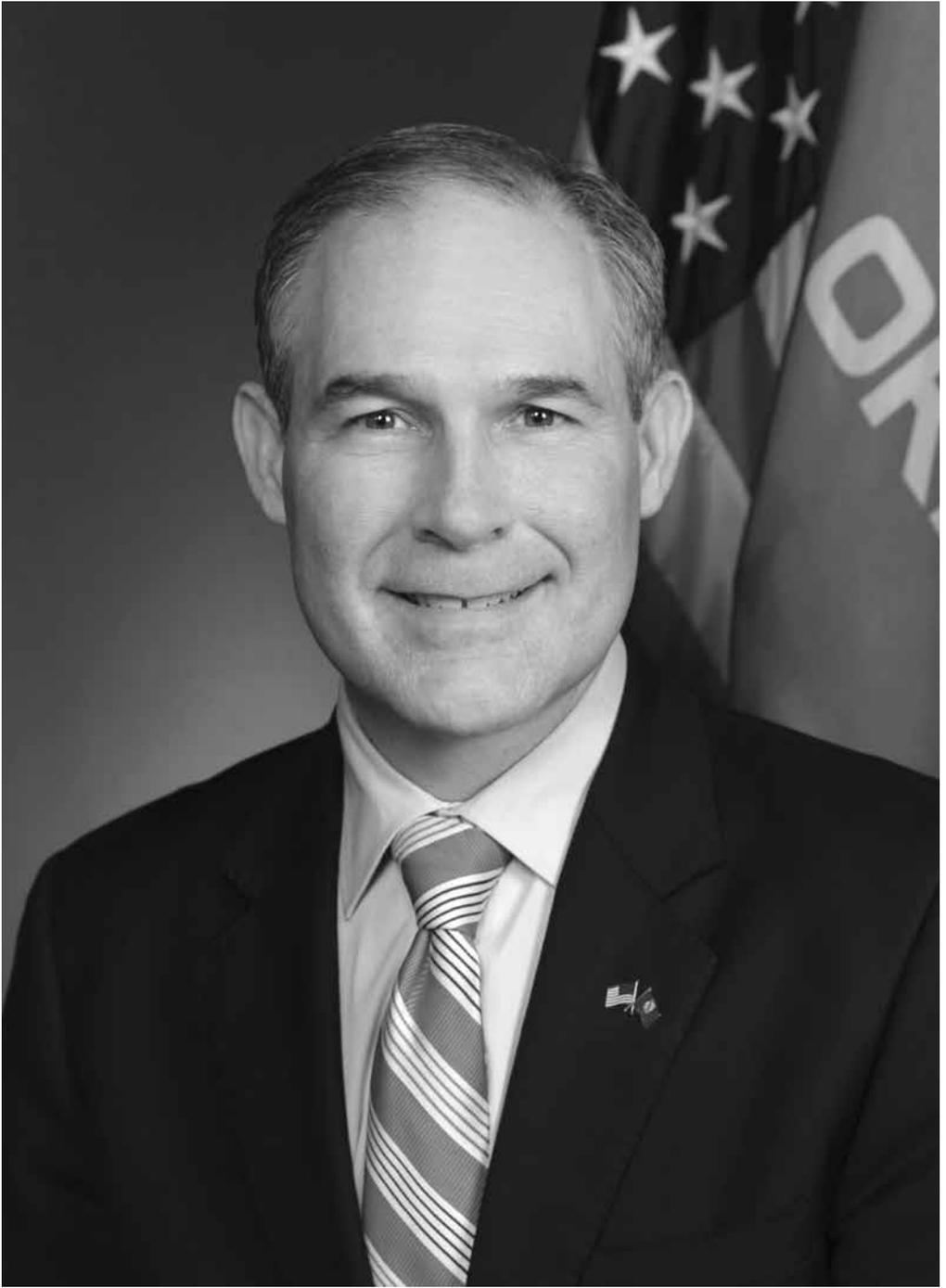
# PREFACE

During the fifth year of his administration, Attorney General Scott Pruitt issued thirteen Attorney General Opinions, which are included in this 2015 volume. These Opinions provide legal clarity on issues ranging from protections afforded student speech to the deliberative process privilege.

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 an Attorney General Opinion is 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. When an opinion request is received, an Assistant Attorney General is assigned to thoroughly research all issues involved and to draft a proposed opinion. The draft is presented in opinion conference by the Assistant Attorney General where it is the subject of rigorous debate amongst the conferees, including the Attorney General, First Assistant Attorney General, the Solicitor General, and others, before it is approved and signed by Attorney General Pruitt.

As has been stated by previous Attorneys General, opinion conference is amongst 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 intellectual effort of the many participants in the process.



**E. SCOTT PRUITT**  
**ATTORNEY GENERAL OF OKLAHOMA**

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## STATEMENT OF POLICY OF THE ATTORNEY GENERAL REGARDING ISSUING 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). The state officer requesting a formal opinion should thus state the nature and extent of his or her official interest when making a request.
2. The Attorney General is not authorized to issue 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). A District Attorney submitting an opinion request should provide 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 opinion requests should be written and should contain a complete statement of the issues together with a clear, concise question of law based upon the information in the request.
5. Opinion requests 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 be accompanied by a legal opinion supported by citations of authority pertaining to the matters submitted.

6. As chief law officer of the State, the Attorney General represents and seeks to further the broad interests of the State. Thus, the Attorney General issues formal opinions concerning questions of statewide interest or application.
7. The Attorney General will not furnish formal opinions 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**



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**OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF OKLAHOMA**

by

**E. SCOTT PRUITT  
ATTORNEY GENERAL**

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*Editors***



**OPINIONS OF THE  
ATTORNEY GENERAL  
OF OKLAHOMA  
VOLUME 45**

**OPINION 2015-1**

R. Darrell Weaver, Director

April 23, 2015

Oklahoma Bureau of Narcotics and Dangerous Drugs Control

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

**May the Oklahoma Bureau of Narcotics and Dangerous Drugs Control (“OBNDD”) reimburse an existing agent for lodging, meals, and incidental expenses following the agent’s transfer to a new duty station until that agent finds a new home?<sup>1</sup>**

You state that OBNDD serves law enforcement functions throughout Oklahoma and that, in order to perform these functions, it stations agents in locations across the State.<sup>2</sup> At times, as you explain, OBNDD determines that enforcement goals would be best served by permanently transferring an agent from one

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<sup>1</sup> Your initial request limited payments of lodging and per diem to only thirty (30) days following transfer, but the statutes do not impose such a limitation. Letter from R. Darrell Weaver, Director, Oklahoma Bureau of Narcotics and Dangerous Drugs Control, to E. Scott Pruitt, Oklahoma Attorney General (Nov. 6, 2014) (on file with author); *see* 74 O.S.Supp.2014, § 500.3 (“Claims . . . shall not cover periods in excess of thirty-one (31) days. However, claims may be filed for subsequent periods of not to exceed thirty-one (31) days.”).

<sup>2</sup> *See* Letter from R. Darrell Weaver, Director, Oklahoma Bureau of Narcotics and Dangerous Drugs Control, to E. Scott Pruitt, Oklahoma Attorney General (Nov. 6, 2014) (on file with author).

area to another.<sup>3</sup> You further state that, in order to ensure that these transfers proceed smoothly, OBNDD would pay for lodging and provide a per diem for meals and incidental expenses when it transfers one of its agents.<sup>4</sup> We conclude that OBNDD does have the authority to make such payments under the State Travel Reimbursement Act, 74 O.S.2011 & Supp.2014, §§ 500.1–500.37, for the reasons set forth below.

## I.

### **THE STATE TRAVEL REIMBURSEMENT ACT, 74 O.S.2011 & SUPP.2014, §§ 500.1–500.37, AUTHORIZES THE PAYMENT OF LODGING EXPENSES AS WELL AS A PER DIEM FOR MEALS AND INCIDENTAL EXPENSES COVER- ING A REASONABLE PERIOD OF TIME WHEN EMPLOYEES HAVE BEEN TRANSFERRED TO A NEW WORK LOCATION BUT HAVE NOT FOUND A NEW HOME.**

The State Travel Reimbursement Act (“Act”), 74 O.S.2011 & Supp.2014, §§ 500.1–500.37, provides the legal framework governing travel reimbursement for most state employees. The statute allows for “[o]fficials and employees of the state, traveling on authorized state business, [to] be reimbursed for expenses incurred in such travel.” 74 O.S.Supp.2014, § 500.2(A). Given that authorization, the relevant criterion for determining whether an employee may be reimbursed is whether that employee is “traveling on authorized state business.” *Id.* Section 500.7 of the Act helpfully provides a definition of “travel status” for determining whether meals and lodging may be reimbursed:

[T]ravel status for meals and lodging purposes shall be defined as absence from the officer’s or employee’s home area and/or official station area while performing assigned official duties. Provided however, employees whose duties are normally mobile and statewide or multicounty in nature shall not be deemed to have an official station.

74 O.S.2011, § 500.7(A).

The definition has two elements: “absence from the officer’s or employee’s home area and/or official station area” and “performing assigned official duties.” *Id.* An employee who has been assigned to a new location and must begin work there would clearly be “performing assigned official duties.” *Id.* As such, your request primarily revolves around the first element: whether the assignment

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

satisfies “absence from the officer’s or employee’s home area and/or official station area.” *Id.*

We make several observations about the first element that have particular salience. First, as a general matter, we interpret statutes “in accordance with their plain, ordinary meaning according to the import of the language used.” *Hubbard v. Kaiser-Francis Oil Co.*, 2011 OK 50, ¶ 8, 256 P.3d 69, 72. The plain, ordinary meaning of a phrase like “home area” would ordinarily refer to a person’s house, dwelling, or abode. The Oklahoma statutes do not appear to provide a more particular legal meaning for “home area.”

Additionally, Section 500.7 contrasts “home area” and “official station area,” indicating that these terms refer to two different locations. Use of the conjunction “and/or” with these terms makes this contrast clearer, strongly indicating the existence of two separate locations. That is, language of the statute implies that travel status can be triggered by absence from *either* location (“or”) or *both* locations (“and”). Therefore, because “official station area” would refer to the work location to which an employee has been assigned, “home area” must refer to a location other than the assigned work location.

In light of these observations, the statute’s usage of “home area” refers to the area where an employee has a house, dwelling, or abode. Absence from that area may satisfy the first element of travel status under the State Travel Reimbursement Act.<sup>5</sup> Travel status can thus occur when an employee must begin work at a new location without having yet found a new home in connection with the transfer to that new work location. Such an employee has moved locations to “perform[] assigned official duties” and would have “absence,” in this situation, from the employee’s “home area.” 74 O.S.2011, § 500.7. This result may seem anomalous as an instance of travel because the employee has no expectation of returning to the original work location. However, the Act’s definition of “travel status” does not suggest that, at the end of travel, the employee must return to the same home or official station area.

We note that travel status would not continue indefinitely just because an employee has declined to sign a lease or purchase a house. An employee only has a reasonable period of time to find a new home before his or her current living situation should be considered his or her new “home area” under the statute. Although travel may cover periods in excess of thirty-one (31) days through the use of multiple claims or vouchers, the maximum period covered by a claim or voucher shows that the Legislature clearly intends for travel to be of a limited

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<sup>5</sup> Although absence from the home area may satisfy the first element of travel status, other requirements must be met before travel reimbursement may be paid. Thus, an employee with a long commute from his or her home area to his or her official station area would not be eligible for reimbursement of lodging, meals, and incidental expenses because he or she would not be performing “assigned official duties,” 74 O.S.2011, § 500.7, nor would such a commute be considered “authorized state business,” 74 O.S.Supp.2014, § 500.2(A).

duration. 74 O.S.Supp.2014, § 500.3. Hence, an agency only has the authority to pay lodging and per diem for meals and incidentals for a reasonable period to give the employee an opportunity to find a new home.

## II.

### **THE STATUTE COVERING EMPLOYEES' MOVING EXPENSES RELATED TO HOUSEHOLD GOODS, 74 O.S.2011 & SUPP.2014, §§ 500.51–500.55, DOES NOT RESTRICT PAYMENTS FOR LODGING AND MEALS DURING PERIODS WHERE AN EMPLOYEE BEGINS WORK IN A NEW LOCATION AND HAS NOT FOUND A NEW HOME.**

Because your request involves the payment of certain expenses when an employee has been transferred to a new location and must find a new home, it potentially implicates the employee moving expenses statute. If Oklahoma's relatively restrictive moving expenses statute sets out the exclusive benefits the State offers in these scenarios, OBNDD would not be able to pay lodging and per diem for transferred agents notwithstanding the apparent availability of these payments under the State Travel Reimbursement Act. Hence, an examination of the breadth of the moving expenses statute is in order.

The moving expenses statute provides the following:

Any employee who is permanently transferred at the request of any state agency . . . shall be entitled to payment by the State of Oklahoma to the carrier for the following services provided by the carrier:

1. (a) The actual line-haul cost of moving ten thousand (10,000) pounds of the employee's household goods, . . . or  
(b) Movement of one manufactured home and its contents . . . ;
2. Special servicing of appliances . . . ; and
3. The insuring of the employee's household goods and/or manufactured home . . . .

Any additional moving expenses incurred as a result of said transfer shall be assumed by the employee.

74 O.S.2011, § 500.53. Violations of the moving expenses statute can constitute a misdemeanor with a fine of up to a thousand dollars (\$1,000.00), imprisonment

for up to ninety (90) days, and mandatory termination from state employment. *Id.* § 500.55(B).

These requirements do not, however, restrict the ability of an agency to make payments for lodging or meals and incidental expenses. Such payments do not fall under the rubric of “moving expenses,” many of which (beyond the covered ones) must be “assumed by the employee.” While the statute does not clearly define “moving expenses,” the statute expressly states that only the cost of literally moving an employee’s goods may be covered, *id.* § 500.51, and that such cost can only be covered in part, *id.* § 500.53. But nothing in the statute suggests it is intended to limit the payment of travel expenses when an employee must start working in a new location and has not yet had the opportunity to actually locate and move into a new home. In short, the moving expenses statute does not apply to temporary lodging and per diem for transferred employees.

Prior opinions of this office do not dictate otherwise. In 1977, Senator Gideon Tinsley asked two questions related to moving expenses for employees of the Department of Wildlife Conservation. A.G. Opin. 77-310, at 345. One of those questions involved whether that agency could pay a one-time moving allowance of \$2,500 to employees. *Id.* The moving expenses statute did preclude the payment of that allowance because the allowance was to cover moving expenses and did not follow the requirements of the moving expenses statute, which were clearly exclusive. *Id.* at 350-51 (citing 74 O.S.Supp.1977, § 500.53). However, the payments discussed in your request could be paid for employees who have not yet found a new home but who must begin working in a new location, and these payments are not covered by the moving expenses statute. Further, the amounts paid would clearly track expenses related to lodging and meals as specified in the State Travel Reimbursement Act, 74 O.S.2011 & Supp.2014, §§ 500.1–500.37. Thus, the reasoning of the prior opinion of this office does not apply. The moving expenses statute does not restrict the payments implicated by your request.

### III.

#### CONCLUSION

We conclude that the Oklahoma statutes, as currently written, allow the payment of lodging and per diem expenses for employees in transition to a new work location who have not yet found a new home. This opinion does not necessarily condone or approve the wisdom of any particular decision by an agency to pay such expenses for an employee. Until the Legislature provides additional instructions, it is the task of each agency to ensure that it expends state funds prudently.

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

- 1. The State Travel Reimbursement Act, 74 O.S.2011 & Supp.2014, §§ 500.1–500.37, does authorize the payment or reimbursement of lodging, meal, and incidental expenses covering a reasonable period of time when employees have been permanently transferred to a new work location but have not found a new home.**
- 2. The statute covering employees’ moving expenses related to household goods, 74 O.S.2011 & Supp.2014, §§ 500.51–500.55, does not restrict payment or reimbursement of lodging, meal, and incidental expenses during periods when employees have been permanently transferred to a new work location and have not found a new home.**

**E. SCOTT PRUITT**  
ATTORNEY GENERAL OF OKLAHOMA

**JARED HAINES**  
ASSISTANT SOLICITOR GENERAL

## OPINION 2015-2

The Honorable Mike Ritze  
State Representative, District 80

May 4, 2015

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

- 1. Does the State Treasurer have legal authority to keep information regarding unclaimed property confidential under the Uniform Unclaimed Property Act or the Oklahoma Open Records Act in response to a disclosure request?**
- 2. What information obtained in the course of the State Treasurer’s administration of the Uniform Unclaimed Property Act may or must be kept confidential by law?**
- 3. Does the State Treasurer have legal authority under the Uniform Unclaimed Property Act to adopt administrative rules that define or limit the scope of confidentiality accorded to information regarding unclaimed property?**
- 4. May the State Treasurer share otherwise confidential information with other entities, including States, in the course of administering the Uniform Unclaimed Property Act?**
- 5. Does the payment of monies from the Unclaimed Property Fund affect any confidentiality accorded to information related to those payments?**

Because your request involves the Uniform Unclaimed Property Act (“UPA”), 60 O.S.2011 & Supp.2014, §§ 651–688, we briefly review the general purpose of the Act to provide some context. The UPA provides a comprehensive system for handling unclaimed property presumed to be abandoned. Under the statutory framework, individuals or entities holding unclaimed property must file reports on and transfer such property to the State after a defined length of time during which the true owner has not claimed the property or had contact with the holder. *Id.* §§ 661(A), 664(A). The periods of time run for several years depending on the exact type of property. *E.g.*, 60 O.S.2011, § 652(A) (setting a period of five years for most types of bank accounts); *id.* § 657.4(A) (setting a period of three years for intangible property such as securities).

Once transferred to the State, the Treasurer—statutorily tasked with administration of the UPA, *e.g.*, *id.* §§ 669, 672, 688(A)—must take steps to safeguard the property (or its value after sale) and make it available for the true owner, *id.* §§ 667(A), 668(A), 674(A). The UPA thus protects property owners by providing an orderly system for them to recover their property. Further, the Act ensures that the State and the general public receive the benefits of such property rather

than allowing the holder of such property to reap windfalls from their customers. See 1 AM.JUR.2d *Abandoned, Lost, & Unclaimed Property* § 44 (2015) (citing *Douglas Aircraft Co. v. Cranston*, 374 P.2d 819, 821 (Cal. 1962)). Your questions involve the State Treasurer's obligations of confidentiality regarding information obtained as part of the administration of this system. We consider each question in turn below.

## I.

### **THE STATE TREASURER DOES HAVE LEGAL AUTHORITY UNDER THE UNIFORM UNCLAIMED PROPERTY ACT AND UNDER THE OKLAHOMA OPEN RECORDS ACT TO KEEP CERTAIN INFORMATION CONFIDENTIAL, INCLUDING HOLDER REPORTS, CLAIMANT INFORMATION, INVESTIGATORY REPORTS, AND ANY OTHER INFORMATION REQUIRED OR ALLOWED TO BE KEPT CONFIDENTIAL BY LAW.**

You first ask whether the State Treasurer has any authority to keep records confidential and, if so, you also ask what information may be kept confidential. Your question implicates the Oklahoma Open Records Act ("Open Records Act"), 51 O.S.2011 & Supp.2014, §§ 24A.1–24A.30, which imposes a general requirement that the "records" of "public bodies" and "public officials" must be made available to individuals who request them. 51 O.S.2011, § 24A.5.

The Act's general disclosure requirement applies to the Treasurer. Under the Open Records Act, records include "all documents" whether in the form of a "book, paper, photograph, microfilm, data file[] created by or used with computer software," and more so long as they are "created by, received by, under the authority of, or coming into the custody, control or possession of public officials." 51 O.S.Supp.2014, § 24A.3(1). "Public bod[ies]" include any "office, department, board, bureau, commission, . . . executive office" or other listed entity "supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property," while "public official[s]" include officials or employees of a public body. *Id.* § 24A.3(2), (4). The Treasurer constitutes both a public body, *id.* § 24A.3(2) (defining public body to include an "executive office . . . supported in whole or in part by public funds"), and a public official, *id.* § 24A.3(4) (defining public official to include "any official . . . of any public body").

Therefore, the Treasurer has a basic obligation to make disclosure available for all records received by the Treasurer, all records under his or her authority, and anything else otherwise satisfying the definition of "record" under the Open

Records Act.<sup>1</sup> Despite the breadth of this basic disclosure obligation, however, various provisions of the Open Records Act and the UPA create exceptions to this general requirement and thereby authorize or even require confidentiality. Thus, we conclude that the Treasurer does have the authority to keep certain records confidential, and we discuss relevant categories of confidential information below.

**A. Several confidentiality and publication rules of the Open Records Act create limitations on the State Treasurer’s basic disclosure obligation.**

To begin, the Open Records Act contains several exceptions that render its disclosure requirements inapplicable to particular records. 51 O.S.2011, § 24A.5. One set of exceptions includes records required by law to be kept confidential such as those protected by unwaived state evidentiary privileges, the minutes of executive sessions held by public bodies, driving records, and confidential medication information. *See id.* § 24A.5(1) (“The [Act] . . . does not apply to records specifically required by law to be kept confidential[.]”). The Open Records Act also contains numerous provisions allowing public officials to keep otherwise open records confidential. These provisions allow for the confidentiality of some information found in public employee personnel records, 51 O.S.Supp.2014, § 24A.7(A), certain personal notes of public officials, 51 O.S.2011, § 24A.9, and more, 51 O.S.2011 & Supp.2014, §§ 24A.10a, 24A.11, 24A.13–24A.16a, 24A.19, 24A.22–24A.24, 24A.27–24A.28 (creating various exceptions to the Act). The Open Records Act also contains a litigation file and investigatory report provision, which allows authorized agency attorneys and the Oklahoma Attorney General to keep litigation files and investigatory reports confidential. 51 O.S.2011, § 24A.12. To the extent authorized attorneys have such files on behalf of the Treasurer when administering the unclaimed property system, this exception would apply.

**B. Several confidentiality and publication rules of the UPA also create limitations on the State Treasurer’s basic disclosure obligation.**

The UPA has several provisions affecting confidentiality and disclosure. First, the UPA requires that the State Treasurer arrange for publication of a list of the names and last known addresses of persons thought to have a claim to property in the system. 60 O.S.2011, § 662. Because this list must be published,

<sup>1</sup> The Open Records Act may not have always so straightforwardly applied to the administration of the UPA. In *Tulsa Tribune Co. v. Okla. Horse Racing Comm’n*, 1986 OK 24, 735 P.2d 548, the Oklahoma Supreme Court interpreted the Open Records Act to require individuals whose information would be subject to release to have an opportunity to object that such a disclosure would invade the individual’s privacy or damage the individual’s commercial interests. *Id.*, 1986 OK at ¶¶ 12-15, 735 P.2d at 555. The Court subsequently applied the *Tulsa Tribune* holding to the UPA. *Merrill v. Okla. Tax Comm’n*, 1992 OK 53, ¶¶ 1-4, 831 P.2d 634, 640–41. However, the *Tulsa Tribune* interpretation was superseded by statute. *Okla. Pub. Emp. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶ 4 n.5, 267 P.3d 838, 842 n.5 (citing *City of Lawton v. Moore*, 1993 OK 168, 868 P.2d 690). *Tulsa Tribune* thus has no bearing on the UPA today.

the names and last known addresses of true owners clearly could not be kept confidential. This information generally comes to the Treasurer through reports filed by holders. The provision requiring holders to file reports listing unclaimed property also requires that these reports remain confidential except for the required-to-be-disclosed names and addresses. 60 O.S.Supp.2014, § 661(F). Thus, apart from the information that must be published, the reports themselves must remain confidential.

Second, the UPA also provides for confidentiality of certain information when a person files a claim in the unclaimed property system. The UPA grants the Treasurer the following authority:

Any information submitted by a claimant . . . may be kept confidential by the State Treasurer if it contains personal financial information of the claimant, social security numbers, birth certificates . . . or any other document which is confidential by statute if in the custody of another public agency or person.

60 O.S.2011, § 674(A). Thus, a disclosure request directed to records containing information about claimants could be rejected by the Treasurer under this statutory provision.

While claimant information must generally be kept confidential, the UPA also allows for the Treasurer to hold a hearing under the Administrative Procedures Act to determine whether a claim should be paid. *Id.* § 675(A). When the Treasurer holds such a hearing, the Treasurer must prepare a written document with findings of fact and a decision as to the validity of all claims filed and considered at the hearing. *See id.* The UPA specifically provides that the written decision becomes a “public record,” lifting confidentiality requirements for any information included in the document. *Id.* In other words, claimant information generally remains confidential if it satisfies the statutory requirements, but it becomes public if included in a written decision on the validity of a claim after an Administrative Procedures Act hearing.

The UPA therefore contains several provisions dealing with confidentiality and disclosure that constitute part of the relevant legal framework for information requests. Still other legal provisions external to the Open Records Act and the UPA may also apply.

**C. The UPA and the Open Records Act both reference external law as a source of confidentiality, which may further limit the State Treasurer’s basic disclosure obligation.**

Other provisions of law could require that records be kept confidential. The Open Records Act states that it does not apply to records where those records are “specifically required by law to be kept confidential”; the provision goes on to list examples of those laws requiring confidentiality, including the evidentiary

privilege exception mentioned above. 51 O.S.2011, § 24A.5(1). Further, as also noted above, the UPA provides that information submitted by claimants “may be kept confidential” in circumstances involving personal financial information, social security numbers, or “any other document which is *confidential by statute if in the custody of another public agency or person.*” 60 O.S.2011, § 674 (emphasis added). External provisions of law can thus prevent disclosure directly under the Open Records Act or create an obligation of confidentiality under the UPA.

The Financial Privacy Act is one notable example of outside law. 6 O.S.2011, §§ 2201–2208. That Act requires certain financial institutions to maintain the confidentiality of their customers’ personal information in the face of disclosure requests from “government authorit[ies]” except upon written consent or a subpoena valid under the Act. *Id.* § 2203. The Oklahoma Supreme Court has interpreted this confidentiality obligation to extend to discovery in litigation between private parties because any judge ordering such discovery would qualify as a “government authority.” *Alva State Bank & Trust Co. v. Dayton*, 1988 OK 44, ¶¶ 1, 5, 755 P.2d 635, 635–36. The Court has further determined that this statute applies to financial institutions engaged in the unclaimed property system: financial institutions must share information with the Treasurer under the Act’s provisions relating to regulatory oversight and, without those provisions, the Treasurer would be required to obtain a subpoena. *See Lincoln Bank & Trust Co. v. Okla. Tax Comm’n*, 1992 OK 22 ¶¶ 9–14, 827 P.2d 1314, 1319–22. Although information obtained from covered financial institutions about presumably abandoned property would be handled by the Treasurer in the manner described in Part I(B) above, that information would remain confidential if the Act’s abandonment requirements were not satisfied. *Id.* ¶¶ 11–14, 13 n.38, 827 P.2d at 1321–22, 1321 n.38. Hence, beyond the publication, disclosure, and confidentiality rules included in the Open Records Act and the UPA, any provision of law like the Financial Privacy Act could potentially trigger the Treasurer’s confidentiality obligations.

## II.

**THE STATE TREASURER HAS LEGAL AUTHORITY UNDER THE UPA TO ADOPT ADMINISTRATIVE RULES CLARIFYING CONFIDENTIALITY REQUIREMENTS UNDER THE ACT, BUT THE STATE TREASURER MAY NOT ADOPT ANY RULES CONTRARY TO LAW. THIS OPINION DOES NOT ADDRESS WHETHER CURRENT REGULATIONS ARE CONSISTENT WITH THE UPA.**

Your third question involves the authority of the State Treasurer to create administrative rules that interact with the confidentiality requirements mentioned

above. The Treasurer clearly has authority under the UPA to enact administrative rules “necessary . . . to carry out the provisions of the [UPA] . . . in accordance with the Administrative Procedures Act.” 60 O.S.2011, § 681. This rulemaking authority allows the Treasurer to clarify confidentiality rules associated with the administration of the unclaimed property system. In fact, the Treasurer has exercised this authority in the context of confidentiality, *see* OAC 735:80-1-5, although this opinion does not address the validity of the regulations currently enacted by the Treasurer.

However, we observe that the Treasurer does not have the authority to enact administrative rules contrary to the Oklahoma statutes. In other words, the Treasurer may adopt rules regarding confidentiality in order to resolve ambiguity, but the Treasurer may not create confidentiality where none otherwise exists. A clarifying interpretation could be entitled to the “highest respect from the courts” if such a rule becomes the subject of litigation, but any interpretation by the Treasurer “must [be] reasonable and not clearly wrong.” *Indep. Fin. Inst. v. Clark*, 1999 OK 43, ¶ 13, 990 P.2d 845, 851. One unreasonable interpretation of the UPA’s confidentiality provisions would be to contravene a clear, binding provision of law. Hence, the Treasurer can clarify or define the confidentiality and disclosure rules governing his or her administration of the UPA, but the Treasurer may not contravene clear, binding law. This opinion does not address the validity of the Treasurer’s current regulations.

### III.

#### **THE STATE TREASURER HAS LEGAL AUTHORITY UNDER THE UPA TO SHARE OTHERWISE CONFIDENTIAL INFORMATION IN VERY LIMITED CIRCUMSTANCES SUCH AS WITH OTHER STATES.**

Your fourth question asks whether, notwithstanding an otherwise binding confidentiality obligation, the State Treasurer may share information with other entities, including other States, in order to properly administer the UPA. We first note that the Act must allow disclosure to persons outside the Treasurer’s office as a matter of common sense lest the Act be reduced to a dead letter. As the Oklahoma Supreme Court has noted, a “statute will be given a reasonable and sensible construction: one that will reconcile its provisions and avoid inconsistencies and absurdities.” *City of Jenks v. Stone*, 2014 OK 11, ¶ 15, 321 P.3d 179, 183. For example, the Treasurer may have to engage with holders concerning otherwise confidential information as part of examinations, *see* 60 O.S.2011, § 678; the Treasurer may need to communicate otherwise confidential information to claimants as part of the process of determining whether to make payments, *see id.* §§ 674, 675; the Treasurer may need to disclose information for the sake of enforcing provisions or rights in court, *see, e.g., id.* § 679(A);

and the Treasurer may have to share confidential information with an attorney when receiving services from an attorney not employed within the Treasurer's own office.

Second, the Act also allows the Treasurer to make agreements to exchange information with other States' unclaimed property administrators in order to ensure that the proper government takes custody of unclaimed property. *Id.* § 683.1(A). The UPA itself contains provisions regarding which States should take custody of property, *id.* § 684.1(A). Therefore, sharing information with other States is crucial to the Act's effectiveness. Additionally, according to the United States Supreme Court, federal law preempts state law when a determination of custodial taking of unclaimed property between States must be made—resolving serious past controversies between States and raising the importance of proper channels of communication between States. *See Am. Petrofina Co. v. Nance*, 697 F.Supp. 1183, 1187–88 (W.D. Okla. 1986) (citing *Texas v. New Jersey*, 379 U.S. 674 (1965)) (striking down Oklahoma's provisions governing priority as preempted by federal law). The Legislature thus had important reasons for ensuring that the Treasurer had the authority to share information with other States.

Given the breadth of confidentiality for holder reports and claimant information discussed above, it would also be an untenable reading of the statute if all of the normal rules of confidentiality applied: the Treasurer would essentially only be able to share with other States the name and last known address of an owner. This would not fulfill the objectives of information sharing in ensuring that the appropriate State receives custody of unclaimed property. The Treasurer can, therefore, share otherwise confidential information with other States pursuant to a valid agreement under the Act.

In light of the above considerations, the Treasurer does have the authority to share otherwise confidential information with a very narrow class of other parties. The Treasurer may communicate information to parties necessarily included in a reasonable application of the UPA, including the agency's attorneys and those parties who submit information in the first place. Other persons making requests would not be entitled to information under the Act's confidentiality obligations. Further, the Treasurer has the authority to share otherwise confidential information with other States' unclaimed property administrators.

#### IV.

**THE PAYMENT OF MONIES FROM THE UNCLAIMED PROPERTY FUND DOES NOT AFFECT THE REQUIREMENT OF CONFIDENTIALITY THAT HAS ATTACHED TO INFORMATION RELATED TO THE BASIS FOR SUCH PAYMENTS, BUT A HEARING ON THE VALIDITY OF A CLAIM DOES RESULT IN A DECISION DEEMED A PUBLIC RECORD.**

Your fifth and last question asks whether a payment from the Unclaimed Property Fund extinguishes confidentiality requirements attached to information providing the basis for payment. In some circumstances, the decision to pay a claim may coincide with circumstances requiring the extinguishment of confidentiality obligations, but in other circumstances it would not. Specifically, as noted above, the Treasurer *may* hold a hearing under the Administrative Procedures Act to determine whether a claim against unclaimed property should be considered valid. 60 O.S.2011, § 675(A). The UPA requires that a written decision be prepared after such hearings, and these decisions must become public records—they are no longer confidential. *Id.* But other information about the claimant not included in the written decision does not become public under the Act. *See id.* Further, no provision of law otherwise requires disclosure of the confidential information obtained from or about a claimant just because that claimant has had his/her property returned to him/her. Thus, if the Treasurer does not hold a hearing on the validity of the claim, nothing extinguishes the confidentiality attaching to a claimant's information even if the Treasurer pays the claim.

#### V.

#### CONCLUSION

We have discussed the Uniform Unclaimed Property Act, the Oklahoma Open Records Act, and other provisions of law related to your questions about confidentiality in the administration of the unclaimed property system. These provisions of law create a system that thoroughly protects the confidentiality of personal information while publishing the name and last known address of the true owners of property in order for them to have notice of the existence of their claims.

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

- 1. The State Treasurer has legal authority under the Uniform Unclaimed Property Act, 60 O.S.2011 & Supp.2014, §§ 651–688, and under the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2014, §§ 24A.1–24A.30, to keep certain information confidential.**

2. **The State Treasurer has the authority to maintain the confidentiality of holder reports, 60 O.S.Supp.2014, § 661(F), certain claimant information, *id.* § 674(A), litigation files and investigatory reports, 51 O.S.2011, § 24A.12, and any other information where confidentiality would be allowed or required by law, *id.* § 24A.5.**
3. **The State Treasurer has legal authority under the Uniform Unclaimed Property Act to adopt administrative rules clarifying confidentiality requirements under the Act, 60 O.S.2011, § 681, but the State Treasurer may not adopt any rules contrary to law. This Opinion does not address whether current regulations are consistent with the Uniform Unclaimed Property Act.**
4. **The State Treasurer has legal authority under the Uniform Unclaimed Property Act to share otherwise confidential information in very limited circumstances, such as with other States. *E.g.*, 60 O.S.2011, § 683.1.**
5. **The payment of monies from the Unclaimed Property Fund does not affect the requirement of confidentiality that attaches to information related to the basis for such payments, but a hearing on the validity of a claim results in a decision deemed a public record. 60 O.S.2011, § 675(A).**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

JARED HAINES  
ASSISTANT SOLICITOR GENERAL

## OPINION 2015-3

The Honorable Mike Ritze  
State Representative, District 80

June 11, 2015

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

- 1. If a legislator or other public official submits a written request for the issuance of a formal written Attorney General Opinion pursuant to 74 O.S.2011, § 18b(A)(5), is that written opinion request for the issuance of a formal written Attorney General Opinion a record which is subject to disclosure under the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2014, §§ 24A.1 – 24A.30?**
- 2. Would it make any difference in your response to question number 1 if an Open Records Act request for the written request for a formal Attorney General Opinion was an Open Records request specific to the official (i.e., an Open Records request for all written Attorney General Opinion requests submitted by a specific named official), compared to an Open Records request for all written request for the issuance of a formal written Attorney General Opinion by topic (i.e., a request for all opinion requests submitted to your office on the subject of the Unclaimed Property Act, for example)?**
- 3. Aside from the provisions of the Oklahoma Open Records Act, has it been the past practice of the Office of the Attorney General to regard opinion requests as confidential?<sup>1</sup>**
- 4. If the past practice of the Attorney General’s office has been to regard the opinion request document as confidential, has there been a change in the practice recently? If so, what is the reason for the change in the past practice?**
- 5. Regardless of whether your office treats the opinion request documents as a “record” for purposes of the Oklahoma Open Records Act, is there any legal basis upon which a legislator’s or other public official’s written request for the issuance of a formal written Attorney General Opinion would be a confidential or privileged communication?**

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<sup>1</sup> Your third and fourth questions do not pose questions of law. Rather, they are inquiries about historical practices of the office, which are not the proper subject of an Attorney General Opinion. We note, however, that the undersigned Senior Assistant Attorney General has served under six Attorneys General, and that during his thirty-four year tenure with the office, no one, to his knowledge, has ever considered a written request for a formal Attorney General Opinion to be confidential or privileged.

**I.****WRITTEN REQUESTS FOR THE ISSUANCE OF A FORMAL WRITTEN ATTORNEY GENERAL OPINION MADE BY A LEGISLATOR OR OTHER PUBLIC OFFICIAL ARE “RECORDS” AS DEFINED IN THE OKLAHOMA OPEN RECORDS ACT, 51 O.S. SECTIONS 24A.1 THROUGH SECTION 24A.30.**

The Oklahoma Open Records Act (“Open Records Act”) at Section 24A.3(1), in pertinent part, defines the term “Record” as follows:

“Record” means *all 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.

51 O.S.Supp.2014, § 24A.3(1) (emphasis added).

Under this definition, a written request for the issuance of a formal written Attorney General Opinion (“written request for a formal Opinion” or “request for an Attorney General Opinion”) made by a legislator or other public official pursuant to 74 O.S.2011, § 18b, is a “record” within the Oklahoma Open Record Act’s definition of that term because:

- A written request for a formal Attorney General Opinion is *a document*;
- A written request for a formal Attorney General Opinion is *received by and comes into the custody of the Attorney General or his representatives*;
- A written request for a formal Attorney General Opinion is *received by a public official*, and
- A written request for a formal Attorney General Opinion is *received in connection with the transaction of public business*.

All of your inquiries deal with written requests for a formal Opinion. Under the *Statement of Policy of the Attorney General Regarding Furnishing Formal*

*Opinions* [hereinafter *Policy*]—printed in the front of each volume of annually published formal written Attorney General Opinions—all requests for a formal Attorney General Opinion must “be written” and, among other things, “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.” OPINIONS OF THE ATTORNEY GENERAL OF OKLA., V. 44, at viii, ¶ 4 (2014).

That a request for a formal Attorney General Opinion is a *document* is clear, as such requests, under the Attorney General’s *Policy*, must be in **writing** and requests universally come in the form of a signed, written letter. Requests for formal Opinions are *received by* and *come into the custody of the Attorney General or his representatives*, as requests are addressed to the Attorney General and when received in the mail or otherwise, are documents within his custody, control or possession or the custody, control, or possession of his representatives.

Requests for a formal Opinion are *received by a public official*, as the Attorney General falls within the Open Records Act’s definition of the term “public official.” Under the Open Records Act, the term “public official” is defined, at 51 O.S.Supp.2014, § 24A.3(4), as follows: “‘Public official’ means *any official* or employee *of any public body* as defined herein [defined in the Open Records Act].” *Id.* (emphasis added).

The Attorney General is an *official of a public body* because the term “public body” includes *executive offices*, and the Attorney General’s office is an executive office. The Open Records Act defines “public body” as follows:

“Public body” shall include, but not be limited to, any 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. Except for the records required by Section 24A.4 of this title, “public body” does not mean judges, justices, the Council on Judicial Complaints, the Legislature, or legislators[.]

51 O.S.Supp.2014, § 24A.3(2) (emphasis added).

Article VI, Section 1 of the Oklahoma Constitution establishes the Attorney General as an executive official who must keep his executive office at the seat of government, Article VI, Section 1 providing, in pertinent part, as follows:

The *Executive authority* of the state *shall be vested* in a Governor, . . . *Attorney General*, . . . each of *whom shall keep his office and public records*, books and papers *at the seat of government* . . . .

*Id.* (emphasis added).

Being an executive official of an executive office—an office constituting a public body—the Attorney General is a “public official” under the Open Records Act. Thus, a document received by the Attorney General in connection with the transaction of public business is a record under the Oklahoma Open Records Act.

Furthermore, a written request for a formal Opinion is received “*in connection with the transaction of public business.*” 51 O.S.Supp.2014, § 24A.3(1). Section 18b(A)(5) of Title 74 imposes a duty upon the Attorney General, “[t]o give an opinion in writing upon all questions of law submitted to the Attorney General by the Legislature or either branch thereof, or by any state officer, board, commission or department,” and subsection (17) of Section 18b(A), imposes a duty upon the Attorney General to “respond to any requests for an opinion of the Attorney General’s office, submitted by a member of the Legislature, regardless of subject matter, by written opinion determinative of the law regarding such subject matter[.]” A written Opinion request is, thus, received “in connection with the transaction of public business”—the receipt of the written request being the first step in the process leading to the drafting and issuance of a formal written Attorney General Opinion. Consequently, a written request for a formal Opinion falls within the Open Records Act’s definition of “record”—a record which, under the provisions of Section 24A.5 of Title 51, must “be open to any person for inspection, copying, or mechanical reproduction during regular business hours[.]”

In sum, in answer to your first question, we conclude that a written request for a formal Opinion received by the Attorney General or his representatives is a “record” under the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2014, §§ 24A.1 through 24A.30, which must be made available for inspection and copying or mechanical reproduction under the requirements of that Act.

## II.

**A DOCUMENT THAT IS A RECORD UNDER THE OKLAHOMA OPEN RECORDS ACT IS A DOCUMENT WHICH MUST BE MADE AVAILABLE FOR INSPECTION, COPYING OR MECHANICAL REPRODUCTION, REGARDLESS OF WHETHER AN OPEN RECORDS ACT REQUEST TO INSPECT THE DOCUMENT IS TO INSPECT A SPECIFIC SINGLE DOCUMENT, OR IS A REQUEST TO INSPECT A GROUP OF DOCUMENTS DEALING WITH THE SAME SUBJECT OR WRITTEN BY THE SAME OFFICIAL.**

In your second question you ask whether our conclusion on whether a written request for a formal Opinion is a “record” under the Oklahoma Open Records Act would change based on how an Open Records request to inspect a “written request for a formal opinion” is made—i.e. a request for a specific document versus a request for a group of letters based on their subject or the name of the official who asked for the issuance of a formal Opinion.

As discussed above, whether a document falls within the Oklahoma Records Act’s definition of “record” depends on the document meeting various criteria. None of those criteria relate to how an Open Records request is made. Thus, there is no legal basis on which to conclude that a document ceases being a record under the Open Records Act based on how an Open Records request is made. Accordingly, a request for a formal Attorney General Opinion is a “record” under the Open Records Act, regardless of whether an Open Records request to inspect it is made based on the requestor’s name or its subject.

## III.

**THERE IS NO LEGAL BASIS UPON WHICH A WRITTEN REQUEST FOR A FORMAL ATTORNEY GENERAL OPINION WOULD BE A CONFIDENTIAL OR PRIVILEGED COMMUNICATION, AS:**

**1) THE OKLAHOMA OPEN RECORDS ACT’S BROAD DEFINITION OF “RECORD” ENCOMPASSES A WRITTEN REQUEST FOR A FORMAL ATTORNEY GENERAL OPINION,**

**2) THE LAW REQUIRES THAT FORMAL WRITTEN ATTORNEY GENERAL OPINIONS BE ANNUALLY PUBLISHED, AND**

**3) THE PUBLISHED FORMAL WRITTEN ATTORNEY GENERAL OPINIONS CONTAIN BOTH THE NAME OF THE REQUESTOR AND THE QUESTIONS ASKED.**

In your final question you ask, in effect, if there is any legal basis upon which an official's written request for a formal Opinion would be a confidential or privilege communication. As noted above: 1) the Oklahoma Open Records Act has a broad definition of "record"—a definition that encompasses a request for a formal written Opinion, 2) under Section 18b of Title 74, the Attorney General has a duty to respond to such requests, and 3) the written request for a formal Opinion is the first step in the process of the Attorney General's drafting and issuance of a formal written Attorney General Opinion in response to the written request.

The final step in the opinion process is the *annual publication* of formal written Opinions, which is required by Section 20(A) of Title 74, which, in pertinent part provides that, "[t]he Attorney General shall *annually publish all of the written opinions* which he promulgates in connection with the interpretation of the laws of the State of Oklahoma."

Given: 1) the law's requirement that formal written Attorney General Opinions be annually published; 2) the Oklahoma Open Records Act's broad definition of the term "record"—which encompasses written opinion requests, and 3) the fact that for more than forty years the published formal written Attorney General Opinions have included both the name of the official requesting an opinion and the question(s) asked, we conclude that there is no legal basis upon which a written request for a formal Attorney General Opinion would be a confidential or privileged communication.

Of course, it is possible that a written request for a formal Opinion could contain specific information—like information about an ongoing investigation—that is otherwise made confidential. In such a case, the confidential information, under 51 O.S.2011, § 24A.5(2), could be redacted before making the remaining portions of the written request available for inspection, copying or mechanical reproduction.

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

- 1. A written request for the issuance of a formal written Attorney General Opinion made by a member of the Legislature or another public official is a "record" under the Oklahoma Open Records Act, 51 O.S.2011 and Supp.2014, §§ 24A.1 through**

**24A.30, which must be made available for public inspection, copying or mechanical reproduction.**

- 2. A written request for the issuance of a formal written Attorney General Opinion is a record under the Oklahoma Open Records Act, 51 O.S.2001 and Supp.2014, §§ 24A.1 through 24A.30, regardless of whether an Open Records request to inspect it is a request to inspect a specific document or is an Open Records request to inspect a group of documents based on their subject or the name of the official requesting the issuance of a formal written Attorney General Opinion.**
- 3. Given: 1) the Oklahoma Open Record Act's broad definition of "record" at 51 O.S.Supp.2014, § 24A.3(1)—a definition which encompasses a written request for a formal written Attorney General Opinion; 2) the law's requirement, at 74 O.S.Supp.2014, § 20(A), that the Attorney General annually publish all written opinions, and 3) the fact that for over forty years the published formal written Attorney General Opinions have included both the name of the official requesting an opinion and the question(s) asked, there is no legal basis upon which a written request for the issuance of a formal written Attorney General Opinion would be a confidential or privileged communication.<sup>2</sup>**

E. SCOTT PRUITT

OKLAHOMA ATTORNEY GENERAL

NEAL LEADER

SENIOR ASSISTANT ATTORNEY GENERAL

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<sup>2</sup> Of course, it is possible that a written request for a formal written Attorney General Opinion could contain specific information—like information about an ongoing investigation—that is otherwise made confidential. In such a case, the confidential information, under 51 O.S.2011, § 24A.5, could be redacted before making the remaining portions of the written request available for inspection, copying or mechanical reproduction.

## OPINION 2015-4

The Honorable Steve Kunzweiler  
District Attorney, District 14

June 25, 2015

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

**May sales tax revenue raised for the purposes of “operating” a county jail be used for the day-to-day functions required or permitted by statute or regulation to operate a working jail?**

### I.

#### BACKGROUND

Your question centers upon the uses for which the proceeds of a county sales tax approved for the express purpose of “operating” a county jail may be lawfully spent. Your question is based upon concerns that arose from conclusions reached by the Attorney General in a recent Opinion regarding a different county sales tax approved under a much different county sales tax proposition. See A.G. Opin. 2014-15, at 87.

A county is an involuntary political subdivision of the State without inherent powers. *Johnston v. Conner*, 1951 OK 262, ¶ 7, 236 P.2d 987, 989; *Herndon v. Anderson*, 1933 OK 490, ¶ 16, 25 P.2d 326, 329; A.G. Opin. 2003-29, at 166 (quoting *Johnston*, 1951 OK 262, ¶ 7, 236 P.2d at 989). 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 (quoting *Herndon*, 1933 OK 490, ¶ 16, 25 P.2d at 329); A.G. Opin. 2003-29, at 166 (quoting *Johnston*, 1951 OK 262, ¶ 7, 236 P.2d at 989). And “[c]ounties 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.” A.G. Opin. 2014-12, at 73.

Every county in Oklahoma must either have a jail or, at county expense, “have access” to a jail located in another county or a jail operated by a private contractor. 57 O.S.2011, § 41. In counties operating a jail:

The sheriff shall have the charge and custody of the jail of his county, and all the prisoners in the same, and shall keep such jail himself, or by his deputy or jailer, for whose acts he and his sureties shall be liable.

19 O.S.2011, § 513. As shown below, the statutes and regulations governing the operation of county jails reflect the fact that county jails are prisons where “persons” are lawfully detained and confined. 57 O.S.2011, § 42. The Oklahoma State Department of Health is authorized to promulgate standards for the operation of county jails according to certain criteria provided by statute, and is required to inspect the jails at least one time each year to ensure compliance therewith. 74 O.S.Supp.2014, § 192(A). Extensive regulations applicable to the operation of county jails have been put into place by the Oklahoma State Department of Health. *See* OAC 301:670-5-1 – 670-5-11.<sup>1</sup> Counties must conform operation of the jail “in all respects” to these rules and directions:

The sheriff, or such person designated by law in his place, shall have charge of the county jail of his county and of all persons by law confined therein, and such sheriff or other officer is hereby required to conform, in all respects, to the rules and directions promulgated pursuant to Section 192 of Title 74 of the Oklahoma Statutes and of the district judge and communicated to him by the proper authority.

57 O.S.2011, § 47 (emphasis added). Jailers must be trained in accordance with standards set forth by the Oklahoma State Department of Health and may not be permitted to supervise jail inmates if the jailer does not meet such standards. 19 O.S.2011, § 513.1. Statutorily, the county sheriff must also “provide bed clothing, washing, board and medical care when required, and all necessities for the comfort and welfare of prisoners as specified by the standards promulgated pursuant to Section 192 of Title 74 of the Oklahoma Statutes.” 57 O.S.2011, § 52. And finally, jails that are operated by public trusts or private contractors must conform their operations to statutes and regulations governing jails operated by counties. 19 O.S.2011, § 744(A), (N); *see Tulsa Cnty. Deputy Sheriff’s Fraternal Order of Police v. Bd. of Cnty. Comm’rs*, 2000 OK 2, ¶¶ 11-12, 995 P.2d 1124, at 1129 [hereinafter FOP II].

<sup>1</sup> These regulations govern the procedures for jail inmate admission, release and records, OAC 310:670-5-1; procedures for the safety, security and control of staff, prisoners and visitors, OAC 310:670-5-2; procedures for the supervision of prisoners, OAC 310:670-5-3; procedures for prisoner rules and discipline, OAC 310:670-5-4; procedures for the classification and segregation of prisoners, OAC 310:670-5-5; procedures governing safety, sanitary and hygiene standards, OAC 310:670-5-6; procedures governing food services and dietary requirements for inmates, OAC 310:670-5-7; procedures for providing inmate medical care and health services, OAC 310:670-5-8; procedures for inmate mail and visitation, OAC 310:670-5-9; procedures governing staff training and development, OAC 310:670-5-10; and procedures governing operation of the jail’s physical plant, OAC 310:670-5-11.

Conformity with laws and regulations governing the day-to-day operation of county jails obviously requires payment of all the costs associated with compliance thereto. Counties are authorized by statute to levy a sales tax not to exceed 2 percent upon the gross proceeds or gross receipts of all sales or services in the county upon which a consumer sales tax is also levied by the State, and subject to approval by the county's voters of the levy. 68 O.S.2011, § 1370(A). The lawful use for the proceeds of the levied tax is subject to the limitations imposed by the Oklahoma Constitution, providing:

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). We now turn to resolve your specific question.

## II.

### **UNDERSTOOD WITHIN ITS HISTORICAL AND JUDICIALLY RECOGNIZED CONTEXT, USE OF THE SPECIAL COUNTY SALES TAX APPROVED BY A MAJORITY OF THE VOTERS IN 1995 FOR "OPERATION" OF THE TULSA COUNTY JAIL INCLUDES ALL OF THE JAIL'S REQUIRED DAY-TO-DAY COSTS.**

Your question centers upon a particular sales tax levied pursuant to Section 1370 and directed toward the operation of the Tulsa County jail. *See* 68 O.S.Supp.1994, § 1370(A).<sup>2</sup> This specific sales tax has been the subject of two published opinions of the Oklahoma Supreme Court. *See Tulsa Cnty. Deputy Sheriff's Fraternal Order of Police v. Bd. of Cnty. Comm'rs*, 1998 OK 44, 959 P.2d 979 [hereinafter *FOP I*.]; *FOP II*, 2000 OK 2, 995 P.2d 1124. While neither opinion specifically decided the precise issue posed in your question, both opinions address the reasons for the enactment of the county sales tax in question and also illuminate the proper purposes for the use of the sales tax revenue.

The court in *FOP I* related the historical circumstances prompting the sales tax proposition:

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<sup>2</sup> This version of Section 1370 governed substantive and procedural requirements for enactment of a county sales tax at the time the Tulsa County sales tax was referred and approved.

Tulsa County currently operates and maintains a consolidated city-county jail system located in the Tulsa County Courthouse, the Tulsa Police/Municipal Court Building, and the Adult Detention Center which is owned by the City of Tulsa. . . . The system has a history of disrepair and overcrowding. However, in 1987 and again in 1989, voters refused to approve property tax increases to build a new jail.

In 1994, the United States Justice Department investigated the jail system and found that the condition of the jail violated the constitutional rights of prisoners and detainees. Tulsa County negotiated a settlement whereby it agreed to build a new jail by November, 1998, to be occupied by February of 1999.

. . . On September 12, 1995, voters approved the following sales tax Proposition:

#### **PROPOSITION NO. 1**

**SHALL THE COUNTY OF TULSA, OKLAHOMA, BY ITS BOARD OF COUNTY COMMISSIONERS, LEVY AND COLLECT A FIVE-TWELFTHS PERCENT (5/12%) SALES TAX TO BE ADMINISTERED BY THE TULSA COUNTY CRIMINAL JUSTICE AUTHORITY FOR THE PURPOSE OF ACQUIRING A SITE AND CREATING, FURNISHING, EQUIPPING, OPERATING, MAINTAINING, REMODELING AND REPAIRING A COUNTY JAIL AND OTHER DETENTION FACILITIES OWNED OR OPERATED BY TULSA COUNTY AND/OR TO BE APPLIED OR PLEDGED TOWARD THE PAYMENT OF PRINCIPAL AND INTEREST ON ANY INDEBTEDNESS, INCURRED BY OR ON BEHALF OF TULSA COUNTY FOR SUCH PURPOSE, COMMENCING OCTOBER 1, 1995, AND CONTINUING THEREAFTER AND REDUCING TO ONE-QUARTER PERCENT (1/4%) ON THE DATE OF PAYMENT OR PROVISION FOR PAYMENT OF ALL INDEBTEDNESS, INCURRED BY OR ON BEHALF OF TULSA COUNTY FOR SUCH PURPOSE?**

*FOPI*, 1998 OK 44, ¶¶ 2-4, 959 P.2d, at 980 (emphasis added).<sup>3</sup> In addition to Proposition 1, the court also recognized the passage of a second, separate but

<sup>3</sup> We are informed by your office that the amount authorized under Proposition I has, upon the payment of all funded indebtedness, been subsequently reduced by the terms of the proposition to the 1/4 percent level. We are also informed that this year the sales tax revenue will account

contemporaneous sales tax proposition that was approved at the same time as Proposition 1, quoted above, that authorized an additional 1/12 percent sales tax for early intervention and delinquency prevention programs to be administered by the Tulsa County Criminal Justice Association (“TCCJA”) for a period commencing October 1, 1995, through and until October 1, 2001. *Id.* ¶ 4; *see also FOP II*, 2000 OK 2, ¶¶ 2-4, 995 P.2d, at 1127. “Operating” the Tulsa County jail has always been one of the several stated and approved purposes distinctly specified for this county sales tax.

When the Oklahoma Supreme Court visited the same matter again in *FOP II*, the court specifically characterized the sales tax authorized under Proposition No. 1 above to be “for the construction and operation of a new county jail.” *FOP II*, ¶ 3, 995 P.2d, at 1127 (emphasis added). Further, the court was called upon to define what “operation” of a jail entailed.<sup>4</sup> It found:

Section 192 of title 74 requires certain standards for many areas of jail operations such as: admission and release procedures, security, sanitary conditions, diet, clothing, living space, discipline, prisoners’ rights, staff training, safety, prisoner supervision and segregation of females, minors and the infirm. Under section 192 of title 74, the State Health Department is required to inspect county jails once a year and violations are to be reported to the district attorney. The Oklahoma Administrative Code, title 310, section 670, sets out additional standards for jail operations.

*FOP II*, ¶ 11, 995 P.2d, at 1129 (emphasis added). Accordingly, as previously interpreted by the Oklahoma Supreme Court, the Tulsa County jail’s “operations” that are lawfully funded by the sales tax include all of the costs associated with compliance to statutory and administrative standards for “jail operations” that are applicable to a county sheriff, whether the jail is operated by the county sheriff, a public trust, or by a private entity.

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for only \$26 million of the \$32 million required to run the jail, with the remainder coming from other revenue sources.

<sup>4</sup> In response to a non-delegation argument, the court found that privatized jails and jails administered by sheriffs must operate according to the same general statutes and regulatory requirements. *FOP II*, ¶ 10, 995 P.2d, at 1129

### III.

**APPROVAL BY THE COUNTY VOTERS OF A SALES TAX FOR WHICH “OPERATING” THE COUNTY JAIL WAS A STATED PURPOSE FOR THE USE OF THE TAX PROCEEDS INCLUDES ALL COMPLIANCE COSTS ASSOCIATED WITH THE STATUTES AND REGULATIONS GOVERNING THE OPERATION OF THE JAIL.**

Plainly the authorized uses for the proceeds of the tax submitted to Tulsa County’s voters for their approval include: “operating . . . a County Jail and other detention facilities owned or operated by Tulsa County.”<sup>5</sup> As shown above, lawfully “operating” the Tulsa county jail includes incurring all of the compliance costs associated with state statutes and regulations governing the lawful operation of county jails. As such, the proceeds of this sales tax may be employed to fund any or all of such costs.

Further, as was noted above, the sales tax authorized for the funding of the operation of the Tulsa County jail was approved at the same time as was a separate proposition that was also approved by the voters for a 1/12 percent county sales tax, the proceeds of which were also to be administered by the TCCJA and used for the funding of “early intervention and [juvenile] delinquency prevention programs.” *See FOPI*, ¶ 4, 959 P.2d, at 980. Plainly the proceeds of the Tulsa County jail sales tax could not be used for funding early intervention and juvenile delinquency prevention programs, nor could the proceeds of the sales tax for the early intervention and juvenile delinquency prevention programs be used for the funding of the operation of the Tulsa County jail, because under either scenario such use would be outside the specific but different uses approved by the voters for the proceeds of these taxes. *See OKLA. CONST.* art. X, § 19.

Lastly, as noted above, we have been informed that your question was prompted by A.G. Opinion 2014-15. That opinion dealt with the scope of the lawful use of county sales tax proceeds levied for the “financing, construction and equipping of a juvenile delinquents detention facility and juvenile justice facilities in Canadian County, including design, construction, expenses, operations, equipment and furnishings[.]” as proposed and approved in the ballot title considered by the voters of Canadian County. Canadian Cnty. Comm’rs. Res. No. 96-20 [emphasis added].<sup>6</sup> We found in A.G. Opinion 2014-15 that because the language of ballot title measures must be written in basic words without special meanings, ballot titles must be understood according to the plain, ordinary meaning of the words used in the ballot title. Since tax revenues levied for one

<sup>5</sup> Tulsa Cnty., Okla., Proposition No. 1 (Sep. 12, 1995).

<sup>6</sup> County sales tax levies must be approved by a majority of the registered voters voting at an election called thereon. 68 O.S.2011, § 1370(A).

purpose are constitutionally restricted from being used for any other purpose, *see* OKLA. CONST. art. X, § 19, the narrowly stated purpose for the Canadian County sales tax, as disclosed by the plain, ordinary meaning of the words used in the Canadian County sales tax proposition, restricted the use of the sales tax proceeds to funding only the “financing, construction and equipping of a juvenile delinquents detention facility and juvenile justice facilities,” *id.*,<sup>7</sup> and did not authorize the use of such sales tax proceeds for non-facility costs such as the funding of juvenile programs using the sales tax proceeds.<sup>8</sup> Considering the narrow scope of the uses approved by the voters for the proceeds of the Canadian County sales tax, such proceeds could not be used in any portion for these programs any more than Tulsa County was authorized to use its approved jail tax to fund early intervention and juvenile delinquency prevention programs.

We must also observe that since the ballot title for the Canadian County referendum examined in A.G. Opinion 2014-15 sets forth the purpose for only that particular tax levy, neither it, nor A.G. Opinion 2014-15 should affect sales tax levies approved in other counties under other ballot proposals that likewise must be governed only by the purposes as set forth in the resolutions and ballot titles specifically appertaining to them.

### CONCLUSION

Seen within its historical context, the overall reason and purpose for the Board of County Commissioners for Tulsa County submitting the county jail sales tax proposition for approval of the voters of Tulsa County was to replace existing jail facilities that were then being operated in a manner deemed constitutionally deficient to the rights of prisoners and detainees incarcerated therein with a new jail that could be legally operated. Also clear from these cases is that the TCCJA, the public trust created for and empowered to administer the sales tax authorized by the Tulsa County voters, is required by law to see that the sales tax proceeds it administers will be spent to “operate” the new jail in a manner consistent with all of Oklahoma’s statutory and regulatory requirements governing jail operations.

It is reasonable to conclude that all expenditures required or allowed by law to “operate” the Tulsa County jail in conformity with the state statutes and regulatory requirements pertaining to the maintenance and operation of a county jail

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<sup>7</sup> The later use of the word “operations” in the ballot title only referred back to and qualified the purpose for the use of the sales tax that plainly was confined to the “facilities” to be constructed and equipped. A.G. Opin. 2014-15, at 90-92.

<sup>8</sup> We found that juvenile programs such as the operation of juvenile rehabilitation and education programs through truancy enforcement, the funding of an alternative school for Canadian County students who have been suspended from their home school, the funding of drug screening of children, the funding of substance abuse treatment nor juvenile drug court, the funding of programs for the supervision of visitation and child exchange between divorced parents, etc., were not within the scope of approved purposes for the sales tax. *Id.* at 92.

would be included within the meaning of “operating” as used in the sales tax proposition set forth above and would, within the contemplation of the board of county commissioners who referred the question to the registered voters and within the contemplation of the voters who approved the referred question, be included within the meaning of “operations” for which the sales tax was authorized.<sup>9</sup>

**It is, therefore, the official Opinion of the Attorney General that your question should be answered in the affirmative:**

**Sales tax revenue raised for the stated purpose of “operating” a county jail may be used to fund the day-to-day functions required or permitted by statute or regulation to operate a working jail.**

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

CHARLES S. ROGERS

SENIOR ASSISTANT ATTORNEY GENERAL

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<sup>9</sup> The funding priority over available county revenue that generally exists within the law regarding expenses pertaining to operating a county jail facility also supports this conclusion. See *Smartt v. Bd. of Cnty. Comm’rs*, 1917 OK 590, ¶ 20, 169 P. 1101, 1104 (finding that OKLA. CONST. art. X, § 26, otherwise restricting county expenditures to monies levied for the fiscal year did not bar a claim for the cost of feeding the jail prisoners though monies budgeted for that purpose had been exhausted); *Protest of Kan. City S. Ry. Co.*, 1932 OK 328, ¶ 32, 11 P.2d 500, 510 (finding that the cost to heat the jail not barred by failure of budgeted funds), *Hillcrest Med. Ctr. v. State ex rel. Dep’t of Corr.*, 1983 OK 101, ¶ 16, 675 P.2d 432, 435 (covering medical expenses of persons in custody of county sheriff). Indeed, although the costs of jail operations is a matter of fiscal priority within the county budget, when appropriated funds prove insufficient, any appropriated funds not then encumbered must be re-appropriated as necessary to this purpose though such actions may reduce the non-priority operations of the county. See *Protest of Cities Serv. Gas Co.*, 1933 OK 148, 19 P.2d 546, 547 (syllabus ¶¶ 4, 5). Given the constitutional fiscal budgeting priority of funding for county jail operations relating to the care of persons detained or confined in the county jail, it is reasonable to conclude that by providing for a perpetual 1/4 percent sales tax for the purpose, among others, of “operating” the jail, it was intended thereby to produce a substantial revenue stream that would be available to support the day-to-day cost of care and custody of the jail’s inmates, if for no other reason than to protect the rest of the county budget from reduction lest the cost of jail operations exceed budgeted amounts.

## OPINION 2015-5

Insurance Commissioner John D. Doak  
Oklahoma Insurance Department

June 25, 2015

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

**Title 36 O.S.Supp.2014, § 7301 requires dentists to provide “covered services” under a subscriber agreement, for fees set by the negotiated fee schedule listed in a network provider agreement. Must a dentist abide by the negotiated fee schedule for a covered service if reimbursement for that service is limited by certain cost-sharing measures?**

Your question centers on the interpretation of 36 O.S.Supp.2014, § 7301, which provides in relevant part:

- A. No contract between a dental plan of a health benefit plan and a dentist for the provision of services to patients may require that a dentist provide services to its subscribers at a fee set by the health benefit plan unless the services are covered services under the applicable subscriber agreement.
- B. As used in this section:
  1. “Covered services” means services reimbursable under the applicable subscriber agreement, subject to the contractual limitations on subscriber benefits as may apply, including, for example, deductibles, waiting period or frequency limitations[.]

*Id.* Subsection A describes the interaction between two different contracts: a “network provider agreement” and a “subscriber agreement.” A network provider agreement is the “contract between a dental plan of a health benefit plan and a dentist” referenced in subsection A. *Id.* § 7301(A). A network provider agreement contains negotiated fee schedules that set the maximum amount a dentist may charge for certain services. A subscriber agreement is the contract between the dental plan and the insured member. A subscriber agreement sets out the “covered services” that the insured is entitled to under that contract. Along with listing the services covered under the dental plan, the subscriber agreement contains guidelines for certain cost-sharing measures that encourage insured members not to overuse their insurance. Deductibles, waiting periods, frequency limitations, maximum allowable benefits, and co-payments are common cost-sharing measures.

Your question turns on the meaning of “covered services” and the interplay between covered services and cost-sharing measures. More specifically, you ask whether an otherwise covered service is deemed to be **non-covered** if the amount being reimbursed is limited by cost-sharing measures such as deductibles, waiting periods, and frequency limitations. We consider the interplay between covered services and cost-sharing measures below.

To begin, Section 7301 is unambiguous. Therefore, in answering your question we assign the plain meaning to the words as written. *State ex rel. Pruitt v. Native Wholesale Supply*, 2014 OK 49, ¶ 31, 338 P.3d 613, 624 (“In reviewing [a statute], we begin with the language, and if it is unambiguous, we assign the plain meaning to the words.”).

As noted above, covered services are those services that are “reimbursable under the applicable subscriber agreement, subject to the contractual limitations on subscriber benefits as may apply.” 36 O.S.Supp.2014, § 7301(B)(1). The first clause describes covered services as those services that are **reimbursable** under the subscriber agreement. Because the statute does not set out a definition for the word “reimbursable,” we look to that term’s plain meaning. “Reimbursable” is used to refer to something that is capable of being reimbursed or repaid. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1914 (3rd ed. 1993) (defining “reimbursable” as repayable). Therefore, a “covered service” is any service that is capable of being reimbursed or repaid under the subscriber agreement. The second clause of Section 7301(B)(1) referring to certain cost-sharing measures merely recognizes that the extent to which a service is reimbursable may depend on cost-sharing measures such as deductibles, waiting periods, and frequency limitations.

Had the Legislature defined covered services as those services **reimbursed**, as opposed to **reimbursable**, under the subscriber agreement, we would reach a different conclusion. For example, in *Iowa Dental Association v. Iowa Insurance Division*, 831 N.W.2d 138 (Iowa 2013), the Supreme Court of Iowa concluded that services subjected to cost-sharing measures such as balance billing, waiting periods, frequency limitations, deductibles, and maximum annual benefits were not covered services because the Iowa statute at issue defined covered services as “services reimbursed under the dental plan.” IOWA CODE ANN. § 514C.3B(3)(b) (West 2015). Because “covered services” were those services actually reimbursed, the Supreme Court of Iowa held that an insurer could only impose a maximum fee on a service if that service were to be reimbursed. *Iowa Dental Ass’n*, 831 N.W.2d at 149.

Thus, the distinction between **reimbursable** and **reimbursed** is critical. While Oklahoma’s statute provides that any service **capable of being reimbursed** is a covered service, a statute defining covered services as those that are **actually reimbursed** results in the conclusion reached by the Supreme Court of Iowa.

As that court stated, such services would not meet the definition of covered services “because they have not been ‘reimbursed under the dental plan.’” *Iowa Dental Ass’n*, 831 N.W.2d at 139. And notably, even while the Supreme Court of Iowa held that services subjected to cost-sharing measures were not covered services, it nonetheless found that cost-sharing measures themselves do not carve out a class of non-covered services. *See id.* at 147 (finding that cost-sharing measures do not qualify the definition of covered services as those services actually reimbursed, but merely “clarify that insurers retain certain rights relating to ‘covered services.’”). Similarly, the “subject to” language in Section 7301 is not intended to qualify the definition of “covered services”—i.e., services *reimbursable* under the applicable subscriber agreement. Rather, it is intended to recognize that the extent to which a covered service is reimbursed is dependent upon certain cost-sharing measures.

This issue was initially considered in A.G. Opinion 13-21, issued on December 11, 2013. At that time, we concluded that services limited by cost-sharing provisions, namely frequency limitations, were not covered services as defined by Section 7301. In that initial analysis, we concluded that the “subject to” language in Section 7301 could be read to modify covered services; that is, that a service is a covered service limited by deductibles, waiting periods, and frequency limitations.

But after receiving a subsequent request from your office, we reexamined Section 7301 and conducted further research into similar statutes. Based on that research, we now conclude that services subject to certain contractual limitations such as deductibles, waiting periods, or frequency limitations *are* covered services as defined by Section 7301.

In reaching our conclusion today, we give meaning to the plain language of Section 7301 and find that the “subject to” language in Section 7301 modifies the word “reimbursable” instead of “covered services.” The “subject to” language merely acknowledges the industry practice of including cost-sharing measures in subscriber agreements; inclusion of that language was not intended to carve out a class of non-covered services. The definition of covered services clearly includes any service that is capable of being reimbursed. Because services subject to cost-sharing measures are capable of being reimbursed, those services are “covered services” as defined in Section 7301.

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

- 1. A “covered service” is one that is “reimbursable under the applicable subscriber agreement, subject to the contractual limitation on subscriber benefits as may apply, including, for example, deductibles, waiting period or frequency limitations[.]” 36 O.S.Supp.2014, § 7301(B)(1). Therefore, a service that is reimbursable under a subscriber agreement is a covered service**

**even if it is subjected to cost-sharing measures. To the extent this Opinion conflicts with A.G. Opin. 13-21, that Opinion is withdrawn.**

- 2. Accordingly, pursuant to the negotiated fee schedule insurers may limit fees charged by dentists for types of services that are eligible for reimbursement but that are not, in fact, fully reimbursed under the subscriber agreement.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

SARAH A. GREENWALT  
ASSISTANT SOLICITOR GENERAL

## OPINION 2015-6

The Honorable Mike Sanders  
State Representative, District 59

September 1, 2015

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

**Title 52 O.S.2011, § 570.10(D) specifies an interest rate of 12 percent owed to non-operating owners of interest in an oil and gas well's production when the holders of the proceeds from the first sale of oil or gas fail to distribute the proceeds within the time periods required by statute, unless the interest owner's title is unmarketable, in which case the applicable interest rate is 6 percent. Does this statute violate the special laws prohibition in Article V, Section 46 of the Oklahoma Constitution?**

### I.

#### BACKGROUND

In most cases, the proceeds from an oil or gas well are divided between the operator of the well, which typically leases the mineral rights, and non-operating owners of interest in the well's production, including royalty interest owners and investors. *See In re SemCrude, L.P.*, 407 B.R. 140, 145-47 (Bankr. D. Del. 2009) (recounting the history of oil and gas production, and regulation thereof, in Oklahoma). When the petroleum production is first sold, either the lessee operator or the first purchaser generally has the responsibility to distribute the proceeds of that sale to the various interest owners. *See Si M. Bondurant, To Have and to Hold: The Use and Abuse of Oil and Gas Suspense Accounts*, 31 OKLA. CITY U. L. REV. 1, 4 (2006) [hereinafter Bondurant].

For decades, oil and gas producers or first purchasers would for various reasons delay or decline to distribute the proceeds from the first sale to interest owners and use those funds for their own purposes until they were ultimately distributed, if at all. *Id.* at 1. Defects in the interest owner's title, liens against the title, failure to execute a division order, or inability to locate the owner sometimes caused the holder of the proceeds to suspend payments. *Id.* at 6. Often, however, holders of the production proceeds would fail to make any reasonable efforts to locate the interest owners or notify them of their interest, suspending payments until they were demanded and, in the meanwhile, gaining the benefit of the possession of those funds. *Id.* When payment was finally made, the holders often refused to make interest payments on the funds withheld. *Id.* at 17-18. "In the inflationary times of the late 1970s and early 1980s when the prime interest rate soared to 21.5%, there was a great incentive to delay royalty payments" and "many

producers routinely suspended royalties and delayed payment for many months and even years to take advantage of the interest earned during the float between the receipt of sales proceeds and disbursement of royalties.” *Id.* at 18. This not only deprived interest owners of the time-value of the money owed to them, it also gave rise to “an ever increasing case load of litigation between royalty owners and purchasers . . . precipitated by the use of suspense accounts.” *Hull v. Sun Refining & Mktg. Co.*, 1989 OK 168, ¶ 9, 789 P.2d 1272, 1277.

These practices led many states to enact statutes specifying payment timing after the first sale of oil or gas production and, in the event of untimely payment, the applicable rate of interest. Bondurant, at 18. Oklahoma passed such a statute in 1980, which is now codified at 52 O.S.2011, § 570.10 and was enacted “to ensure that those entitled to royalty payments would receive proceeds in a timely fashion,” evincing legislative “intent that it shall be the public policy in Oklahoma for royalty owners to receive prompt payment from the sale of oil and gas products.” *Hull*, 1989 OK ¶ 14, 789 P.2d at 1279.

As currently written,<sup>1</sup> Section 570.10 requires that:

Proceeds from the sale of oil or gas production from an oil or gas well shall be paid to persons legally entitled thereto:

- a. commencing not later than six (6) months after the date of first sale, and
- b. thereafter not later than the last day of the second succeeding month after the end of the month within which such production is sold.

52 O.S.2011, § 570.10(B)(1).<sup>2</sup> The statute also specifies the timing of payments when the amounts owed are small. For example, accumulated unpaid amounts less than ten dollars may be held until production ceases, while amounts between ten and one hundred dollars must be remitted at least annually. *Id.* § 570.10(B)(3). When proceeds are not “paid prior to the end of the applicable time periods provided in [the] section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid,” unless the reason for nonpayment is because the title to the

<sup>1</sup> Section 570.10 was originally enacted in 1980 as 52 O.S.Supp.1980, § 540. As part of the Production Revenue Standards Act of 1992, which “provides a comprehensive regulatory structure governing how interest owners and operators work together at the wellhead, and serves to hold operators accountable to their interest owners,” *In re SemCrude*, 407 B.R. at 154, the former Section 540 was rewritten and recodified as new Section 570.10. 1992 Okla. Sess. Laws ch. 190, § 28.

<sup>2</sup> For royalty proceeds from the sale of gas, proceeds after the initial distribution must be paid “not later than the last day of the third succeeding month after the end of the month within which such production is sold[.]” with some exceptions. *Id.* § 570.10(B)(2)(b).

mineral interest is unmarketable, in which case the statutory interest rate is 6 percent compounded annually. *Id.* § 570.10(D).<sup>3</sup> A “first purchaser or holder of proceeds who fails to remit proceeds from the sale of oil or gas production to owners legally entitled thereto within the time limitations set forth” in the statute “shall be liable to such owners for interest” as specified by the statute. *Id.* § 570.10(E)(1).

## II. LEGAL PRINCIPLES

Article V, Section 46 of the Oklahoma Constitution prohibits the Legislature from passing “any local or special law . . . . Fixing the rate of interest[.]” A law is a “special law” if it “single[s] out less than an entire class of similarly affected persons or things for different treatment.” *Reynolds v. Porter*, 1988 OK 88, ¶ 14, 760 P.2d 816, 822. Article V does not prohibit all legislative classifications; a law that creates “a proper and legitimate classification” is not special. *City of Enid v. Pub. Emps. Relations Bd.*, 2006 OK 16, ¶ 13, 133 P.3d 281, 287. If there is “some distinctive characteristic upon which a different treatment may be reasonably founded, and that furnishes a practical and real basis for discrimination,” the statute is not a special law. *Burks v. Walker*, 1909 OK 317, ¶ 23, 109 P. 544, 549; *see also EOG Res. Mktg., Inc. v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 20, 196 P.3d 511, 520-21. Rather, a statute is a special law if the classification it creates “is arbitrary or capricious” or fails to “bear[] a reasonable relationship to the object to be accomplished” and thus is “wholly unrelated to the object of the Act.” *City of Enid*, 2006 OK 16, ¶¶ 13, 16, 133 P.3d at 287-88.

Under these standards, a statute that is a special law legislating one of the subjects listed in Article V, Section 46 is “absolutely and unequivocally prohibit[ed].” *Reynolds*, 1988 OK 88 ¶ 17, 760 P.2d at 822-23. In other words, in a Section 46 analysis, “the only issue to be resolved is whether a statute upon a subject enumerated in that section targets for different treatment less than an entire class of similarly situated persons or things.” *Id.*; *see also Lafalier v. Lead-Impacted Cmty. Relocation Assistance Trust*, 2010 OK 48, ¶ 26, 237 P.3d 181, 192.

## III. ANALYSIS

Any constitutional analysis proceeds “with great caution” and starts with “a presumption that every statute is constitutional.” *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188-89. Thus, courts “indulge every possible presumption that an act of the Legislature was constitutional.” *Adwon v. Okla. Retail Grocers Ass’n*, 1951

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<sup>3</sup> “Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.” *Id.* § 570.10(D)(2)(a); *see also Hull*, 1989 OK 168, ¶ 9, 789 P.2d at 1277.

OK 43, ¶ 11, 228 P.2d 376, 379. “If there is any doubt as to the Legislature’s power to act in any given situation, the doubt should be resolved in favor of the validity of the action taken by the Legislature.” *Draper v. State*, 1980 OK 117, ¶ 10, 621 P.2d 1142, 1146. As a corollary, “[r]estrictions and limitations upon legislative power are to be construed strictly.” *Id.* A law will be deemed unconstitutional only if it “is clearly, palpably, and plainly inconsistent with the Constitution.” *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188; *see also Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 12, 152 P.3d 861, 866.

Section 570.10 specifies the time frames in which the holders of the proceeds from the first sale of oil and gas must pay the rightful interest owners. To encourage compliance with this statutory duty of prompt payment, Section 570.10(D) provides a 12 percent rate of interest compounded annually for nonpayment, unless the reason for nonpayment is because the title is unmarketable. The statute thus sets forth a higher rate of interest for a class of individuals—petroleum producers or first purchasers owing sums to royalty or other interest owners with marketable title—as distinct from others failing to make timely payment under contract. For all other contractual debts, “[t]he legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest,” unless otherwise provided for by valid law. 15 O.S.2011, § 266. The question of whether Section 570.10 violates Article V, Section 46 turns on whether the statute “embrace[s] all of the class that should naturally be embraced” or whether, instead, it “rest[s] on a false or deficient classification.” *City of Enid*, 2006 OK 16, ¶ 20, 133 P.3d at 310 (Opala, J., dissenting) (citation omitted).

Given the immense importance of the industry and the unique legal relationships involved, “[t]he State of Oklahoma . . . has extensively and continuously regulated” the oil and gas industry. *Seal v. Corp. Comm’n*, 1986 OK 34, ¶ 45, 725 P.2d 278, 292; *see also Oryx Energy Co. v. Plains Res., Inc.*, 1994 OK CIV APP 185, ¶ 3, 918 P.2d 397, 399. The relationships and property interests involved in oil and gas leases are extraordinarily complex, involving numerous parties over long periods of time, and the disparities in economic power between oil producers or first purchasers and royalty or mineral interest owners is often very wide. Consequently, it is reasonable that the Legislature sought to “provide[] a comprehensive regulatory structure governing how interest owners and operators work together at the wellhead, and . . . to hold operators accountable to their interest owners.” *In re SemCrude*, 407 B.R. at 154.

As recounted above, the long history of petroleum producers or first purchasers wrongfully withholding production proceeds for their own profit led the Legislature to impose statutory timeframes within which payment must be made and a 12 percent rate to incentivize compliance with the statute. The holder of these proceeds thus possesses a “distinctive characteristic upon which a different treatment may be reasonably founded, and that furnishes a practical and real basis for discrimination.” *Burks*, 1909 OK 317, ¶ 23, 109 P. at 549. This

classification applies to all those similarly situated—those responsible for the distribution of petroleum production proceeds from the first sale—including both producers and first purchasers. Having created a right to prompt payment to combat the pervasive refusal to make contract payments to interest owners that was peculiar to first sales in the petroleum industry, the Legislature was free to impose a higher rate of interest to incentivize respect for that unique substantive right. *See State ex rel. Macy v. Bd. of Cnty. Comm'rs*, 1999 OK 53, ¶ 9, 986 P.2d 1130, 1143 (“[D]ifferent remedies may be based upon legislatively drawn criteria that distinguish different causes of action . . . based upon the nature of the substantive rights at issue.”). Thus, the class subject to the higher interest rate is not “false” or “deficient,” but rather embraces a natural and rational class of similarly situated persons. *City of Enid*, 2006 OK 16, ¶ 20, 133 P.3d at 297-98 (Watt, C.J., Opala, Taylor, Colbert JJ., dissenting) (citation omitted). For the same reasons, Section 570.10(D)’s rate of interest is not “arbitrary or capricious” and bears “a reasonable relationship to the object” of the statute. *Id.* (citation omitted). Accordingly, Section 570.10(D) is not a “special law” and, therefore, cannot be in violation of Article V, Section 46.<sup>4</sup>

Similarly, courts have upheld analogous laws setting a higher rate of interest in the face of special law challenges when those laws were justified by a rational and legitimate public policy. For example, a law allowing for a higher rate of interest for judgments in workers’ compensation suits is not an unconstitutional special law because the Legislature reasonably imposed that elevated rate to combat “frivolous appeals which . . . have often been prosecuted by less conscientious employers and insurance companies to ‘starve’ helpless victims of industrial injuries into early and cheap settlements.” *Cyrus v. Vierson & Cochran, Inc.*, 1981 OK CIV APP 40, ¶ 15, 631 P.2d 1349, 1354. In the case of Section 570.10, a similar history of abuse of modest interest owners by the holders of petroleum proceeds justifies the 12 percent interest rate. As another example, courts in other states with similar constitutional provisions have upheld elevated interest rate laws when rationally justified, permitting, for example, elevated interest rates on retail installment contracts because the costs of consumer lending (including increased risk of default, volume, and servicing costs) are higher than those for commercial loans to established businesses. *See Cesary v. Second Nat’l Bank of N. Miami*, 369 So.2d 917, 920-21 (Fla. 1979); *Cecil v. Allied Stores Corp.*, 513 P.2d 704, 710 (Mont. 1973); *but see Stanton v. Mattson*, 123 N.W.2d 844, 846-48 (Neb. 1963). Similarly, the common practice of unjustified impounding of proceeds in suspense accounts, often requiring interest owners to institute

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<sup>4</sup> Because this Opinion concerns the constitutionality of a statute, it should be considered advisory only. The Oklahoma Supreme Court “alone has the power to authoritatively determine the validity or invalidity of a statute.” *York v. Turpen*, 1984 OK 26, ¶¶ 10-12, 681 P.2d 763, 767.

costly litigation, creates a greater risk of nonpayment that may justify a higher interest rate owed by oil and gas producers and first purchasers.<sup>5</sup>

For similar reasons, the disparate interest rates owed to those with and without marketable title does not create a special law in violation of Article V, Section 46, because the two groups are not similarly situated and the Legislature has rationally decided that liability for nonpayment of proceeds should be lower when the reason for nonpayment is legitimate questions concerning title. *See Tulsa Energy, Inc. v. KPL Prod. Co. (In re Tulsa Energy)*, 111 F.3d 88, 90 (when title is unmarketable, “[p]ublic policy requiring prompt payment of proceeds cannot spur on the party responsible for payment, because he cannot be, and is not, required to pay until the other party has cleared up his title”). Nor can it be said that those in the oil and gas industry are subject to a special law on interest rates as compared to other industries because other industries are not characterized by the same potential, incentives, and history of refusal to timely pay sums due and the frequent litigation that ensued. Even within the oil and gas industry, the special relationships and problems of distribution of proceeds at the wellhead pursuant to mineral leases sets these relationships in a different class than other contracts for petroleum products. Finally, that Section 570.10 specifies different time periods during which proceeds must be paid to interest owners does not create a special law fixing a rate of interest because, though the **amount** of interest due under the statute may vary depending on when various dollar thresholds are met (*e.g.*, \$10, \$25, or \$100), when interest does begin to accumulate, it does so at the same **rate** across classes.

Even if there were doubt about the purposes of the statute, the effect of its revisions, or the unique situation of the oil and gas industry that by nature justifies its regulation as a class, those doubts must “be resolved in favor of the validity of the action taken by the Legislature.” *Draper*, 1980 OK 117, ¶ 10, 621 P.2d at 1146. Indulging “every possible presumption that [this] act of the Legislature was constitutional,” *Adwon*, 1951 OK 43, ¶ 11, 228 P.2d at 379, it cannot be said that Section 570.10(D) is “clearly, palpably, and plainly inconsistent

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<sup>5</sup> In 1985, the Legislature deleted from the statute the phrase “as the penalty,” which originally appeared after the specification of the 12 percent rate. *See* 1985 Okla. Sess. Laws ch. 141, § 1; *see also Fleet v. Sanguine, Ltd.*, 1993 OK 76, ¶ 5 n.14, 854 P.2d 892, 895 n.14. As a result, courts have recognized that Section 570.10(D) is no longer construed as a penalty for certain purposes, such as determining the statute of limitations for a claim for the 12 percent interest or deciding whether the 12% rate precludes a punitive damages award. *See Purcell v. Santa Fe Minerals, Inc.*, 1998 OK 45, ¶¶ 15-22, 961 P.2d 188, 192-93; *Hebble v. Shell Western E & P, Inc.*, 2010 OK CIV APP 61, ¶ 22, 238 P.3d 939, 946. But it is clear from the text and history of the statute, which has seen its core provisions maintained despite several revisions, that the Legislature still intends that Section 570.10(D) promote timely distribution of proceeds to oil and gas interest owners. *See Hull*, 1989 OK 168, ¶ 14, 789 P.2d at 1279. Deletion of the phrase “as a penalty” does not change the purposes of and justifications for Section 570.10(D) and does not render it an irrational classification prohibited by Article V, Section 46. Mere removal of three words does not render the law unconstitutional.

with the Constitution,” *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188. Section 570.10(D) does not “single out less than an entire class of similarly affected persons or things for different treatment.” *Reynolds*, 1988 OK 88, ¶ 14, 760 P.2d at 822. Rather, in light of the unique history, relationships, and importance of the use of suspense accounts by oil and gas producers and first purchasers to unjustifiably delay payment to interest owners, the Legislature has recognized “a proper and legitimate classification” by providing for a higher rate of interest when the holder of proceeds delays distribution of sums to the rightful owner in violation of the statute. *City of Enid*, 2006 OK 16, ¶ 13, 133 P.3d at 287. The elevated rate of interest is not “arbitrary or capricious,” but rather facilitates compliance with the prompt payment requirements of the statute, “bear[ing] a reasonable relationship to the object to be accomplished.” *Id.* ¶¶ 13-16, 133 P.3d at 287-88 (citation omitted).

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

**Title 52 O.S.2011, § 570.10(D) is not a special law fixing the rate of interest in violation of Article V, Section 46 of the Oklahoma Constitution because it does not single out similarly affected persons for disparate treatment, but rather rests on a proper and legitimate classification.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

MITHUN MANSINGHANI  
DEPUTY SOLICITOR GENERAL

## OPINION 2015-7

The Honorable Jon Echols  
State Representative, District 90

September 16, 2015

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

1. **Once the Corporation Commission of Oklahoma has deemed a previously defined regulated telecommunications service to be “competitive,” can the Commission exercise jurisdiction over that competitive service, or over the service provider in connection with the provision of that competitive service?**
2. **If the Corporation Commission of Oklahoma may exercise jurisdiction over a service deemed competitive or over the service provider in connection with that service, what kinds of matters can the Commission review with respect to those competitive services?**<sup>1</sup>

### I.

#### INTRODUCTION

On February 8, 1996, the United States Congress passed the Telecommunications Act of 1996 to promote competition for local telecommunications services and to reduce regulation of those services nationwide. *See* Pub. L. No. 104-104, 110 Stat. 56 (1996); 142 CONG. REC. S686-03 (daily ed. Feb. 1, 1996) (statement of Sen. Dole). Oklahoma followed suit on June 13, 1997, and enacted the complementary Oklahoma Telecommunications Act of 1997 (“Oklahoma Act”), codified as amended at 17 O.S.2011 & Supp.2014, §§ 139.101 – 139.110.

The Oklahoma Act provides that the Corporation Commission of Oklahoma (“Commission”) “may implement an alternative form of regulation other than traditional rate base, rate of return regulation.” *Id.* § 139.103(E). And in 1999, the Commission promulgated rules governing alternative regulation through competition. 17 Okla. Reg. 306 (Nov. 2, 1999) (codified at OAC 165:55-5-64 – 55-5-76). The Commission’s rules provided that “[a] telecommunications service provider may file an application to have the Commission determine that ***a regulated telecommunications service is subject to effective competition and is therefore competitive*** for the applicant and/or the applicant class.” OAC 165:55-5-10.1(a) (emphasis added).

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<sup>1</sup> This opinion does not address the jurisdiction over a telecommunications company either generally or with respect to any services other than telecommunications services deemed competitive that a telecommunications company may provide.

Based on the application and the provider's successful completion of a transition plan, the Commission placed the competitive service under the "Oklahoma Plan" and classified services by one of four "baskets" based on the level of competition for each service. OAC 165:55-5-64, 165:55-5-66. Services placed in "Basket 1" were non-competitive services, while services placed in "Basket 4" were deemed competitive. OAC 165:55-5-66(1), (4). Price changes for Basket 4 services took immediate effect and did not require Commission approval, although they had to comply with public notice requirements. *See* OAC 165:55-5-66(4), 165:55-5-10(c). To ensure the market remained competitive and to guard against predatory pricing, the Oklahoma Plan set pricing floors and provided that the Commission could "revoke the competitive designation of a service, after notice and hearing, if the Commission determine[d] that the service [was] no longer competitive." OAC 165:55-5-10.1(e), *see* 165:55-5-66(4)(B).

Other than these minimal safeguards, when a service was deemed competitive, it was no longer a "regulated" service. Section 139.102 of the Oklahoma Act provides that:

"Regulated telecommunications service" means the offering of telecommunications for a fee directly to the public where the rates for such service are regulated by the Commission. ***Regulated telecommunications service does not include*** the provision of nontelecommunications services, including, but not limited to, the printing, distribution, or sale of advertising in telephone directories, maintenance of inside wire, customer premises equipment, and billing and collection service, nor does it include the provision of wireless telephone service, enhanced service, and other unregulated services, including services not under the jurisdiction of the Commission, and ***services determined by the Commission to be competitive***[.]

17 O.S.2011, § 139.102(25) (emphasis added). Your question relates to the Commission's jurisdiction as it pertains to telecommunications services that, at one time, were regulated by the Commission, but are now deemed competitive and are, therefore, no longer regulated by the Commission. To answer your question, we must examine what regulation means with respect to the Commission's jurisdiction.

## II.

### THE OKLAHOMA PLAN SIGNIFICANTLY NARROWED THE COMMISSION'S JURISDICTION OVER SERVICES DEEMED COMPETITIVE.

#### A. The Commission's general authority over companies is limited and must be exercised within the confines of the Oklahoma Constitution and legislative enactments.

Article IX, Section 18 of the Oklahoma Constitution governs the general powers and duties of the Commission and provides that it has

the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

OKLA. CONST. art. IX, § 18.<sup>2</sup> But while Article IX, Section 18 describes the authority of the Commission to set rates, charges, and classifications as “paramount,” it also provides that “its authority to prescribe any other rules, regulations or requirements for corporations . . . shall be subject to the superior authority of the Legislature.” *Id.*

Indeed, the Supreme Court of Oklahoma has found that the “Commission’s power . . . must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution” and statute. *Pub. Serv. Co. v. State ex rel. Corp. Comm’n*, 1997 OK 145, ¶ 23, 948 P.2d 713, 717; *Pub. Serv. Co. v. State ex rel. Corp. Comm’n*, 1996 OK 43, ¶ 21, 918 P.2d 733, 738. That is, “[t]he Commission’s power to regulate is not unfettered.” *Id.*

Finally, before the Commission can direct any rate, charge, classification, order, rule, regulation, or requirement against a specific company, the Commission must first afford that company at least ten days’ notice of the contemplated ac-

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<sup>2</sup> Because telephone companies are transmission companies, public service corporations, and telecommunications carriers, the Commission regulates telephone companies. *See* A. G. Opin. 06-15, at 112.

tion and a reasonable opportunity to introduce evidence, and to be heard on the issue. OKLA. CONST. art. IX, § 18.

**B. The Oklahoma Plan further narrowed the Commission’s jurisdiction over services deemed competitive, removing Commission approval over pricing generally but authorizing the Commission to determine whether the market remained competitive.**

Within the context of the Commission’s general powers and duties, the Supreme Court has limited the Commission’s jurisdiction over services deemed competitive under the Oklahoma Plan. In *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corporation Commission*, 2007 OK 55, 164 P.3d 150, the Supreme Court recognized that the Oklahoma Plan provided “some measure of freedom from regulatory oversight by the Commission depending on the level of competition present in the . . . marketplace,” *id.* ¶ 2, 164 P.3d at 153, and noted that the Commission maintained “*minimal* regulatory supervision.” *Id.* ¶ 15, 164 P.3d at 158 (emphasis added). The court specified that providers received “pricing freedom” but found, in agreement with the Commission, that granting an application under the Oklahoma Plan did not “deregulate *the company*.” *Id.* ¶ 57, 164 P.3d at 170-71 (emphasis added). Rather, the Commission retained a very narrow strand of jurisdiction: the ability to remove a service’s competitive designation if the Commission found that the marketplace was no longer competitive. *Id.*

In 2012, however, the Commission revoked the Oklahoma Plan and the rules governing competitive services. 29 Okla. Reg. 1549 (July 2, 2012). Therefore, these rules no longer have the force and effect of law.<sup>3</sup> *State ex rel. West v. McCafferty*, 1909 OK 291, ¶ 12, 105 P. 992, 994. Nevertheless, a review of the legislative enactments still governing services deemed competitive shows that the Commission’s jurisdiction over such services is still very narrow, as the Supreme Court found in *Cox*.

### III.

**FOLLOWING REVOCATION OF THE OKLAHOMA PLAN, THE COMMISSION’S JURISDICTION OVER SERVICES STILL BEARING THEIR COMPETITIVE DESIGNATION MUST BE DETERMINED ON THE BASIS OF THE OKLAHOMA ACT.**

Despite the Commission’s revocation of the Oklahoma Plan, this Office understands that certain services still bear their competitive designations. Indeed, to date, it appears that the Commission has not notified any service provider of the Commission’s intention to remove the competitive designation from any

<sup>3</sup> See *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 10, 184 P.3d 518, 523 (standing for the proposition that agency rules have the force and effect of law).

service—an action it could not take without notice and an opportunity to be heard. *See* OKLA. CONST. art. IX, § 18. Therefore, at present, providers still offer services deemed competitive that have been untethered from the rules pursuant to which they gained their competitive designations. As such, we return to the Oklahoma Act to determine what that legislation states regarding the Commission’s jurisdiction over services deemed competitive.

To do so, we construe the relevant enactments and their various provisions together “in light of their underlying general purpose and objective.” *State ex rel. Okla. State Dep’t of Health v. Robertson*, 2006 OK 99, ¶ 7, 152 P.3d 875, 878. We also consider these provisions in light of Article IX, Section 18 of the Oklahoma Constitution, included at Part II(A) above, which describes the Commission’s duties generally. When interpreting the Oklahoma Constitution, 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 the provision itself.” *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 11, 176 P.3d 1217, 1220; *see also Okla. Elec. Co-op., Inc. v. Okla. Gas & Elec. Co.*, 1999 OK 35, ¶ 7, 982 P.2d 512, 514 (noting the controlling importance of intent and plain text when construing the Oklahoma Constitution).

Returning to Section 139.102 of the Oklahoma Act, subsection 14 provides that “‘local exchange telecommunications service’ means a **regulated** switched or dedicated telecommunications service,” 17 O.S.Supp.2014, § 139.102(14) (emphasis added), and “local exchange telecommunications service provider” is simply a provider of such service. *Id.* § 139.102(15). **Regulated** services do not include services determined to be competitive. *Id.* § 139.102(25). Therefore, where the Oklahoma Act refers to “local exchange telecommunications services” (which are regulated services), providers of such services, or “regulated services” themselves, those provisions would not apply to services deemed competitive.

With these definitions in mind, a review of provisions within the Oklahoma Act addressing the Commission’s jurisdiction demonstrates that the vast majority of these provisions plainly do not apply to competitive services. For example, Section 139.103 provides, in pertinent part, the following:

- A. Except as provided as follows, no company shall increase or decrease any **regulated telecommunications service** rate without approval of the Corporation Commission, consistent with Commission rules. . . .
- B. Unless approved by the Legislature, no **local exchange telecommunications service provider** may charge a basic local exchange service rate that exceeds a basic local exchange service rate previously approved by the Commission and in effect on March 20, 1997 . . . .

- C. Nothing in this act shall be construed as modifying, affecting, or nullifying the responsibilities of the Commission or any telecommunications carrier as required pursuant to the National Labor Relations Act, the Communications Act of 1934 as amended by the Telecommunications Act of 1996, or the provisions relating to refund liability for overcharges pursuant to Section 121 et seq. of this title.
- D. . . . With respect to *local exchange telecommunications service providers* serving fifteen percent (15%) or more of the access lines in the state[.]
- . . . .
- E. Upon application of a provider of *regulated telecommunications services*, the Commission may implement an alternative form of regulation . . . .
- F. Nothing in this section shall be construed as restricting any right of a consumer to complain to the Commission regarding quality of service or the authority of the Commission to enforce quality of service standards through the Commission's contempt powers or authority to revoke or rescind a certificate of convenience and necessity if the provider fails to provide adequate service. A certificate shall not be revoked or rescinded without notice, hearing, and a reasonable opportunity to correct any inadequacy.
- G. The rules of the Corporation Commission governing quality of service shall apply equally to all *local exchange telecommunications service providers*.
- H. In a manner consistent with the provisions of this act and rules promulgated by the Commission, the Commission shall retain jurisdiction over access services and rates.

17 O.S.2011, § 139.103 (emphasis added).

Based on the definitions provided above, subsections (A), (B), (D), (E), and (G) do not apply to services deemed competitive. That is, because these provisions apply to local exchange telecommunications services, providers of such services, or regulated services themselves, these provisions plainly do not apply to competitive services. As such, the Commission's authority as provided in these particular subsections do not apply to competitive services or over service providers in connection with the provision of these competitive services.

Pursuant to subsections (F) and (H), however, the Commission retains limited oversight to ensure that the market remains competitive. Pursuant to subsection

(F), the Commission retains the authority to hear consumer complaints regarding quality of service and to enforce quality of service standards.<sup>4</sup> *Id.* § 139.103(F). In tandem with subsection (F), Section 139.104 of the Oklahoma Act provides that “the Commission, through its Consumer Services Division, shall mediate grievances between consumers and telecommunications carriers and ensure compliance with quality of service standards adopted for local exchange telecommunications service providers *and other telecommunications carriers which operate in this state.*” 17 O.S.2011, § 139.104(B) (emphasis added). “Telecommunications carrier” is defined in the Oklahoma Act as “a person that provides telecommunications service in this state[.]” without reference to whether such service is regulated or not. § 139.102(29). Reading subsection (F) in conjunction with Section 139.104, it is clear that even though services deemed competitive *are not regulated* by the Commission, the Commission *retains* this *limited oversight*.

Further, subsection (H) provides that the Commission retains jurisdiction over access services and rates generally. 17 O.S.2011, § 139.103(H). “Access lines” are facilities “provided and maintained by a telecommunications service provider,” without reference to whether such services would be regulated or not. *Id.* § 139.102(1). Reading subsection (H) in light of the foregoing, general jurisdiction over access services and rates must comport with the goal of deregulation—that goal being a competitive marketplace. Thus, as *Cox* determined, this sharply limited oversight solely reflects the Commission’s ability to ensure that the marketplace remains competitive, but no more. *See Cox*, 2007 OK 55 at ¶¶ 2, 15, 164 P.3d at 153, 158.

In sum, subsections (A), (B), (D), (E), and (G) of Section 139.103 largely relate to the Commission’s role in regulating and setting rates and do not apply to services deemed competitive or providers in connection with the provision of those services. But subsection (F) and Section 139.104 authorize the Commission to ensure that the consumer receives a quality service regardless whether that service is regulated or not. Further, subsection (H) ensures that the marketplace remains competitive and, therefore, fair.<sup>5</sup>

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<sup>4</sup> The Commission retains this authority through its contempt power and through its ability to revoke or rescind a Certificate of Convenience and Necessity. *See id.* § 139.103(F). No telecommunications service provider can provide services within the State without first obtaining a certificate of convenience and necessity, *see* 17 O.S.2011, § 131(A), and Article IX, Section 19 of the Oklahoma Constitution describes the Commission’s contempt powers. *See OKLA. CONST.* art. IX, § 19.

<sup>5</sup> This reading accords with the plain meaning of the Constitution and the Oklahoma Act with an eye to the purposes of deregulation generally. That is, the Telecommunications Act of 1996 provides that a State may continue to “protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253.

Because we conclude that the Commission retains limited jurisdiction over competitive services, we next consider the kinds of things the Commission may review with respect to competitive services.

#### IV.

#### HAVING DETERMINED THAT THE COMMISSION RETAINS JURISDICTION OVER COMPETITIVE SERVICES, THE COMMISSION MAY CONSIDER CERTAIN CATEGORIES OF INFORMATION IN REVIEWING BOTH QUALITY OF SERVICE STANDARDS AND A COMPETITIVE MARKETPLACE.

##### A. Quality of service standards fall into three categories: ensuring continuous service of an adequate quality, sufficient equipment in a good state of repair, and adequate provision for emergencies.

Having determined that the Commission retains jurisdiction over services deemed competitive, the Commission's current administrative rules apply to those services. *See* OAC 165:55-1-3 ("This Chapter shall apply to every telecommunications service provider . . . in Oklahoma *subject to the jurisdiction of the Commission.*") (emphasis added).<sup>6</sup> Nevertheless, the Commission's authority as embodied in those rules must fit within the confines of legislative enactments. *See Pub. Serv. Co.*, 1996 OK 43, ¶ 21, 918 P.2d 733, 738. That means the Commission's rules must reflect those aspects of jurisdiction that the Commission has retained and not exceed them.

The Commission's rules define what constitutes quality of service standards, *see* OAC 165:55-13-20 – 26, and fit within the legislative enactments that speak to the Commission's jurisdiction as discussed above. Pursuant to the Commission's rules, quality of service includes standards falling within three general categories: ensuring continuous service of an adequate quality, sufficient equipment in a good state of repair, and adequate provision for emergencies.

As to the first category—continuous service of an adequate quality, a telecommunications service provider must ensure "adequate and efficient telephone service." OAC 165:55-13-20(a). Adequate and efficient telephone service requires telephone systems to be "safe, efficient, and continuous." OAC 165:55-13-20(b). Further, "[t]he dominant criteria for these standards is voice grade service quality." OAC 165:55-13-20(d). Within this context, quality of service would include considerations such as dial tone, call dropping, and clear communications.

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<sup>6</sup> Reference in the Commission's rules to a "telecommunications service provider" applies to "providers of local exchange service, whether an incumbent LEC or a competitive LEC." OAC 165:55-1-4.

Second, a telecommunications service provider must keep “its lines, equipment, and facilities in a good state of repair.” OAC 165:55-13-20(b). Indeed, the Commission has adopted national minimum standards for the installation, construction, and maintenance of communication lines. OAC 165:55-13-20(c). And this equipment must be sufficient “to handle the average busy hour, busy season traffic.” OAC 165:55-13-24.

Finally, telecommunications service providers must “make adequate provision for emergencies in order to prevent interruption of continuous telecommunications service throughout the area it serves.” OAC 165:55-13-22(a). And central offices must have an emergency power source. OAC 165:55-13-22(b). Quality of service, therefore, suggests that telecommunications service providers must be prepared for emergency situations.

In sum, quality of service includes the considerations listed above. Because the Commission retains jurisdiction to consider quality of regulated and non-regulated services alike, the Commission may review things like dial tone and emergency preparedness. *See* OAC 165:55-13-25 (providing the timelines for a telecommunications service provider to respond to customer complaint inquiries).

**B. Marketplace review permits the Commission to consider certain factors with respect to telecommunications service providers as a whole.**

Next, and to a lesser extent, the Commission retains jurisdiction to ensure that the marketplace remains competitive. Indeed, the Commission’s rules provide that they are intended “to allow Oklahoma consumers to receive timely benefits from lawful market-driven price and service competition.” OAC 165:55-1-1.

Ensuring the marketplace remains competitive permits the Commission to consider for a class of providers any matter reasonably related to the market’s competitiveness, such as the rates charged, the timing of rate increases, and service territory. This conclusion is in parity with the Supreme Court’s *Cox* opinion in which the court stated that market-driven price regulation raises no concerns in light of the Commission’s continuing jurisdiction “should it suspect anti-competitive behavior or predatory pricing.” *Id.*, 2007 OK 55, ¶ 57, 164 P.3d at 171.

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

- 1. Once the Corporation Commission of Oklahoma deems a service competitive, the Commission no longer retains the authority to regulate that competitive service or over the service provider in connection with the provision of that competitive service, i.e. the Commission cannot regulate service rates. But the Commission retains the authority to ensure the continued**

**quality of regulated and non-regulated services alike and to ensure that the marketplace remains competitive.**

- 2. To ensure consumers receive a quality service, the Commission may consider the following categories of quality considerations including continuous service of an adequate quality, sufficient equipment in a good state of repair, and adequate provision for emergencies.**
- 3. And to ensure the market remains competitive, the Commission may consider various factors such as the rates charged, the timing of rate increases, and the service territory for a class of providers.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

CARA N. RODRIGUEZ  
GENERAL COUNSEL TO THE ATTORNEY GENERAL

## OPINION 2015-8

Chairman Robert H. Gilliland  
Workers' Compensation Commission

September 23, 2015

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

**The Oklahoma Workers' Compensation Commission is composed of three Commissioners who, under various provisions of Title 85A of the Oklahoma Statutes, act as an appellate tribunal in appeals from decisions of Administrative Law Judges, Petitions for Review in adverse benefits decisions made by appeal committees of employers' benefit plans, and arbitration awards made under the arbitration provisions of Title 85A.**

**When acting as an *en banc* appellate tribunal considering such cases, does the deliberative process privilege permit the Commissioners to hold confidential deliberations?**

### BACKGROUND

Your question was previously asked in conjunction with a prior request regarding whether the Commission was permitted under the Oklahoma Open Meeting Act to deliberate privately in such cases. This office, in Attorney General Opinion 2014-14, opined that 1) because the individual proceedings considered by the Workers' Compensation Commission, when acting as an *en banc* appellate tribunal, were *not* individual proceedings under the Administrative Procedures Act, and 2) because the provisions of the Oklahoma Open Meeting Act allowing deliberation in executive session applied only to individual proceedings under the Administrative Procedures Act, the Oklahoma Open Meeting Act did *not* authorize the Commission to deliberate in executive session. We also concluded that no other statute authorized the Commission to hold confidential deliberations.

In issuing that Opinion, we noted that because the question regarding deliberative process was presently being considered in a pending appeal before the Oklahoma Supreme Court, we could not address your question regarding deliberative process privilege at that time.

The Oklahoma Supreme Court has now ruled in that case, *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, holding that the deliberative process component of executive privilege exists in Oklahoma—not based on statutory law—but based on both common law and the Oklahoma Constitution. *Id.* ¶ 29, 343 P.3d at 1279. In light of that ruling, you ask us to consider again whether the deliberative process privilege permits the Workers' Compensation

Commissioners to confidentially deliberate when deciding individual cases heard by the Commission under the various provisions of Title 85A.

## I.

### **THE OKLAHOMA SUPREME COURT RULED THAT THE DELIBERATIVE PROCESS PRIVILEGE IS ROOTED NOT ONLY IN COMMON LAW, BUT ALSO IN THE STATE CONSTITUTION'S SEPARATION OF POWERS PROVISION.**

In *Vandelay*, the Oklahoma Supreme Court was asked to determine whether the deliberative process privilege existed in Oklahoma in the context of Governor Fallin's assertion of the privilege in response to an Open Records Act request. While the trial court affirmed that the deliberative process privilege exists in Oklahoma, it held so only on the basis of common law. *Id.*, 2014 OK 109, ¶ 4, 343 P.3d 1273, 1275. The Supreme Court went further, holding that the privilege is rooted in both common law and constitutional *inherent powers*—powers reflected in the Separation of Powers Provision of the Oklahoma Constitution. *Id.* ¶¶ 12, 13, 343 P.3d at 1276.

The *Vandelay* Court heavily relied on the court's prior decision in *Ford v. Board of Tax–Role Corrections*, 431 P.2d 423 (Okla. 1967), a case discussing the inherent power of the judicial department of government. *Vandelay*, 2014 OK 109, ¶ 13, 343 P.3d 1273, 1276. In *Ford*, the Court “recognized that *inherent powers are reflected in the separation of powers clause* in Article 4, § 1 of the Oklahoma Constitution.” *Vandelay*, ¶ 13, 343 P.3d at 1276 (emphasis added). In discussing the *Ford* case, the *Vandelay* Court held that the *principles regarding the recognition and protection of inherent powers are equally applicable to all three co-equal branches of government*:

While the *Ford* case dealt with a question concerning the inherent power of the judicial branch, *the principles and analysis this Court applied in recognizing the inherent power of the judiciary are the same for recognizing and protecting the inherent powers of the other coequal branches.*

*Id.* (emphasis added).

The *Vandelay* Court addressed one of the principles recognized in *Ford*, stating:

In *Ford*, this Court concluded the “powers properly belonging” to a branch of government were those “which [are] *essential* to the *existence, dignity* and *functions [of the branch]*” and *include inherent powers.*

*Id.* ¶ 14, 343 P.3d at 1276 (emphasis added).

Thus, under *Vandelay*, the principle that the “powers properly belonging to a branch of government” are those “which are essential to the existence, dignity, and function of the branch” is a principle that applies with equal force to all three branches of government.

In light of this understanding of the Separation of Powers Clause’s protection of inherent powers, *Vandelay* held that the deliberative process privilege was available to Governor Fallin to protect the confidentiality of the frank, candid discussion and advice she received from her staff and advisors regarding governmental operations, procedures, and decision-making. So ruling, the Supreme Court agreed “with the United States Supreme Court’s view that ‘complete candor and objectivity from advisors calls for great deference from the courts’ in determining the scope of executive privilege.” *Id.* ¶ 19, 343 P.3d at 1277-78. The Court then concluded that the Governor, no less than the President, has a need to receive “‘candid, objective, and even blunt or harsh opinions’ provided by ‘senior and executive branch officials’ *as well as a need to refuse to disclose such advice . . .*” *Id.* (emphasis added).

In the Court’s words, the Governor’s right to receive such advice and consultation:

[I]s *essential to the existence, dignity and function of the Governor as chief executive and lies within the Governor’s inherent power. The principle of separation of powers expressly declared in Article 4, § 1, protects this privilege from encroachment by Legislative acts, such as the Open Records Act.*

*Id.* ¶ 20, 347 P.3d at 1278 (emphasis added).

In recognizing the constitutional protection afforded the Governor’s deliberative process by the Separation of Powers Clause, the *Vandelay* Court quoted with approval from *Freedom Foundation v. Gregoire*, 310 P.3d 1252, 1258 (Wash. 2013), in which the Court held that refusal to recognize the gubernatorial communications privilege “would subvert the integrity of the governor’s decision making process [thereby] *damaging the functionality of the executive branch and transgressing the boundaries set by . . . separation of powers.*” *Vandelay*, ¶ 18, 343 P.3d at 1277 (emphasis added).

Applying the constitutional principles identified by the *Vandelay* Court, regarding the protection of inherent powers to the deliberations of the Workers’ Compensation Commission, we conclude that the Commissioners’ deliberations are protected by the deliberative process privilege.

## II.

**FRANK, CANDID AND CONFIDENTIAL DELIBERATIONS AMONG THE WORKERS' COMPENSATION COMMISSIONERS ARE ESSENTIAL TO THE COMMISSIONERS' PERFORMANCE OF THEIR QUASI-JUDICIAL FUNCTION, AND ACCORDINGLY, THEIR DELIBERATIONS ARE PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE BY VIRTUE OF THE OKLAHOMA CONSTITUTION'S SEPARATION OF POWERS PROVISION, ARTICLE IV, SECTION 1.**

**A. The Workers' Compensation Commissioners are Constitutionally Vested With the Authority to Exercise the State's Judicial Power.**

The three Workers' Compensation Commissioners are empowered to hear three types of appeals under various provisions of Title 85A of the Oklahoma statutes. First, under the provisions of 85A O.S.Supp.2014, § 78(A), the Commissioners are authorized to reverse, modify, or affirm decisions or awards made by the Commission's Administrative Law Judges. Second, under the provisions of 85A O.S.Supp.2014, § 211(B)(5), the Commissioners may review adverse benefit determinations made under the Oklahoma Employment Injury Benefit Act. Third, under the provisions of 85A O.S.Supp.2014, §§ 322 and 323, the Commissioners may confirm, reverse, or modify arbitration awards entered under Title 85A.

Under the Oklahoma Constitution, the judicial power of the State is not exclusively vested in judges or courts. Rather, under Article VII, Section 1 of the Oklahoma Constitution, both legislative and executive branch bodies are also vested with the State's judicial power:

The judicial power of this State shall be vested *in the Senate*, sitting as a Court of Impeachment, a Supreme Court, the Court of Criminal Appeals, . . . District Courts, and *such Boards, Agencies and Commissions created by the Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings.*

*Id.* (emphasis added).

As under Title 85A the Workers' Compensation Commissioners exercise adjudicative authority and render decisions in individual proceedings, the Commissioners are vested with authority to exercise the State's judicial power.

## B. In Exercising the State’s Judicial Power, the Workers’ Compensation Commissioners Act in a Quasi-Judicial Capacity.

When the State’s judicial power is being exercised by other than members of the Judicial Branch, the power being exercised is referred to as quasi-judicial power.<sup>1</sup> Thus, in all three instances in which the Workers’ Compensation Commissioners act as an appellate tribunal, they are performing a quasi-judicial function—the exercise of a judicial power by other than a member of the Judicial Branch of government, such as a judge or justice.

The Commissioners’ performance of a quasi-judicial function is not unusual as under the Oklahoma Constitution and statutes, quasi-judicial functions are performed by a variety of Executive Branch entities. Licencing agencies, such as the Oklahoma Board of Dentistry and the Oklahoma Pharmacy Board, act in a quasi-judicial capacity in disciplining their licensees, as does a regulatory commission, such as the Oklahoma Horse Racing Commission, when it conducts individual proceedings to discipline horse owners and trainers. Indeed, even the Attorney General, in issuing Attorney General Opinions, acts in a quasi-judicial capacity. *York v. Turpen*, 1984 OK 26, ¶ 9, 681 P.2d 763, 767.

## C. Confidential Deliberations are an Essential Component of the Decision-Making Process of the Workers’ Compensation Commissioners When Acting in Their Quasi-Judicial Capacity.

In *Vandelay*, discussing the Governor’s *need* to seek and receive advice in aid of deliberations and decision-making, the court held that confidentiality was necessary:

[T]he public interest is best served by the Governor seeking and receiving advice to aid in deliberations and decision-making. The United States Supreme Court has observed “[T]hose who assist [executive decision-makers] must *be free to explore alternatives* in the process of shaping policies and making decisions *and to do so in a way many would be unwilling to express except privately.*”

*Vandelay*, ¶ 17, 343 P.3d at 1277 (emphasis added) (quoting, with approval, *United States v. Nixon*, 418 U.S. 683, 708 (1974) (superseded by statute on other grounds)).

Just as the deliberative process privilege is necessary to the Executive function, such confidentiality is equally *necessary* to the Judicial function. The United States Court of Appeals for the Eleventh Circuit discussed the need for

<sup>1</sup> A judicial act is one performed by the Judicial Branch of government. See *Umholtz v. City of Tulsa*, 1977 OK 98, ¶ 8, 565 P.2d 15, 18, (“A quasi-judicial duty is one lying in the judgment or discretion of an officer *other than a judicial officer.*”) (emphasis added) (quoting with approval from *Gray v. Bd. of County Comm’rs*, 1957 OK 152, ¶ 5, 312 P.2d 959).

deliberative process privilege in the Judicial Branch in *In the Matter of Certain Complaints Under Investigation by an Investigating Committee v. Mercer*, 783 F.2d 1488 (11th Cir. 1986). Comparing judges' need for confidential communications with that of the President as explored in *United States v. Nixon*, the Eleventh Circuit Court stated:

*Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of both judges and litigants.*

*Id.* at 1519-20 (emphasis added).

In a more recent case, an Illinois appellate court described judges' need for confidential deliberations as follows:

*Confidential communications between judges and between judges and the court's staff certainly "originate in a confidence that they will not be disclosed." Judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires.*

*Thomas v. Page*, 837 N.E.2d 483, 489-90 (Ill. App. Ct. 2005) (emphasis added).

Continuing the discussion, the Illinois appellate court found that *confidentiality* was a *necessary component* of the judicial decision-making process:

*In order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public.*

....

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A quasi-judicial power, on the other hand, "is one imposed upon an officer or a board involving the exercise of discretion, *judicial in its nature*, in connection with and as incidental to the administration of matters assigned or entrusted to such officer or board." *State ex rel., Tharel v. Bd. of County Comm'rs*, 1940 OK 468, ¶ 18, 107 P.2d 542, 549 (emphasis added) (quoting *Bd. of County Comm'rs v. Cypert*, 1917 OK 248, ¶ 6, 166 P. 195, 198).

The *very integrity* of the *process* often *rests on judges' candid communications with their colleagues and staffs* and, as a consequence, the *confidentiality of such matters is a necessary component of the process*.

*Id.* at 490 (emphasis added).

**D. Because Confidential Deliberations Are Essential to the Workers' Compensation Commissioners' Quasi-Judicial Decision-Making Process, the Commissioners' Deliberations Are Protected by the Deliberative Process Privilege.**

As noted above, in deciding the appellate cases before them, the Workers' Compensation Commissioners are exercising the judicial power of the State, vested in them by Article VII, § 1 of the Oklahoma Constitution. In exercising that power, the Commissioners act in their quasi-judicial capacity and have the same need as judges to engage in confidential communications among themselves and with their staff—a necessary component of their quasi-judicial deliberative process. Those performing judicial functions of the State—regardless of whether they are judges and justices in the Judicial Branch; or Executive Officials; or State Agencies, Boards, or Commissions—have the same inherent need as the Governor for *confidential deliberations*. The confidentiality of the pre-decisional deliberative process for those acting in a quasi-judicial capacity *is essential to their function and inherent power*. Accordingly, under the teachings of *Vandelay*, it is beyond the power of the Legislature to deprive those performing quasi-judicial functions, such as the Workers' Compensation Commissioners, of the *confidentiality* of their deliberations. And, as *Vandelay* makes clear, the privilege not only attaches to verbal communications, it also attaches to written communications.

Thus, as a matter of constitutional law, under the State Separation of Powers Provision, the deliberations of the Workers' Compensation Commissioners are protected by the *deliberative process privilege*.<sup>2</sup>

Furthermore, under the teachings of *Vandelay*, communications must be pre-decisional and deliberative to fall within the deliberative process privilege. 2014 OK 109, ¶ 24, 343 P.3d 1273, 1278.

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<sup>2</sup> As Governor Fallin's Exhibits at Tab 7 of the certified appellate Record in *Vandelay Enterprises v. Fallin*, (Supreme Court Case No. 113,187) demonstrates, the deliberative process is not new to Oklahoma. Rather, it has been invoked on numerous occasions: Justice Marion Opala relied on the privilege while testifying in litigation challenging Oklahoma's Anti-Cock Fighting laws (Governor's Exhibit 1, pgs. 52, 53); State Treasurer Ken Miller invoked the privilege to quash a subpoena for his appearance (Governor's Exhibit 2); for decades the Oklahoma Horse Racing Commission invoked the deliberative process privilege in refusing to release deliberative information (Governor's Exhibit 3); and the Department of Securities relied upon the privilege in support of its motion to quash a notice to take the deposition of a department attorney (Governor's Exhibit 4).

Of course, all hearings on the appeals that come before the Commission, as well as the appellate record and the briefs and memorandums filed by the parties, do not fall within the privilege. Rather, the privilege attaches to written or oral deliberative, pre-decisional communications engaged in as part of the Commissioners' decision-making process in cases decided under their judicial power.

The privilege would thus protect all verbal communications among all three Commissioners sitting down to discuss a case, or deliberative communications between two of the Commissioners, as well as such discussions with Commission staff members tasked with aiding the Commissioners in deciding the case. The privilege would further attach to proposed draft orders, staff memorandum prepared in aid of the decision-making process, and any other pre-decisional, deliberative communication related to the cases decided by the Commissioners in the exercise of their judicial power.

Because, as a matter of constitutional law, the Workers' Compensation Commissioners' deliberations are protected by the deliberative process privilege, we conclude that the provisions of Oklahoma's Open Meeting Act, 25 O.S.2011 & Supp.2014, §§ 301 – 314, are not applicable to the Commissions' oral deliberations.

In concluding that confidential deliberations are essential to the Workers' Compensation Commissioners' quasi-judicial decision-making process and that, therefore, such deliberations are protected by the deliberative process privilege, we need not and do not determine the full contours of the deliberative process privilege available to other members of the Executive Branch. Rather, we deal today only with the Workers' Compensation Commission—a Commission created to take over the function of the Workers' Compensation Court.

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

- 1. The Workers' Compensation Commissioners are empowered to act as an appellate tribunal in three types of appeals: review of decisions or awards made by the Commission's Administrative Law Judges, 85A O.S.Supp.2014, § 78(A); review of adverse benefit determinations under the Oklahoma Employment Injury Benefit Act, 85A O.S.Supp.2014, § 211(B)(5); and review of arbitration awards, 85A O.S.Supp.2014, §§ 322 and 323.**
- 2. In acting as an appellate tribunal, the Workers' Compensation Commissioners, by virtue of Article VII, Section 1 of the Oklahoma Constitution, are exercising the judicial power of the State and act in a quasi-judicial capacity.**

3. **Confidential, pre-decisional deliberations are an essential component of the decision-making process when the Workers' Compensation Commissioners act in their quasi-judicial capacity.**
4. **Under the teachings of the Oklahoma Supreme Court's decision in *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, because confidential deliberations are essential to the Workers' Compensation Commissioners' quasi-judicial decision-making process, the Commissioners' pre-decisional deliberations in cases considered in the exercise of their judicial power are protected by the deliberative process privilege by virtue of the Separation of Powers Provision of Article IV, Section 1 of the Oklahoma Constitution.**

E. SCOTT PRUITT

OKLAHOMA ATTORNEY GENERAL

NEAL LEADER

SENIOR ASSISTANT ATTORNEY GENERAL

## OPINION 2015-9

The Honorable Bobby Cleveland  
State Representative, District 20

October 6, 2015

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

**May a public school district or a publicly funded association that has been delegated control of certain school athletic events by public school districts ban or prohibit voluntary student speech because of the speech's religious viewpoint if the speech is expressed during opening remarks before athletic events, the student-speaker chooses the message for the opening remarks without any government official involvement, and the student-speaker is chosen through neutral criteria that is completely unrelated to the viewpoint of the student's speech, as long as the student does not engage in any of the limited categories of speech a school district may ban as outlined in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) and *Morse v. Frederick*, 551 U.S. 393 (2007)?**

Recently, the Oklahoma Secondary School Activities Association ("OSSAA") revised its policy regarding publicly recited prayer at OSSAA playoff and championship events.<sup>1</sup> Approved by OSSAA's Board of Directors at its June 9, 2015, meeting, that policy now states:

In view of current law, no school, individual, group, or organization may publicly recite a prayer to all attendees and participants, or invite all attendees and participants to pray, whether audibly or in silence, at OSSAA championship events, or at regional, area, district or other playoff events leading to championship events. This policy applies even if the proposed prayer is nondenominational, or is offered voluntarily by a student, or by a parent or other adult who is not associated with OSSAA or a member school.<sup>2</sup>

It is our understanding that this policy revision prompted your question.

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<sup>1</sup> OSSAA coordinates, leads, supervises, and regulates secondary school activities for member schools, many of which are public schools. This opinion does not examine whether OSSAA is publicly funded. Nevertheless, the analysis applies to any entity, whether publicly funded or not, that acts on behalf of and stands in the shoes of public schools when coordinating, leading, supervising, and regulating secondary school activities.

<sup>2</sup> Board of Directors' Policy, XIX. Prayer at OSSAA Events, *available at*, [http://www.os-saaonline.com/docs/2015-16/MiscForms/MF\\_2015-16\\_BoardPolicies.pdf?id=5](http://www.os-saaonline.com/docs/2015-16/MiscForms/MF_2015-16_BoardPolicies.pdf?id=5) (last visited Sep. 24, 2015).

The First Amendment to the U.S. Constitution contains both the Establishment Clause, providing that “Congress shall make no law respecting an establishment of religion,” and the Free Speech Clause, providing that Congress shall not abridge the freedom of speech. U.S. CONST. amend. I. Your question relates to how these two Clauses intersect and, more particularly, the balance between the Establishment Clause’s concept of neutrality and the Free Speech Clause’s concept of the limited public forum. We examine this balance below.

## I.

### **A PUBLIC SCHOOL DISTRICT OR A PUBLICLY FUNDED ASSOCIATION CREATES A LIMITED PUBLIC FORUM WHEN IT SELECTS THROUGH NEUTRAL, EVENHANDED CRITERIA A STUDENT SPEAKER TO MAKE OPENING REMARKS BEFORE A SCHOOL ATHLETIC EVENT.**

#### **A. A public school district or a publicly funded association is not required to create a limited public forum, but where such a forum is created, a student speaker’s First Amendment Free Speech rights are implicated.**

At the outset, it is important to note that “speech which is constitutionality protected against state suppression is not . . . accorded a guaranteed forum on all property owned by the State.” *Capitol Square Review Bd. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). “The right to use government property for one’s private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses.” *Id.*

Unquestionably, a public school district, and by extension a publicly funded association, “like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). That is, “the government may limit speech that takes place on its own property without running afoul of the First Amendment.” *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 225 (2003). To do so, a public school district or a publicly funded association must simply elect not to open its nonpublic forum to public use.

However, when a public school district or a publicly funded association acts to open that forum to speech, the Free Speech rights enshrined in the First Amendment may be triggered. This is so because “[w]here . . . the property at issue is a traditional public forum or a forum designed as public by the government, the First Amendment hinders the government’s ability to restrict speech.” *Id.* Indeed, if a forum is public, the State “may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state

interest.” *Capitol Square Review & Advisory Bd.*, 515 U.S. at 761 (emphasis omitted).

A limited public forum is a subcategory of the designated public forum that “is created when the government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain kinds of subjects.” *Donovan ex rel. Donovan*, 336 F.3d at 225 (internal quotation omitted). Your question contemplates a limited public forum—a public forum that has been opened to student speech limited to certain kinds of subjects, here, presumably, opening remarks applicable to a school athletic event. We examine below in greater detail how such a limited public forum is created.

**B. A limited public forum is created when students are selected through neutral criteria to make opening remarks limited to certain kinds of subjects as identified by a public school district or a publicly funded association.**

Limited public forums can be created pursuant to lawful boundaries a public school district or a publicly funded association sets for itself. For example, in *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993), the U.S. Supreme Court recognized the creation of a limited public forum where a school district policy permitted after-hours use of school property for ten specified purposes, including for “social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community[.]” *Id.* 508 U.S. at 386 (citation omitted). Indeed, both the district court and the court of appeals below acknowledged that the school district had created a limited public forum, with the appellate court holding that school property was “a limited public forum open only for designated purposes, a classification that ‘allows it to remain non-public except as to specified uses.’” *Id.* at 389-90 (citation omitted). The Court again reviewed this same district use policy and the subsequent creation of a limited public forum in *Good News Club v. Milford Central School*, 533 U.S. 98, 102-03 (2001).

And in *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 225 (2003), the U.S. Court of Appeals for the Third Circuit acknowledged the creation of a limited public forum where a school policy created an “‘activity period’—a time during which . . . noncurriculum related student groups met.” *Id.*, 336 F.3d at 214. This activity period created “free reign in a closed universe,” allowing students to choose between club meetings, study hall, student government gatherings, tutoring programs, or college prep clinics, to name just a few. *Id.* The school allowed clubs and groups to seek permission to meet during the activity period, and “[a]mong the voluntary, noncurriculum related groups that [met] . . . [we]re the ski club, an anti-alcohol and anti-tobacco club

called Students Against Destructive Decisions, and the future health services club.” *Id.* at 214-15.

In those cases, school officials created opportunities for the community to use school property after hours and for students to use school time. Those opportunities were limited, however, by the restrictions placed on the use of school property—for ten specified purposes—and on the use of school time—for one of the enumerated purposes including for a school club meeting. Indeed, those opportunities represented “free reign in a closed universe.”

Conversely, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), a school district attempted to create a limited public forum, but failed to do so because of the manner in which that closed universe was created. There, the Santa Fe Independent School District crafted a policy permitting, but not requiring, prayer initiated and led by a student before varsity football games. *Id.* at 294. The policy—crafted during the pendency of litigation challenging the district’s historic delivery of prayer before all such games—was premised on two student elections: the first determining “whether ‘invocations’ should be delivered” and the second selecting who should deliver them. *Id.* at 297. In rejecting the District’s argument that it had created a limited public forum, the Court held that school officials had not evinced in policy or practice “any intent to open the pregame ceremony to indiscriminate use by the student body generally.” *Id.* at 303 (internal quotation omitted). Importantly, the Court noted:

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe’s student election system ensures that only those messages deemed “appropriate” under the District’s policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

*Id.* at 304.

At bottom, the Court identified two problems with the district’s policy: “[t]he plain language of the policy clearly spell[ed] out the extent of school involvement in both [(1)] the election of the speaker and [(2)] the content of the message.” *Id.* at 314-15. Because of the school’s involvement in the election of the speaker and the content of the message, the policy had not created a limited public forum for the expression of student speech at all, *id.* at 315, but had “establish[ed] an improper majoritarian election on religion,” with the purpose and the effect “of encouraging the delivery of prayer at a series of important school events,” *id.*

at 317. As such, the Court found the district's policy violative of the Establishment Clause. *Id.* at 301.

*Santa Fe Independent School District* does not, however, stand for the proposition that a high school football game, or other athletic event, *never* constitutes a limited public forum. On the contrary, opening remarks before such events may provide a limited public forum for student speech if (1) a student speaker is selected through neutral criteria and (2) the school district or the association does not involve itself in the content of the student's speech. For example, a school district or an association may have a policy permitting opening remarks before athletic events, limiting those remarks to the giving of a motivational speech on safe play, sportsmanship-like behavior, and general announcements, and selecting a student through an evenhanded process to deliver those remarks, all without violating the Establishment Clause.<sup>3</sup>

## II.

### WHERE A PUBLIC SCHOOL DISTRICT OR A PUBLICLY FUNDED ASSOCIATION CREATES A LIMITED PUBLIC FORUM, VIEWPOINT DISCRIMINATION BASED ON THE RELIGIOUS CONTENT OF SPEECH IS UNCONSTITUTIONAL.

#### A. Once a limited public forum is created, a public school district or a publicly funded association must respect the boundaries it sets for itself and cannot censor ideas that fit within those boundaries.

In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), the Supreme Court held that once a limited public forum has been opened, "the State must respect the lawful boundaries it has itself set." *Id.* at 829. "The State may not exclude speech . . . nor may it discriminate against speech on the basis of its viewpoint." *Id.* Such exclusion constitutes viewpoint discrimination—"an egregious form of content discrimination." *Id.* "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

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<sup>3</sup> While the Supreme Court has not clearly specified what constitutes neutral criteria in the context presented here, there is strong suggestion that a selection process not based on the content of speech would pass constitutional muster—for example, through selecting a student from a pool of those who entered on a first-come-first-served basis or who made honor roll in a given period. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 843 (1995) ("[A] public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall.").

Returning to *Lamb's Chapel*, for example, the Court considered a policy that opened school facilities for after-hours use to community groups for social, civic, and recreational purposes, 508 U.S. at 386, and reviewed whether the school district violated the Free Speech Clause when it “den[ie]d a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents,” *id.* at 387. The Court held that “[t]he church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purpose.” *Rosenberger*, 515 U.S. at 832.

Therefore, if a school district or association creates a policy permitting opening remarks before athletic events but limits those remarks to the giving of a motivational speech on safe play, sportsmanship-like behavior, and general announcements, and then selects a student-speaker through an evenhanded process to deliver those remarks, it cannot then censor that student-speaker’s speech if those remarks are made from a religious viewpoint. This is so because “speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.” *Good News Club*, 533 U.S. at 112.

Further, a public school district or a publicly funded association cannot cite its fear of violating the Establishment Clause as the reason for censoring speech, as this reasoning has been nearly universally rejected by the Supreme Court. See *Rosenberger*, 515 U.S. at 839 (“We have held that the guarantee of neutrality is respected, not offended, when the government following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”); see also *Donovan ex rel. Donovan*, 336 F.3d at 226.

Therefore, once a school district or an association creates a limited public forum, it must respect the lawful boundaries it sets for itself and cannot restrict speech fitting within that limited public forum simply because it reflects a religious viewpoint.

**B. A public school district or a publicly funded association may, nevertheless, restrict speech that is disruptive to the work of the school, that is lewd, or that encourages illegal drug use without violating a student’s Free Speech rights.**

Nevertheless, pursuant to Supreme Court precedent, a public school district or a publicly funded association may, at times, restrict speech without violating the Free Speech Clause. First, in the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court held that “[i]t can hardly be argued that either students or teachers shed

their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506. There, the Court reviewed a school district’s last-minute policy banning the display of black arm bands worn to protest the Vietnam War. *Id.* at 514. Despite protecting the students’ silent demonstration, the Court held that student speech is not immunized if it materially and substantially interferes with the work of the school or invades the rights of others. *Id.* at 513.

These concepts were further explored in *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986) and *Morse v. Frederick*, 551 U.S. 393 (2007). In *Fraser*, the Court held that “[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.” *Id.*, 478 U.S. at 683. Rather, the Court found the Bethel School District “acted entirely within its permissible authority” when it imposed sanctions on a student that delivered an “offensively lewd and indecent speech” at a school assembly. *Id.* at 685.

Drawing from the holding in *Fraser*, the Court instructed in *Morse* that two basic principles could be distilled from the *Fraser* case: (1) “that ‘the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings’ ” and (2) “that the mode of analysis set forth in *Tinker* is not absolute.” *Morse*, 551 U.S. at 404-05 (citation omitted). From these two basic principles, the Court held that a school district properly sanctioned a student for unfurling a fourteen-foot banner that promoted illegal drug use. *Id.* at 397, 408.

Considering these cases as a whole, a public school district or a publicly funded association may restrict speech that materially and substantially interferes with the work of the school, that is lewd and indecent, or that promotes illegal drug use. But because these cases were decided roughly coextensively with *Rosenberger*, *Lamb’s Chapel*, and *Good News Club*, they should not be viewed as abrogating the Free Speech rights of students, particularly when a student expresses a religious viewpoint within a limited public forum. Indeed, respect for religious viewpoint within a limited public forum has even been extended to prayer specifically.<sup>4</sup>

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<sup>4</sup> See *Doe ex rel. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 613 (8th Cir. 2003); *Adler v. Duval Cnty. Sch. Bd.*, 206 F.3d 1070, 1080 (11th Cir. 2000) (en banc), *reinstated*, *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001); *Chandler v. Siegelman*, 230 F.3d 1313, 1316-17 (11th Cir. 2000); *Am. Humanist Ass’n v. S.C. Dep’t of Educ.*, Civil Action No. 6:13-2471-BHH, 2015 WL 2365350, \* 10 (D.S.C. May 18, 2015).

**C. Consistent with the Supreme Court cases discussed above, the U.S. Department of Education has issued guidelines reflecting that a school district that has created a limited public forum cannot engage in viewpoint discrimination.**

The conclusion we reach today is in parity with U.S. Department of Education guidelines issued on February 7, 2003.<sup>5</sup> Those guidelines were generated in response to the requirements of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001. Specifically, federal law requires the Secretary of the Department of Education to “provide and revise guidance . . . to State educational agencies, local educational agencies, and the public on constitutionally protected prayer in public elementary schools and secondary schools, including making the guidance available on the Internet.” 20 U.S.C. § 7904(a). Compliance with these guidelines is a condition of receiving funds under the No Child Left Behind Act. *Id.* § 7904(b).

Those guidelines provide the following:

**Student Assemblies and Extracurricular Events**

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.<sup>6</sup>

These guidelines, issued approximately two years after the Supreme Court’s decision in *Santa Fe Independent School District*, reflect the balancing between the Establishment Clause’s concept of neutrality and the Free Speech Clause’s limited public forum. Thus, while a school district or an association may consider

<sup>5</sup> Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools [hereinafter guidelines], U.S. Dep’t of Educ. Letter (last modified Sep. 15, 2003), available at [http://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

<sup>6</sup> See footnote 5.

drafting a neutral disclaimer regarding student speech, it cannot censor student speech from a religious viewpoint where the school district or the association has created a limited public forum.

### III.

#### **THE RECENTLY REVISED OSSAA POLICY IS CONSTITUTIONALLY OVERBROAD, POTENTIALLY VIOLATING A STUDENT-SPEAKER'S FREE SPEECH RIGHTS.**

Applying this balancing to the recently revised OSSAA policy, that policy is overbroad for three reasons. First, while the policy fails to indicate whether a limited public forum is created, the policy specifically bans prayer. Therefore, if opening remarks are offered, the OSSAA policy certainly places a religious viewpoint restriction on speech. The policy specifically states that no one may publicly recite a prayer or invite others to do so audibly or in silence. Moreover, this restriction applies even if prayer is offered voluntarily by a student, parent, or other adult. Such a sweeping restriction is inconsistent with the fact-intensive balancing described by the cases above.

Second, the policy extends to regional, area, district, or other playoff events that could lead to OSSAA events. Consequently, the policy requires other entities to also place restrictions on speech that implicates a student-speaker's Free Speech rights.

Third, even if a limited public forum is not created, the OSSAA policy on its face prohibits corporate prayer at any such events, even if offered voluntary and even if done in silence. Such an extreme prohibition runs afoul of the Free Speech rights of those who would choose to voluntarily pray before events. For example, a crowd at a high school football game recently recited the Lord's Prayer during a "moment of silence" after the high school changed its policy regarding prayer.<sup>7</sup> A policy attempting to preemptively ban such speech clearly runs afoul of the Free Speech Clause. *See Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (indicating that an injunction limiting any prayer in a public context at any school function would be too broad).

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

- 1. The U.S. Supreme Court has held that a public school district or a publicly funded association may (1) permit a student-speaker chosen through neutral criteria unrelated to the content of the student-speaker's speech (2) to deliver opening remarks (3) the content of which are chosen by the student-speaker without of-**

<sup>7</sup> Chris Martin, Georgia High School Scolded for Pregame Prayers and Hymns, IJReview, available at <http://www.ijreview.com/2015/08/404356-georgia-high-school-scolded-pregame-prayers-hymns-heresfansresponded-friday-night/>.

**official government involvement. Compare *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).**

- 2. And when a student-speaker delivers remarks within that context, the school district or association cannot ban or prohibit those remarks simply because they exhibit a religious viewpoint. See *Rosenburger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).<sup>8</sup>**
- 3. The recently revised Oklahoma Secondary School Activities Association policy is constitutionally overbroad on its face.<sup>9</sup>**

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<sup>8</sup> The Oklahoma Supreme Court recently held that the plain intent of Article II, Section 5 of the Oklahoma Constitution “is to ban State Government, its officials, and its subdivisions from using public money or property for the benefit of any religious purpose.” *Prescott v. Okla. Capitol Pres. Comm’n*, 2015 OK 54, ¶ 4, \_\_\_P.3d. \_\_. Further, it held that “[t]o reinforce the broad, expansive effect of Article 2, Section 5, the framers specifically banned any uses ‘indirectly’ benefitting religion.” *Id.* ¶ 5.

Because this opinion addresses student-led, student-initiated, and student-controlled prayer, Article II, Section 5 is not implicated. Specifically, a student-speaker who makes remarks from a religious viewpoint is neither the State nor a state official or subdivision. Further, that such speech is the student’s own, the content of which the State has had no hand in shaping, contravenes any state attempt to indirectly benefit religion. Finally, because the student-led speech as described in this opinion is specifically deemed permissible under federal law, interpreting Article II, Section 5 otherwise would produce a chilling effect on speech that is contrary to one of this country’s most basic and fundamental rights: the freedom of speech. Therefore, we conclude that Article II, Section 5 does not operate to silence a student-speaker’s message as described in this opinion and, in fact, conclude that Article II, Section 5 has no application in this context.

<sup>9</sup> An official Attorney General opinion addressing the constitutionality of policies, as with statutes, is not binding but carries persuasive value. *York v. Turpen*, 1984 OK 26, ¶ 12, 681 P.2d 763, 767.

## OPINION 2015-10

The Honorable Richard Morrisette  
State Representative, District 92

October 29, 2015

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

**Pursuant to 43A O.S.2011, § 10-111, district courts are vested with jurisdiction to issue and enforce orders restricting visitations with a vulnerable adult.**

- 1. Does a guardian have the power to solely, and without court order, restrict or terminate visitation with a nursing home resident or other vulnerable adult, or does a ward retain the right to visits from family members or friends?**
- 2. If a guardian of an adult can restrict or terminate visitation without a court order, by what statutory authority does the guardian have such power?**

### I.

#### INTRODUCTION

The answer to your questions requires two inquiries: (1) an identification of the statutory authority for guardianship of an adult in Oklahoma and (2) whether that statutory authority, without a court order, includes the power to restrict or terminate visitation. Additionally, your corresponding point that restriction of visitation may be sought by court order is briefly addressed herein.

### II.

#### **TITLE 30 GOVERNS GUARDIANSHIP OF ADULTS IN OKLAHOMA AND DOES NOT PROVIDE A GUARDIAN WITH THE AUTHORITY TO RESTRICT OR TERMINATE VISITATIONS WITHOUT A COURT ORDER.**

Guardianship in Oklahoma is governed by the Oklahoma Guardianship and Conservatorship Act, including Sections 1-101 through 5-101. 30 O.S.2011, § 1-101. Article III of the Act specifically addresses guardianship of adults. 30 O.S.2011, § 1-102. Answering your questions requires a review of the legislative intent of the Act and its substantive provisions.

**A. The Legislature made its purpose clear in establishing the Oklahoma Guardianship and Conservatorship Act, emphasizing maximum self-reliance and independence of the ward.**

The Legislature stated its purpose for establishing a system of guardianship was in part, “to provide for the participation of such persons, as fully as possible, in the decisions which affect them.” 30 O.S.2011, § 1-103(B). The Legislature elaborated that “the court shall exercise the authority conferred by the Oklahoma Guardianship Act so as to encourage the development of maximum self-reliance and independence of the incapacitated or partially incapacitated person.” *Id.* § 1-103(B)(1). As to guardians, the Legislature further provided its intent, in part, that guardians should “encourage, to the extent reasonably possible, incapacitated or partially incapacitated persons to participate to the maximum extent of their abilities in all decisions which affect them and to act on their own behalf on all matters in which they are able to do so within the limitations imposed by the court[.]” *Id.* § 1-103(B)(2)(b). Accordingly, the Legislature made its purpose clear in establishing the Oklahoma Guardianship and Conservatorship Act, to emphasize the maximum self-reliance and independence of the ward.

Having identified the statutory authority for guardianship in Oklahoma and noting its stated purpose, we review the substantive provisions in that context. “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 a statute.” *J.L.M. v. State*, 2005 OK 15, ¶ 5, 109 P.3d 336, 338; *see also State ex rel. Okla. Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶ 12, 237 P.3d 125, 132. Legislative intent is “ascertained from the whole legislative act in light of its general purpose and object.” *City of Tulsa v. State ex rel. Pub. Emp. Relations Bd.*, 1998 OK 92, ¶ 14, 967 P.2d 1214, 1220; *see also J.L.M.*, 2005 OK ¶ 5, 109 P.3d at 338. The statutory language will be given its “plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole.” *Stump v. Cheek*, 2007 OK 97, ¶ 9, 179 P.3d 606, 611. Where the “language is plain and clearly expresses the legislative will, further inquiry is unnecessary.” *Cattlemen’s Steakhouse, Inc. v. Waldenville*, 2013 OK 95, ¶ 14, 318 P.3d 1105, 1110.

**B. The plain statutory language of the Act does not provide a guardian the power to restrict or terminate visitation.**

A guardian’s power to restrict or terminate visitation must be found in the Act itself, or be derived from a court order. Section 3-118 provides that a guardian of an adult “is responsible for the care or control of the ward pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act, and the orders of the court, and the guardianship plan approved by the court . . . .” 30 O.S.2011, § 3-118(A). Thus, the only sources of a guardian’s authority are the Act itself, and the courts. The Legislature went even further, explicitly stating

that a “guardian *shall have no powers except* as provided by the Oklahoma Statutes or given to such guardian in the orders in the guardianship proceeding.” *Id.* § 3-119 (emphasis added). These provisions stating the limitation of power within Article III are congruent with the general provisions of Article I, which include, “[a] guardian has only those powers over the person or the property of the ward, or both such person and property, as ordered by the court pursuant to this title.” *Id.* § 1-119.

A review of Title 30 reveals the Oklahoma Legislature did not provide a guardian with the statutory authority to restrict or terminate visitations. Such a power is simply not included in the statute. Indeed, Section 1-124 requires the “Administrative Office of the Courts shall prepare a guardianship and conservatorship handbook for distribution to the district courts,” which is to include in clear, simple language “the duties and responsibilities of such guardians and conservators.” 30 O.S.2011, § 1-124. A review of the handbook likewise provides no mention of the duty or power of a guardian to restrict or terminate visitation, and states “[i]n general, all the powers and duties of the guardian are set forth in the order of the court creating the guardianship.” ADMIN. OFFICE OF THE COURTS, A HANDBOOK FOR GUARDIANS 6 (n.d.), [http://www.oscn.net/forms/aoc\\_form/adobe/Guardian.-Guardianship-Handbook.pdf](http://www.oscn.net/forms/aoc_form/adobe/Guardian.-Guardianship-Handbook.pdf) (last visited Oct. 12, 2015).

Thus, the Act plainly excludes a guardian’s power to restrict or terminate visitation. *Stump*, 2007 OK ¶ 9, 179 P.3d at 611 (“The words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole.”).

### **C. An argument that Title 30 implies the power to restrict or terminate visitations is inconsistent with the legislative intent.**

To the extent that one might argue language in Title 30 could be implied to confer the power to restrict or terminate visitations, such an interpretation is inconsistent with the legislative intent of the Act as set forth above and in the context of other provisions in the Act. The enumerated duties and limitations both indicate the Legislature did not intend for guardians to restrict or terminate visitations without a court order.

Section 3-118 provides some affirmative duties, including in part, to “assure that the ward has a place of abode in the least restrictive, most normal setting consistent with the requirements for his health or safety[.]” 30 O.S.2011, § 3-118(B)(1)(b). The power to restrict visitations is not included in the enumerated duties listed in Section 3-118, and the duty to assure the least restrictive and most normal setting indicates that the Legislature intended the ward to retain the right of visitations.

In addition to enumerated duties, there are also some limitations on a guardian's power. 30 O.S.2011, § 3-119. The Oklahoma Legislature provided a short list of limitations but indicated that the list was not exhaustive. 30 O.S.2011, § 3-119 (stating the "limitation of powers includes but is not limited to the following"). The limitations include in part, that "[n]o guardian shall have the power to prohibit the marriage or divorce of a ward except with specific authorization of the court having jurisdiction of the guardianship proceeding[.]" *Id.* § 3-119(4). A guardian also cannot "consent on behalf of the ward to the termination or relinquishment of parental rights of the ward[.]" *Id.* § 3-119(2). These limitations strongly suggest the Legislature's desire to leave relationship decisions with the ward. *Id.* § 3-119.

Thus, in addition to a lack of any enumerated power to restrict visitations without a court order, it further appears consistent with the Act that the power to control relationships could not proceed without a court order. *State ex rel. Pub. Emp. Relations Bd.*, 1998 OK ¶ 14, 967 P.2d at 1220 (stating that "intent is ascertained from the whole legislative act in light of its general purpose and object"). *See also Stump*, 2007 OK ¶ 9, 179 P.3d at 611 ("The words of a statute will be given their plain and ordinary meaning unless it is contrary to the purpose and intent of the statute when considered as a whole.").

The Oklahoma Court of Civil Appeals elaborated on the intent of the Legislature to allow wards to determine their relationships and associations in a case where a ward was ordered by a district court to continue visitations with his father. *In re Guardianship of Rowland*, 2015 OK CIV APP 39, ¶¶ 5-10, 348 P.3d 228, 230. There, the court held the ward "has the right to choose with whom he associates." *Id.* ¶ 6, 348 P.3d at 230. Most notably, the court went on to address the purpose and intent of the Legislature in Section 1-103, including the provisions to "provide for the participation of such persons, as fully as possible" and to "encourage the development of maximum self-reliance and independence." *Id.* ¶ 7, 348 P.3d at 230 (quoting 30 O.S.2011, § 1-103). The court held its ruling is "consistent with legislative intent" and that an ordered visitation "does not allow [the ward] to participate in decisions affecting him, nor does it foster his independence." *Id.* ¶¶ 7-8, 348 P.3d at 230. While this case does not address the power of a guardian to restrict or terminate visitation without a court order, it affirms the legislative intent of the Oklahoma Guardianship and Conservatorship Act. Specifically, it affirms that without a court order, and in this case an order that has a sufficient basis, the ward "has the right to choose with whom he associates." *Id.* ¶ 6, 348 P.3d at 230.

### III.

#### **WHERE A GUARDIAN BELIEVES VISITATION RESTRICTIONS ARE NECESSARY, THE GUARDIAN SHOULD SEEK SUCH A REMEDY WITH THE COURTS.**

While the Oklahoma Guardianship and Conservatorship Act does not provide a guardian with the power to restrict or terminate visitation without a court order, such a remedy where necessary may be sought with the courts.

#### **A. The courts may provide guardians with additional powers in guardianship proceedings.**

As set forth above, the Oklahoma Guardianship and Conservatorship Act states a guardian's powers include those "given to such guardian in the orders in the guardianship proceeding." 30 O.S.2011, § 3-119. Accordingly, should a guardian believe it necessary to obtain authority to restrict or terminate visitations, such power would have to be sought through court orders in the initial or subsequent guardianship proceedings, as it is not provided by statute.<sup>1</sup>

#### **B. Courts may issue and enforce orders restricting visitation, for the protection of a ward, under the Protective Services for Vulnerable Adults Act.**

As your question indicates, in addition to court orders in guardianship proceedings, an example of court protection is found in the Protective Services for Vulnerable Adults Acts. This Act provides that any person "having reason to believe that visitation of a vulnerable adult should be restricted may notify the Department of Human Services pursuant to the Protective Services for Vulnerable Adults Act." 43A O.S.2011, § 10-111(D). A vulnerable adult is defined as "an individual who is an incapacitated person" and an incapacitated person includes "a person for whom a guardian, limited guardian, or conservator has been appointed pursuant to the Oklahoma Guardianship and Conservatorship Act[.]" *Id.* § 10-103(A)(4)(b), (A)(5).

Where this procedure is followed, "district courts are vested with jurisdiction to issue orders and enforce orders restricting visitation, by the custodian or by any other person specified by the court, of a vulnerable adult who is receiving or has been determined to need protective services pursuant to the Protective Services for Vulnerable Adults Act." 43A O.S.2011, § 10-111(A)(1). Title 30 references this procedure stating, "Reports regarding the abuse, neglect, or exploitation of an incapacitated person, or a partially incapacitated person shall be made and shall be governed by the provisions of the Protective Services for

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<sup>1</sup> A guardian should first look to the initial court order of the guardianship proceeding to determine if the power to restrict or terminate visitation is provided, and if necessary seek such authority through Title 30 guardianship proceedings.

Vulnerable Adults Act.” 30 O.S.2011, § 4-903(A)(3). These provisions ensure a ward is not without means of protection by the courts.

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

- 1. A guardian has no powers except as provided by the Oklahoma Guardianship and Conservatorship Act, or by court orders. 30 O.S.2011, §§ 1-119, 3-118(A), 3-119.**
- 2. Title 30 does not provide a guardian with the power to solely, and without court order, restrict or terminate visitation with a nursing home resident or other vulnerable adult. 30 O.S.2011, § 3-118(B).**
- 3. Where a guardian believes restriction of visitation is necessary, the guardian should seek such a remedy with the courts. 30 O.S.2011, §§ 1-119, 3-118(A), 3-119.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

TIMOTHY J. DOWNING  
ASSISTANT ATTORNEY GENERAL

## OPINION 2015-11

John D. Harrington, Chairman  
Statewide Virtual Charter School Board

November 9, 2015

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

- 1. Does the Oklahoma Charter Schools Act establish the Statewide Virtual Charter School Board as a state agency/entity separate and apart from the State Department of Education?**
- 2. Does the Office of Management and Enterprise Services (“OMES”) have the authority to establish a separate cash account for the Statewide Virtual Charter School Board?**
- 3. Does the Oklahoma Charter Schools Act require the State Department of Education to serve as the budgeting entity of the Statewide Virtual Charter School Board after December 31, 2014?**

### I.

#### INTRODUCTION

Since 1999, Oklahoma has supplemented its traditional public school system with a concurrent system that allows for the creation and maintenance of charter schools. *See* 1999 Okla. Sess. Laws ch. 320, § 6 (currently at 70 O.S.2011, § 3-131). Among other things, charter schools encourage the development of innovative teaching methods, foster healthy competition with traditional public schools, and increase learning opportunities for students. *See* 70 O.S.2011, § 3-131. While it used to be that charter schools could only exist in brick and mortar buildings within clearly defined school districts, that is not true today. Technological advances led to the emergence of virtual charter schools whose boundaries extend to all corners of the State. Because these virtual schools cannot be contained within the traditional geographical boundaries of a school district, the Legislature created a new mechanism for their sponsorship—the Statewide Virtual Charter School Board. Your questions revolve around whether the Legislature intended this Board to be its own state agency.

### II.

#### THE STATEWIDE VIRTUAL CHARTER SCHOOL BOARD

The Oklahoma Legislature created the Statewide Virtual Charter School Board (“Board”) in 2012,<sup>1</sup> giving the Board “sole authority to authorize and sponsor statewide virtual charter schools” within the State. 70 O.S.Supp.2015, § 3-145.1(A). The Board is made up of five appointed members—one by the

<sup>1</sup> *See* 2012 Okla. Sess. Laws ch. 367, § 3 (codified at 70 O.S.Supp.2012, § 3-145.1)

Governor, two by the President Pro Tempore of the Senate, and two by the Speaker of the House of Representatives—and two ex-officio, non-voting members, the State Superintendent of Public Instruction, and the Secretary of Education, or their designees. *Id.* Pursuant to statute, the Board must:

1. Provide oversight of the operations of statewide virtual charter schools in this state;
2. Establish a procedure for accepting, approving and disapproving statewide virtual charter school applications and a process for renewal or revocation of approved charter school contracts which minimally meet the procedures set forth in the Oklahoma Charter Schools Act;
3. Make publicly available a list of supplemental online courses which have been reviewed and certified by the Statewide Virtual Charter School Board to ensure that the courses are high quality options and are aligned with the subject matter standards adopted by the State Board of Education pursuant to Section 11-103.6 of this title. The Statewide Virtual Charter School Board shall give special emphasis on listing supplemental online courses in science, technology, engineering and math (STEM), foreign language and advanced placement courses. School districts shall not be limited to selecting supplemental online courses that have been reviewed and certified by the Statewide Virtual Charter School Board and listed as provided for in this paragraph; and
4. In conjunction with the Office of Management and Enterprise Services, negotiate and enter into contracts with supplemental online course providers to offer a state rate price to school districts for supplemental online courses that have been reviewed and certified by the Statewide Virtual Charter School Board and listed as provided for in paragraph 3 of this subsection.

70 O.S.Supp.2015, § 3-145.3(A).

Initially, the State Department of Education provided the Board with staff support. *Id.* § 3-145.1(F). But after December 31, 2014, the Board began providing its own staff support and now has the sole authority to hire and terminate its own employees. *Id.*; OAC 777:1-1-4(b). In order to pay for that administrative support and in furtherance of the Board's mission, the Board may retain up to 5 percent of the state aid allocated to statewide virtual charter schools. *Id.* § 3-145.3(D). The 5 percent retained by the Board then flows into the Statewide

Virtual Charter School Board Revolving Fund, which was created earlier this year and which can only be operated by the Board. The provision that created the Fund states:

There is hereby created in the State Treasury a revolving fund for the Statewide Virtual Charter School Board to be designated the “Statewide Virtual Charter School Board Revolving Fund”. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies received by the Statewide Virtual Charter School Board from State Aid pursuant to Section 3-145.3 of Title 70 of the Oklahoma Statutes or any other state appropriation. *All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Statewide Virtual Charter School Board for the purpose of supporting the mission of the Statewide Virtual Charter School Board.* Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of the Office of Management and Enterprise Services for approval and payment.

70 O.S.Supp.2015, § 3-145.7 (emphasis added). The Board is further authorized to promulgate rules “as may be necessary to implement” the Oklahoma Charter Schools Act. 70 O.S.Supp.2015, § 3-145.4.

### III.

#### **THE LEGISLATURE INTENDED THE BOARD TO BE AN ENTITY SEPARATE AND APART FROM THE STATE DEPARTMENT OF EDUCATION**

In construing any statute, we must first ascertain and give effect to legislative intent. *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656, 658. Where that intent is not expressly stated, we look to “various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent.” *Id.* Because there is no language providing for the creation of an agency or executive office in the Board’s enabling statute, we must look to the structure and nature of the Board itself as evidence of the Legislature’s intent.

When we have conducted similar analyses regarding an entity’s independent status in the past, we have considered the following, albeit non-exhaustive, factors: whether the entity’s enabling statute has specific language indicating its independent nature; whether the entity in question employs its own staff; who has control over revolving funds; and whether the entity is authorized to promulgate rules.

For example, in 2003 we examined the statutorily created Oklahoma State Bond Advisor (“Bond Advisor”) and that position’s relationship to the Department of Central Services. *See* A.G. Opin. 2003-3. In that opinion, we concluded that the Bond Advisor was not subject to control by or subordinate to the Director of the Department of Central Services. *Id.* at 20. At its outset, the Bond Advisor was a “position within the [Department of Central Services.]” *Id.* at 16, (citing 62 O.S.Supp.1987, § 695.7(B)).<sup>2</sup> However, that description was later amended to read “[t]he Oklahoma State Bond Advisor shall be an independent position within the [Department of Central Services]” and “may employ the necessary staff to carry out the duties of the Bond Advisor.” 1990 Okla. Sess. Laws ch. 342, § 2(B) (amending 62 O.S.Supp.1989, § 695.7(B)). Additionally, funding for the Bond Advisor flowed to the Bond Oversight Revolving Fund. Even though the Fund’s provision stated that “[a]ll monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Department of Central Services,” A.G. Opin. 2003-3, at 19 (quoting 62 O.S.2001, § 695.8a), we found that “nothing in the statutes authorizes the Department of Central Services to regulate how the money in the revolving fund may be spent.” A.G. Opin. 2003-3, at 20. Therefore, we concluded that “[t]he Director of the Department of Central Services ha[d] no authority to impose specific budget cuts on funds appropriated for the Oklahoma State Bond Advisor.” *Id.*

That same year, we also analyzed the relationship between the Real Estate Appraiser Board and the Oklahoma Insurance Department. *See* A.G. Opin. 2003-9. In that Opinion, we concluded that the Real Estate Appraiser Board functioned independently from the Oklahoma Insurance Department for three main reasons. First, the Legislature had explicitly stated that it was “independent” from and “adjunct to” the Insurance Department. *Id.* at 39 (“Actions of the Board shall not be subject to review by the [Insurance] Department.”). *Id.* at 40. Second, the role of the Insurance Department with respect to the Real Estate Appraisers Board was limited only to providing administrative support and other assistance as may be requested by the Board. *Id.* at 40. And third, the Real Estate Appraiser Board had the authority to promulgate regulations and other functions necessary to implement the Act. *Id.*; *see* 59 O.S.2011, § 858-706.

Many of the characteristics we relied on in those opinions are present here. First, the supervisory power of the State Department of Education is limited only to reviewing sponsorship denials. Second, the Statewide Virtual Charter School Board maintains its own staff “as is authorized by law and necessary to fulfill the duties set forth by Oklahoma statute and regulations.” 70 O.S.Supp.2015, § 3-145.1(F); OAC 777:1-1-4. Third, it is the sole authorizer of the budgeting and expenditure of the Statewide Virtual Charter School Board Revolving Fund. 70 O.S. Supp.2015, § 3-145.7. And fourth, the Board was given the authority to

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<sup>2</sup> That provision now states that “[t]he Office of the State Bond Advisor shall be a separate state agency as set forth in Section 695.7a . . .” 62 O.S.Supp.2015, § 695.7(B).

promulgate rules. *Id.* § 3-145.4. In addition to those characteristics, the Board is also given sole authority to “authorize and sponsor statewide virtual charter schools” within the State, and the members of the Board include the State Superintendent of Public Instruction, the Secretary of Education, and five other appointed members. *Id.* § 3-145.1(A).

Based on these factors, it appears that it was the Legislature’s intent to create an autonomous entity that did not require budgetary or administrative approval from the State Department of Education.<sup>3</sup> The structure and nature of the Statewide Virtual Charter School Board closely resembles the structure and nature of boards and offices we have in the past determined to be independent entities. For these reasons, we find that the Board is an agency independent from the State Department of Education.

#### IV.

#### **THE OFFICE OF MANAGEMENT AND ENTERPRISE SERVICES SHOULD ESTABLISH A SEPARATE CASH ACCOUNT FOR THE BOARD THAT IS NOT SUBJECT TO APPROVAL BY THE STATE DEPARTMENT OF EDUCATION**

This year, the Legislature created the Statewide Virtual Charter School Board Revolving Fund into which all monies received by the Board from state aid allocations must be deposited. Independent from the finding that the Legislature intended the Board to have the authority to act as a separate entity, the Legislature clearly intended for the Board to budget and expend “[a]ll monies accruing to the credit of the fund . . . for the purpose of supporting the mission of the Statewide Virtual Charter School Board.” 70 O.S.Supp.2015, § 3-145.7. Nothing in this provision or the provisions of the Charter School Act authorizes the State Department of Education to regulate how the money in the revolving fund may be spent. Thus, in order to comply with Section 3-145.7, OMES should establish a separate cash account for the Board that is not subject to the State Department of Education’s approval.

This conclusion is further supported by our State Bond Advisor Opinion. *See* A.G. Opin. 2003-3. The statute governing the Bond Oversight Revolving Fund specifically gave the Department of Central Services rather than the State Bond Advisor the authority to budget and expend monies within the fund.

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<sup>3</sup> The Board is not, however, completely separate and distinct from the State Department of Education. As with many state agencies, the Board and the State Department of Education are interrelated. For instance, the Board uses the State Department of Education’s facilities for its office, *see* 70 O.S.Supp.2015, § 3-145.1(F), and receives travel reimbursement from the State Department of Education, *see id.* § 3-145.2(C). Further, if the Board denies, declines to renew, or terminates a charter contract with a statewide virtual charter school, that decision may be appealed to the State Board of Education. *See id.* § 3-145.3(F).

Nevertheless, we found that because the statute did not sanction that Department's regulation of the money, the Bond Advisor had the sole responsibility for authorizing specific budget cuts. *Id.* at 20. Here, the statute governing the Statewide Virtual Charter School Board Revolving Fund expressly provides that the revolving fund may "be budgeted and expended by the Statewide Virtual Charter School Board." 70 O.S. Supp.2015, § 3-145.7. There can thus be no question as to the Legislature's intent regarding who shall approve expenditures made from the Fund.

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

- 1. The Oklahoma Charter Schools Act establishes the Statewide Virtual Charter School Board as an entity separate and apart from the State Department of Education.**
- 2. The Office of Management and Enterprise Services should establish a separate cash account for the Statewide Virtual Charter School Board. See 70 O.S.Supp.2015, § 3-145.7.**
- 3. The Statewide Virtual Charter School Board serves as its own budgeting entity and is not subject to budgetary restrictions of the State Department of Education. See 70 O.S.Supp.2015, § 3-145.7.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

SARAH GREENWALT  
ASSISTANT SOLICITOR GENERAL

## OPINION 2015-12

The Honorable Mike Ritze  
State Representative, District 80

November 30, 2015

The Honorable Chris Kannady  
State Representative, District 91

The Honorable Kevin Calvey  
State Representative, District 82

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

**Pursuant to Title 52, Section 137.1 of the Oklahoma Statutes, political subdivisions of the State of Oklahoma may (1) “enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors incidental to oil and gas operations within [their] boundaries” so long as such ordinances, rules, and regulations are not inconsistent with regulations established under Title 52 or by the Oklahoma Corporation Commission, and (2) “establish reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety and welfare of [their] citizens but may not effectively prohibit or ban any oil and gas operations[.]” Section 137.1 also provides, in relevant part, that “[a]ll other regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission.”**

- 1. Do the provisions of Section 137.1, which limit municipal regulation of oil and gas operations, apply equally to charter municipalities organized under Article XVIII, Section 3 of the Oklahoma Constitution and non-charter municipalities?**
- 2. May a political subdivision regulate aspects of oil and gas operations that are not specifically enumerated in Section 137.1?**
- 3. If a political subdivision adopts setback and/or fencing requirements for oil and gas well sites that effectively prohibit certain types of drilling within its boundaries, will those measures be enforceable in light of Section 137.1?**
- 4. Will an ordinance adopted by a political subdivision be enforceable, notwithstanding a conflict with Section 137.1, if the ordinance (a) predates the statute, or (b) provides for an appeal process to a board of adjustment or local governing body?**

**5. How will it be determined whether an ordinance, rule, or regulation concerning road use, traffic, noise, or odors incidental to oil and gas operations or a particular setback and fencing requirement for oil and gas well site locations meet the reasonableness requirement of Section 137.1?**

**BACKGROUND**

A common theme underlying each of the questions presented is the proper balance of regulatory power between the State and its localities. While there is a clear hierarchy of regulatory authority between a State and its political subdivisions, *see, e.g., City of Hartshorne v. Marathon Oil Co.*, 1979 OK 48, ¶ 6, 593 P.2d 97, 99, a locality is not without power to police matters within its boundaries. Indeed, the concept of concurrent jurisdiction has deep roots in Oklahoma law. *See, e.g., Sparger v. Harris*, 1942 OK 418, ¶ 19, 131 P.2d 1011, 1014 (“Where the Legislature has made or may by general law make a specific police regulation, that fact of itself will not prevent the lawmaking power of a city from making further regulations on the same subject, not inconsistent with general laws.” (quoting *Ex parte Johnson*, 1921 OK CR 202, (Syllabus ¶ 4), 201 P. 533, 534 (Syllabus ¶ 4))); *see also Moore v. City of Tulsa*, 1977 OK 43, ¶ 2, 561 P.2d 961, 963 (“A municipal corporation may exercise police power on subjects of municipal concern which are also proper for statutory regulation, and where the state has not spoken the position of a municipal corporation is analogous to that of the state to the federal government with reference to matters of interstate commerce.”). A full discussion of the contours of this balance between state and local powers is beyond the scope of this opinion. Nevertheless, this framework informs our analysis regarding the effects of Section 137.1 on local regulation of oil and gas activities.

Municipalities in Oklahoma have had a long-recognized role in regulating oil and gas operations within their boundaries.<sup>1</sup> *See Vinson v. Medley*, 1987 OK 41, ¶ 6, 737 P.2d 932, 936 (“A city is empowered to enact zoning laws to regulate the drilling of oil-and-gas wells with a view to safeguarding public welfare. Without these regulations residents would be exposed to multiple dangers and unnecessary inconveniences.” (footnote omitted)); *City of Hartshorne*, 1979 OK ¶ 6, 593 P.2d at 99 (“There is no doubt a city, under its police power, may enact ordinances regulating the drilling of oil and gas wells within its city limits.”); *Van Meter v. H.F. Wilcox Oil & Gas Co.*, 1935 OK 188, ¶ 27, 41 P.2d 904, 911 (“It is no longer open to doubt that a city has the authority to regulate the drilling of oil wells within its corporate limits.”). Thus, courts have upheld ordinances

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<sup>1</sup> While several of the questions addressed herein refer to political subdivisions generally, counties in Oklahoma do not have the same regulatory authority over oil and gas operations as municipalities. For instance, the extraction of oil and gas is specifically exempt from the zoning authority granted to counties. *See* 19 O.S.2011, §§ 866.30, 868.11; *see also* A.G. Opin. 86-37, at 66. We do not address in this opinion all of the implications of this disparate regulatory authority.

ranging from simple permitting and fee requirements, *see, e.g., Ptak v. Oklahoma City*, 1951 OK 99, 229 P.2d 567, to those that confine oil and gas operations to certain areas within the municipality and restrict the number of wells allowed per parcel. *See, e.g., Van Meter*, 1935 OK 188, 41 P.2d 904.

At the same time, the State has an interest in regulating the extraction and production of oil and gas resources, an industry that has long been a driving force behind the State's economy. *See, e.g., C.C. Julian Oil & Royalties Co. v. Capshaw*, 1930 OK 452, ¶ 13, 292 P. 841, 844. But even with the creation of the Oklahoma Corporation Commission as the state entity with exclusive jurisdiction over the drilling and operation of oil and gas wells, *see* 1917 Okla. Sess. Laws ch. 207, § 2, municipalities have retained some regulatory authority regarding oil and gas production within city limits. *See Gant v. Oklahoma City*, 1931 OK 241, ¶ 11, 6 P.2d 1065, 1068 (declining to hold “that the general police power of Oklahoma City to provide for the safety and health of its inhabitants, is in any way taken away by virtue of the jurisdiction conferred upon the corporation commission, to superintend the drilling for oil and gas, and their carrying and preservation”); *C.C. Julian Oil & Royalties Co. v. Oklahoma City*, 1934 OK 88, ¶ 16, 29 P.2d 952, 955 (rejecting the argument that the Legislature's grant to the Corporation Commission of “exclusive power” to regulate oil and gas drilling deprived cities of the authority “to adopt any ordinance, rule, or regulation attempting to govern or control the drilling of such wells”).

We acknowledged this concurrent authority in a 2006 Attorney General Opinion interpreting Section 52(B) of Title 17, which grants the Corporation Commission and incorporated cities and towns, together, “exclusive jurisdiction over permit fees for the drilling and operation of oil and gas wells.” 17 O.S.2011, § 52(B). In that opinion, we stated, “[t]he fact that the Corporation Commission has issued a permit to drill a well would not prevent a city from denying an application for a permit to drill the well pursuant to its municipal ordinances when, for example, the location was not zoned for such an activity.” A.G. Opin. 2006-12, at 94. The concept of shared authority over oil and gas regulation was also recognized in Section 137 of Title 52, which provided as follows:

Nothing in this act is intended to limit or restrict the rights of cities and towns governmental corporate powers to prevent oil or gas drilling therein nor under its police powers to provide its own rules and regulations with reference to well-spacing units or drilling or production which they may have at this time under the general laws of the State of Oklahoma.

52 O.S.2011, § 137 (repealed by 2015 Okla. Sess. Laws ch. 341, § 2). The “act” referenced in Section 137 is found in 1935 Session Laws, Chapter 59,

Article 1, which addressed, among other things, “the spacing of oil wells in the common sources of oil supply in this State, more effectively preventing waste and adjusting the correlative rights of producers of oil and royalty owners in such common sources of supply[.]” The legislation also clarified the role of the Corporation Commission in regulating well spacing to prevent waste in oil and gas production. *See id.* § 3.

In the most recent legislative session, however, the Legislature altered this shared regulatory structure via its enactment of Senate Bill 809. *See* 2015 Okla. Sess. Laws ch. 341. The bill had two sections. The second section repealed the entirety of Section 137 of Title 52, quoted above. *Id.* § 2. The first section created Section 137.1 of Title 52, which, subject to the following exceptions, provides that “*all...regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission.*” *See id.* § 1 (emphasis added). The first exception authorizes municipalities, counties, or other political subdivisions to:

*enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors incidental to oil and gas operations* within [their] boundaries, provided such ordinances, rules and regulations are *not inconsistent with any regulation* established by Title 52 of the Oklahoma Statutes or the Corporation Commission.

*Id.* (emphasis added). This exception appears to be a recognition of the traditional power of municipalities to regulate traffic and road use, *see* 11 O.S.2011, §§ 22-117, 36-101, and abate nuisances, *see id.* § 22-121, within their boundaries. *See also Moore*, 1977 OK ¶ 2, 561 P.2d at 963 (describing home-rule municipalities’ powers of self-government to address similar concerns).

The second exception permits municipalities, counties, or other political subdivisions to:

*establish reasonable setbacks and fencing requirements for oil and gas well site locations* as are reasonably necessary to protect the health, safety and welfare of its citizens *but may not effectively prohibit or ban any oil and gas operations*, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure.

2015 Okla. Sess. Laws ch. 341, § 1 (emphasis added). This provision appears to be directed at the zoning power of a municipality to restrict certain industries and activities to particular sub-areas within city limits. *See* 11 O.S.2011,

§ 43-101. As noted above, municipal zoning ordinances that affect oil and gas development have been the subject of litigation since shortly after statehood.<sup>2</sup>

### ANALYSIS

Your questions touch on several topics regarding the impact of Senate Bill 809—and in particular the provisions of new Section 137.1 of Title 52—on the regulatory authority of political subdivisions. These are addressed in the following order. *First*, we analyze whether Section 137.1 affects charter municipalities and statutory municipalities differently, concluding that it does not. Specifically, if local regulation by either type of municipality conflicts with Section 137.1, the regulation is void. *Second*, we examine whether regulation by political subdivisions is now limited to only those aspects of oil and gas operations that are specifically enumerated in Section 137.1, and conclude that it is. *Third*, we address three specific scenarios in which local regulation would conflict with Section 137.1 and conclude that, in each case, the local regulation would be void. *Finally*, even permissible local regulations of oil and gas activity—*i.e.*, those that address a subject matter specifically listed in Section 137.1 and that do not otherwise conflict with state law—must also be reasonable. Therefore, in the final section we review the guidelines for determining whether local oil and gas regulations satisfy the reasonableness requirement of Section 137.1.

#### **1. The provisions of Section 137.1 of Title 52 apply equally to charter municipalities organized under Article XVIII, Section 3 of the Oklahoma Constitution and non-charter municipalities.**

“In Oklahoma, municipalities are divided into two categories: charter and non-charter (or statutory) municipalities.” *Trentham v. Isaacs*, 2014 OK CIV APP 35, ¶ 16, 324 P.3d 425, 428. As the name suggests, statutory/non-charter municipalities derive their legislative authority from statute. *See* 11 O.S.2011, § 14-101 (permitting municipalities to “enact ordinances, rules and regulations not inconsistent with the Constitution and laws of Oklahoma *for any purpose mentioned in Title 11 of the Oklahoma Statutes or for carrying out their municipal functions*”) (emphasis added); *see also City of Hartshorne*, 1979 OK, ¶ 4, 593 P.2d at 99 (“A city has no inherent power or authority; it possesses and can exercise only those powers expressly granted, or incidental to powers expressly granted, by the state.”). In all cases of conflict between an ordinance of a non-charter municipality and state law, the ordinance is void and state law controls. *See Nucholls v. Bd. of Adjustment*, 1977 OK 3, ¶ 8, 560 P.2d 556, 559; *Morehead v. Dyer*, 1973 OK 121, ¶¶ 8-9, 518 P.2d 1105, 1107-08 .

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<sup>2</sup> A third exception, not relevant here, permits political subdivisions to “enact reasonable ordinances, rules and regulations concerning development of areas within [their] boundaries which have been or may be delineated as a one-hundred-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility.” *See* 2015 Okla. Sess. Laws ch. 341, § 1.

As for charter (or “home-rule”) municipalities, the Oklahoma Constitution permits a municipality with a population greater than 2,000 to “frame a charter for its own government, consistent with and subject to the Constitution and laws of this State[.]” OKLA. CONST. art. XVIII, § 3(a); *see also* 11 O.S.2011, § 13-101. “A city which adopts a home-rule charter . . . is accorded full power of local self-government, and as such the city has the power to enact and enforce ordinances to protect the public peace, order, health, morals and safety of its inhabitants, even though general statutes exist relating to the same subjects.” *Moore*, 1977 OK ¶ 2, 561 P.2d at 963. In cases of conflict between charter provisions and state law, the charter will control if the provision “affects a subject that is deemed to lie **exclusively within municipal concern**.” *Vinson*, 1987 OK ¶ 5, 737 P.2d at 936 (emphasis added); *see also* 11 O.S.2011, § 1-102 (“Once a municipal charter has been adopted and approved, it becomes the organic law of the municipality in all matters pertaining to the local government of the municipality and prevails over state law on matters relating to purely municipal concerns[.]”). Conversely, if a charter provision conflicts with statutes “affecting matters of general statewide concern, or in matters where the state ha[s] a sovereign interest, the statutes control.” *Brown v. Dunnaway*, 1952 OK 297, ¶ 13 248 P.2d 232, 234; *see also City of Chickasha v. Arkansas Louisiana Gas Co.*, 1981 OK CIV APP 5, ¶ 7, 625 P.2d 638, 641 (holding that charter enabling statutes “may not be used to achieve predomination of an ordinance over a conflicting statute in matters of statewide concern in an attempt to override substantive statutory law which relates to matters of statewide concern”).

“The line between a chiefly municipal affair and a sovereign state interest is not well illuminated.” *Edwards v. City of Sallisaw*, 2014 OK 86, ¶ 11, 339 P.3d 870, 874; *see also* Maurice H. Merrill, *Constitutional Home Rule for Cities Oklahoma Version*, 5 OKLA. L. REV. 139, 159 (1952) (noting the difficulty in identifying any “harmonizing principle” to differentiate matters of statewide concern from “merely municipal affairs”). However, there is little question that regulation of oil and gas production is a matter of statewide concern. As the Oklahoma Supreme Court long ago recognized:

[I]t cannot be disputed that the production of petroleum and its various products is one of the major industries of this state, and one in which many of its citizens are vitally concerned. The almost universal use of oil, gasoline, and other petroleum products, together with the fact that a major portion of the revenues to support our educational and eleemosynary institutions and other departments of state government is derived from taxes levied upon this industry, makes the conservation of this great natural resource a matter of grave concern to the state and every citizen thereof.

*C.C. Julian Oil & Royalties Co. v. Capshaw*, 1930 OK ¶ 13, 292 P. at 844; *cf. Jacobs Ranch, LLC v. Smith*, 2006 OK 34, ¶ 53, 148 P.3d 842, 856 (noting the Legislature’s responsibility to regulate the state’s water resources for the benefit of the state as a whole). With the passage of Senate Bill 809, the Legislature reinforced this notion by situating all regulation of oil and gas operations, unless specifically reserved to political subdivisions, within the exclusive jurisdiction of a single state agency.

Therefore, because the production of oil and gas is a matter of statewide concern, municipal charter provisions that conflict with state regulation of oil and gas operations are invalid. *See, e.g., Brown*, 1952 OK ¶ 13, 248 P.2d at 234. Likewise, state regulation of oil and gas operations will, in all cases, control over conflicting municipal ordinances of non-charter municipalities. *See, e.g., Nucholls*, 1977 OK ¶ 8, 560 P.2d at 559. Accordingly, the effect of Section 137.1 of Title 52 on a municipality will be the same regardless of whether it is a charter or a non-charter municipality: conflicting municipal regulations are void and of no effect.<sup>3</sup>

## **2. Political subdivisions may regulate only those aspects of the oil and gas industry that are specifically listed in Section 137.1 of Title 52.**

Your second question involves the scope of local authority to regulate oil and gas operations in light of the limiting language of Section 137.1. We believe the answer lies in the plain language of the statute. *See Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 11, 230 P.3d 853, 859 (“If a statute is plain and unambiguous, it will not be subjected to judicial construction but will receive the interpretation and effect its language dictates.”). Indeed, it is clear from the entirety of Senate Bill 809 that the Legislature intended to limit local regulation to the areas specifically enumerated therein.

We reach this conclusion for several reasons. First, the bill repealed Section 137 of Title 52, which recognized a broad authority of municipalities, pursuant to their general police power, to ban oil and gas drilling within city limits or to implement their own rules and regulations for well-spacing, drilling, and production. *See* 2015 Sess. Laws ch. 341, § 2.

Second, the broad municipal authority recognized in Section 137 was replaced with clear subject-matter limitations on oil and gas regulation by political sub-

<sup>3</sup> Importantly, this opinion does not address the question of whether any particular ordinance or charter provision conflicts with Section 137.1 or any other state regulation of oil and gas operations. Answering that question would require parsing the language of both to determine whether they “contain either express or implied conditions which are inconsistent and irreconcilable with one another.” *Moore*, 1977 OK ¶ 2, 561 P.2d at 963; *see also Hampton v. Hammons*, 1987 OK 77, ¶ 27, 743 P.2d 1053, 1060 (holding that in matters that “are of concern to both the city and state and not the exclusive concern of either,” municipal and state regulations that are not irreconcilable “are to be construed cumulatively”). Such an inquiry is beyond the scope of this opinion.

divisions. Now, Section 137.1 permits only regulations that (i) concern “road use, traffic, noise and odors incidental to oil and gas operations” or (ii) establish “setbacks and fencing requirements for oil and gas well site locations[.]” See 2015 Sess. Laws ch. 341, § 1.<sup>4</sup>

Finally, the Legislature included explicit language in Section 137.1 that “[a]ll other regulations of oil and gas operations shall be subject to the *exclusive jurisdiction of the Corporation Commission*.” *Id.* (emphasis added). The plain language of these provisions, when taken together, evince clear legislative intent to limit local oil and gas regulation to only those areas set forth in Section 137.1.<sup>5</sup> See, e.g., *State v. Tate*, 2012 OK 31, ¶ 7, 276 P.3d 1017, 1020 (“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.”).

### **3. Local regulations that conflict with Section 137.1 of Title 52 are invalid and unenforceable, regardless of when the regulation was adopted or whether it provides for an appeal process.**

In this section, we address three scenarios described in your request letters, each involving potential conflicts between local regulation of oil and gas activity and the provisions of Section 137.1. Specifically, you asked, in effect, (a) whether setback or fencing requirements that have the effect of banning certain types of oil and gas activity are invalidated by Section 137.1, (b) whether a preexisting local regulation that conflicts with Section 137.1 will remain valid due to the fact that it was in place before the effective date of Senate Bill 809, and (c) whether a local regulation that conflicts with Section 137.1 is valid if it includes an appeal process to a board of adjustment or local governing body.

#### **A. Setback and/or fencing requirements for oil and gas well sites that effectively prohibit certain types of oil and gas drilling within the subdivision’s boundaries conflict with Section 137.1 and are invalid.**

Section 137.1 provides that, while political subdivisions may “establish reasonable setbacks and fencing requirements for oil and gas well sites,” they “may *not effectively prohibit or ban any oil and gas operations*.” 52 O.S.Supp.2015, § 137.1 (emphasis added). Such operations include, among other things, “oil and gas exploration, drilling, [and] fracture stimulation[.]” *Id.* The plain language of the statute proscribes the implementation by political subdivisions of fencing or setback requirements for well sites that have the effect—whether direct or indirect—of prohibiting or banning *any* oil and gas operations. As

<sup>4</sup> As noted above, Section 137.1 also includes a third exception, not relevant here, pertaining to local regulation of flood plain development.

<sup>5</sup> However, we note that incorporated cities and towns, along with the Corporation Commission, may collect “permit fees for the drilling and operation of oil and gas wells.” 17 O.S.2011, § 52(B).

noted above, “[i]f a statute is plain and unambiguous, it will not be subjected to judicial construction but will receive the interpretation and effect its language dictates.” *Rogers*, 2010 OK ¶ 11, 230 P.3d at 859. We emphasize, however, that while the answer to this question is clear in the abstract, its application to particular ordinances, rules, or regulations is likely to be less obvious. Specifically, whether a particular setback or fencing requirement for oil and gas well sites—or any set of such ordinances, rules, and regulations taken together—has the effect of prohibiting oil and gas activity in violation of Section 137.1 will require a fact-specific inquiry undertaken on a case-by-case basis. Any such inquiry is beyond the scope of this opinion.

**B. An ordinance that conflicts with Section 137.1 is void even if the ordinance was in existence before the effective date of the statute.**

As a general rule, an ordinance, regardless whether it was earlier enacted, “is impliedly repealed by a later valid statute on the same subject which is incompatible with it.” 6 MCQUILLIN MUNICIPAL CORPORATIONS § 21:32 (3d ed. 2015); *see also City of St. Louis v. Doss*, 807 S.W.2d 61, 63 (Mo. 1991) (holding that a preexisting municipal ordinance “was superceded and became unlawful when the [conflicting] statute was enacted”). The same can be said for municipal charter provisions. *See* 6 MCQUILLIN MUNICIPAL CORPORATIONS § 21:28 (“Undoubtedly a subsequent statute supersedes an earlier charter provision or ordinance, where the repugnancy between the two makes it impossible that they both can stand and where there is nothing in the constitution or statutes giving the charter provision or ordinance continued force and effect locally despite the repugnancy.”).

Oklahoma law supports this general rule. *See Ex Parte Shaw*, 1916 OK 179, 157 P. 900 (invalidating a local traffic ordinance that required drivers to register their vehicles with the city because the ordinance conflicted with a later-adopted state law that placed exclusive authority for vehicle registration with the State Department of Highways); *City of Kingfisher v. State*, 1998 OK CIV APP 39, ¶9, 958 P.2d 170, 172 (holding that a municipal charter provision that required all sessions of the city’s governing board to be public was voided by later amendments to the Open Meetings Act that permitted executive session for certain purposes).

Moreover, a municipality may exercise only those powers that have been delegated to it by the State as the sovereign entity. *See Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, ¶ 18, 71 P.3d 5, 11. And where such power has been delegated, it can also be withdrawn. *See City of Chickasha*, 1981 OK CIV APP ¶ 11, 625 P.2d at 641. Indeed, it is a “well-established rule that a municipal corporation is but a political subdivision of the state, and, being a mere creature of the state, the powers may be enlarged, modified, or diminished by the state,

without its consent.” *Western Okla. Gas & Fuel Co. v. City of Duncan*, 1926 OK 945, ¶ 13, 251 P. 37, 40.

In passing Senate Bill 809, the Legislature expressly withdrew the broad regulatory authority of localities over oil and gas operations, leaving in its place a more limited scope of power. See discussion in Section 2, pp. 7 – 8 above. With this withdrawal, localities no longer have the authority to enforce regulations that fall outside the powers specifically granted to them by the Legislature in Section 137.1. Thus, an ordinance or charter provision that conflicts with Section 137.1, but was adopted prior to the statute’s effective date, is nevertheless invalid.

**C. That an appeal process may exist for an ordinance that otherwise conflicts with Section 137.1 will not render the ordinance valid.**

Similarly, the inclusion of a procedure for appeal to a board of adjustment or local governing body will not validate an ordinance that conflicts with Section 137.1. As explained above, an ordinance conflicting with Section 137.1 is null and void, leaving no doubt as to which party would prevail in any appeal. See *City of Cherokee v. Tatro*, 1981 OK 127, ¶ 8, 636 P.2d 337, 339 (noting futility of judicial review of city’s denial of a variance where underlying ordinance is void on its face). Indeed, the statutory authority of a board of adjustment to grant special exceptions and variances from local zoning ordinances implicitly assumes the validity of the underlying ordinance. See 11 O.S.2011, §§ 44-104 – 107. Thus, a local appeal process will not serve to cure an otherwise invalid ordinance.

**4. A political subdivision’s regulation of oil and gas operations within its boundaries must be “reasonable” to comply with Section 137.1 of Title 52.**

For the reasons outlined above, local regulation of oil and gas operations may not conflict with, or regulate areas not expressly enumerated in, Section 137.1. Further, Section 137.1 explicitly requires all such regulations to be reasonable.<sup>6</sup> See 52 O.S.Supp.2015, § 137.1. In general, the reasonableness of a municipal ordinance can only be judged by applying the language of a particular ordinance to a specific set of facts. See, e.g., *Hisaw v. Atchison, T. & S. F. Ry. Co.*, 1946 OK 139, ¶ 15, 169 P.2d 281, 284 (“A general ordinance may be unreasonable when applied to one state of facts or to one particular locality, and reasonable when applied to another set of facts or to another locality, and the fact that it may be unreasonable as to one particular place does not necessarily render it invalid as to all.”). Accordingly, we cannot evaluate the reasonableness of any

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<sup>6</sup> While Section 137.1 explicitly requires local regulations of oil and gas operations to be reasonable, we note also the general principles that any local regulation “must be reasonable and not arbitrary or discriminatory.” A.G. Opin. 2012-10, at 89.

particular regulation not before us. Nevertheless, Oklahoma law does provide general guidelines for assessing the reasonableness of municipal zoning ordinances, which are the most obvious example of local regulation that will be affected by the enactment of Section 137.1.

In order to be considered reasonable, a zoning ordinance must be tethered to a municipality's proper exercise of its police power. See *Clouser v. City of Norman*, 1964 OK 109, ¶ 18, 393 P.2d 827, 829; *Nucholls*, 1977 OK ¶ 11, 560 P.2d at 560. For instance, Oklahoma zoning statutes allow municipalities, “[f]or the purpose of promoting health, safety, morals, or the general welfare of the community,” to enact regulations or restrictions on “the location and use of buildings, structures and land for trade, industry, residence or other purposes.” 11 O.S.2011, § 43-101. This means that “[m]unicipal power to interfere by zoning with the general rights of landowners is not unlimited, and a restriction by the character of use cannot be imposed if it does not bear substantial relation to public health, safety, morals or general welfare.” *Nucholls*, 1977 OK ¶ 11, 560 P.2d at 560. If the required relationship between the zoning ordinance and a permissible public purpose is absent, the ordinance will be invalidated as arbitrary and unreasonable. See *Clouser*, 1964 OK 109, ¶ 23, 393 P.2d at 830 (invalidating municipal ban on oil and gas drilling as applied to particular tract).

In many cases, the reasonableness of a zoning ordinance will amount to a judgment call. Indeed, as the Oklahoma Supreme Court has recognized, “the ‘line established [by a zoning ordinance] is necessarily somewhat arbitrary, since a striking or marked difference cannot be expected to exist between property on one side of an established line and that on the other.’” *Mid-Continent Life Ins. Co. v. Oklahoma City*, 1985 OK 41, ¶ 15, 701 P.2d 412, 415 (quoting *Beveridge v. Harper & Turner Oil Trust*, 1934 OK 388, ¶ 24, 35 P.2d 435, 441). In cases where there is legitimate uncertainty as to whether a zoning ordinance bears a substantial relationship to a permissible public purpose, the uncertainty will be resolved in favor of the municipality.<sup>7</sup> Specifically, if the validity of a zoning ordinance is “fairly debatable” the legislative judgment of the governing body “must be allowed to control.” *McNair v. Oklahoma City*, 1971 OK 134, ¶ 11, 490 P.2d 1364, 1367 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)); see also *Hud Oil & Refining Co. v. Oklahoma City*, 1934 OK 94 (Syllabus ¶ 4), 30 P.2d 169, 170 (Syllabus ¶ 4) (“If there is room for debate as to whether a municipal ordinance is arbitrary or unreasonable, the court will not substitute its own judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.”).

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<sup>7</sup> Indeed, with regard to municipal ordinances more generally, there is a “presumption in favor of [upholding] a municipal ordinance.” *Garrett v. Oklahoma City*, 1979 OK 60, ¶ 5, 594 P.2d 764, 766.

Whether the validity of an ordinance is “fairly debatable” will vary case by case. Ultimately, the determination of whether a zoning ordinance is reasonable will depend on the nature of the restriction and the characteristics of the affected property. For instance, in *Beveridge v. Harper & Turner Oil Trust*, a municipal ordinance prohibiting drilling for oil and gas in an area of Oklahoma City was upheld due to, among other things, the dense population of the area, the likelihood of future growth and the inherent dangers and nuisance effects of oil and gas production at that time. *See id.*, 1934 OK 398, ¶¶ 7 – 23, 35 P.2d 435, 438-40. By contrast, in *Clouser v. City of Norman*, the court found a similar ban to be unreasonable as applied to a ten-acre tract that was occupied only by a single family and where oil and gas development on the tract “could not affect other areas . . . [or] the future development of the city.” *See id.*, 1964 OK ¶ 22, 393 P.2d at 830.<sup>8</sup> While these decisions, along with the general rules reviewed herein, provide some guidelines for determining whether a particular ordinance, rule, or regulation is reasonable as required by Section 137.1, the ultimate determination of reasonableness can only be made on a case-by-case basis.

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

- 1. The provisions of 52 O.S.Supp.2015, § 137.1, which limit municipal regulation of oil and gas operations, apply equally to charter municipalities organized under OKLA. CONST. art. XVIII, § 3 and non-charter municipalities.**
- 2. The power of political subdivisions to regulate oil and gas activity is limited to those areas enumerated in 52 O.S.Supp.2015, § 137.1, specifically (a) enacting reasonable ordinances, rules, or regulations concerning road use, traffic, noise, and odors incidental to oil and gas operations, (b) establishing setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety, and welfare of their citizens, but that do not effectively prohibit or ban any oil and gas operations, and (c) enacting ordinances, rules, and regulations regarding development of areas that have been or may be delineated as a one-hundred-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility.**

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<sup>8</sup> Compare *Mid-Continent Life Ins. Co.*, 1985 OK ¶ 14, 701 P.2d at 414 (“The existence of conflicting opinions, with the City’s position supported by highly regarded planning experts, is one indication the zoning decision was ‘fairly debatable’ and best left to the sound legislative discretion of the municipality.”) with *City of Tulsa v. Swanson*, 1961 OK 286, ¶ 10, 366 P.2d 629, 633 (“An academic opinion of a professional city planner as to the desirability of a particular restriction . . . will not, when contradicted by controlling physical facts, justify this court in holding as a matter of law that the question here presented is ‘fairly debatable’ . . .”).

- 3. Setbacks or fencing requirements for oil and gas well site locations adopted by a political subdivision that effectively prohibit certain types of oil and gas drilling within the subdivision's boundaries conflict with 52 O.S.Supp.2015, § 137.1, and are therefore invalid.**
- 4. A municipal ordinance that conflicts with 52 O.S.Supp.2015, § 137.1 is invalid and unenforceable regardless of when the ordinance was adopted or whether it provides for an appeal process.**
- 5. In addition to the aforementioned limitations, 52 O.S.Supp.2015, § 137.1 requires regulations of oil and gas activity by political subdivisions to be reasonable. To meet this standard, the local regulation must bear a substantial relation to public health, safety, morals or general welfare of the community, a determination that can only be reached by examining the specific language of the regulation and the application to a particular set of facts. In cases of uncertainty or reasonable debate, doubt will be resolved in favor of finding the local regulation to be reasonable.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

ETHAN SHANER  
ASSISTANT ATTORNEY GENERAL

## OPINION 2015-13

Glen D. Johnson, Chancellor  
Oklahoma State Regents for Higher Education

December 1, 2015

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

**For the purposes of the Teacher Shortage Employment Incentive Program, are participants who teach at Oklahoma technological or vocational centers eligible for benefits under the program?**

### I.

#### INTRODUCTION

In 2000, the Legislature enacted the Mathematics or Science Teacher Shortage Employment Incentive Program (“Incentive Program”), to increase the number of mathematics and science teachers in Oklahoma public schools. *See* 2000 Okla. Sess. Laws ch. 242, § 1 (codified as amended at 70 O.S.2011, § 698.3). The law provides that

- A. It is the intent of the Oklahoma Legislature that, beginning with the 2001-2002 school year, the Oklahoma State Regents for Higher Education establish a teacher shortage employment incentive program for students enrolled in a major course of study in mathematics or science at the undergraduate level or graduate level who declare an intention to serve and who subsequently serve this state by teaching in a secondary level public school of this state for a minimum of five (5) years in the subject areas of mathematics or science. Students meeting the criteria provided in this section shall be given the opportunity to enter into participation in the program.**
- B. The Oklahoma State Regents for Higher Education are authorized to make employment incentive payments pursuant to the provisions of this section to persons who actually render a minimum of five (5) years of service as teachers in the public schools of this state if not less than seventy-five percent (75%) of the teaching assignment meets the criteria specified in subsection A of this section. The total amount of the employment incentive payments for any qualified person shall not exceed an amount equal to three times the average annual cost of undergraduate resident tuition and fees for full-time enrollment at institutions which offer teacher education programs within The Oklahoma State System of Higher Education, as defined**

**by the State Regents. Any amount not necessary to repay the balance of a student's loans shall be paid directly to any person otherwise eligible for employment incentive payments pursuant to this section.**

**C. The Oklahoma State Regents for Higher Education shall require the execution of appropriate contracts with eligible persons. Persons failing to comply with the requirements of this section shall not be eligible for the employment incentive payments provided for in this section. The Chancellor of the Oklahoma State Regents for Higher Education, with approval of the State Regents, may contract with any other appropriate organization or unit of government for the administration of the provisions of this section.**

**D. If insufficient funds are available for employment incentive payments to qualified persons during any fiscal year, the Chancellor may make reductions in the payments made to those qualifying.**

70 O.S.2011, § 698.3.

The Oklahoma State Regents for Higher Education (“State Regents”) have determined through administrative action that the “implied purpose of this legislation is to provide an incentive for students who major in mathematics or science to serve as teachers of mathematics and science in Oklahoma public secondary schools for at least five (5) years.” OAC 610:25-27-1(c). To apply for the Incentive Program, undergraduate or graduate students enrolled in a mathematics or science major course of study must submit the Incentive Program Participation Agreement forms to their college or university’s Incentive Program coordinator before they graduate. OAC 610:25-27-3(c)-(d). The Incentive Program coordinator then submits the agreement to the State Regents, which notifies each applicant of the receipt of the application and the details of the program. OAC 610:25-27-3(e)-(f). The student is eligible for Incentive Program benefits after they graduate, obtain a teaching license and certificate, and provide full-time teaching service under a regular teaching contract at an Oklahoma public school. OAC 610:25-27-6(1). The teaching must be at the secondary level for five consecutive years, and be in the mathematics or science subject areas. *Id.*

You specifically ask whether the State Regents should provide Incentive Program benefits only to participants teaching in Oklahoma public high schools, and not to those individuals teaching at technical or vocational centers. The answer hinges on whether the Legislature intended to include technical or vocational centers within the definition of a “secondary level public school,” and on which courses fall within the “subject areas mathematics or science.” We examine these issues below.

## II.

### **PARTICIPANTS TEACHING MATHEMATICS AND SCIENCE AT TECHNICAL OR VOCATIONAL CENTERS ARE ELIGIBLE FOR BENEFITS UNDER TITLE 70, SECTION 698.3 IF 75 PERCENT OF THEIR TEACHING ASSIGNMENT CONSISTS OF QUALIFYING MATHEMATICS OR SCIENCE INSTRUCTION.**

The Legislature is presumed to have “expressed its intent in the statutory language.” *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 2005 OK 71, ¶ 6, 123 P.3d 5, 6. Thus, “[w]here the language of a statute is plain and unambiguous, legislative intent and the meaning of the statute will be gleaned from the face of the statute without resort to judicial rules of statutory construction.” *Id.* And whenever the Legislature defines a word or phrase in statute, “such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” 25 O.S.2011, § 2.

#### **A. Technical and vocational centers fall within the meaning of “public schools.”**

The Incentive Program requires five consecutive years of teaching mathematics or science in a “public school.” Neither Section 698.3 nor the State Regents define “public schools,” but the Oklahoma School Code of 1971 (“Oklahoma School Code”) defines public schools as

all free schools supported by public taxation and shall include nurseries, kindergartens, elementary, which may include either K-6 or K-8, secondary schools and technology center schools, not to exceed two (2) years of junior college work, night schools, adult and other special classes, vocational and technical instruction and such other school classes and instruction as may be supported by public taxation or otherwise authorized by laws which are now in effect or which may hereafter be enacted.

70 O.S.2011, § 1-106. Technology and vocational centers are funded by public monies, and provide tuition-free instruction to high school students residing in the technology center district. OAC 780:10-5-3; 780:15-3-6. Free technology center schools that are supported by public taxation thus fall within the definition of “public schools” under the Oklahoma School Code. There is no other statutory or regulatory language in conflict with this plain reading of the statute. Technical and vocational centers are therefore “public schools” for the purposes of the Incentive Program.

**B. Vocational and/or technical centers provide secondary level education.**

In addition to the requirement that eligible teachers must provide instruction at a public school, the instruction must be provided at the “secondary level.” As with the term “public schools,” neither the statute at issue, nor any other statute, nor the State Regents have defined “secondary level,” but the Oklahoma School Code has. In a section of the Oklahoma School Code addressing disruptions at athletic events, “secondary school” is defined as a public or private school “engaged in the education of students for any of grades seven through twelve.” 70 O.S.2011, § 24-131.1(5).

Technology centers offer courses in certain grades that fall within the range specified by the definition of “secondary school.” For instance, certain science, technology, engineering, and mathematics courses are specifically designed for grades 9-10. OAC 780:20-3-2(b)(7)(F)(vii)-(viii). The technology center specifically acts as “an extension of the student’s high school.” OAC 780:15-3-6(a) (1). Further, high school students within the technology center district attend technology centers on a tuition-free basis. OAC 780:15-3-6(b)(1). Technology centers are thus “engaged in the education of students for any of grades seven through twelve” under certain circumstances, meaning that they provide secondary level instruction. 70 O.S.2011, § 24-131.1(5).

**C. Vocational and/or technical center teachers are eligible for benefits under the Incentive Program if 75 percent of their teaching assignment is secondary level mathematics or science instruction.**

Because vocational and technical centers are public schools that provide secondary level instruction, the key question becomes what qualifies as secondary-level mathematics and science instruction. The Legislature has set out specific benchmarks for the State Department of Education to follow in setting subject matter standards for public schools. 70 O.S.Supp.2015, § 11-103.6. Those benchmarks require completion of certain curriculum units for graduation from a public high school. For mathematics, students must complete three units or sets of competencies in “Algebra I, Algebra II, Geometry, Trigonometry, Math Analysis, Calculus, Advanced Placement Statistics, or any mathematics course with content and/or rigor above Algebra I and approved for college admission requirements[.]” *Id.* § 11-103.6(B)(2). For science, students must complete three units or sets of competencies in “Biology, Chemistry, Physics, or any laboratory science course with content and/or rigor equal to or above Biology and approved for college admission requirements[.]” *Id.* § 11-103.6(B)(3). These requirements can be replaced, however, with a “science, technology, engineering and math (STEM) block course” that meets the requirements of the course competencies, is taught at a technology center by a certified teacher, and is approved by the State Board of Education and the independent district board of education. *Id.* §§ 11-103.6(D)(2)(h)(2), 11-103.6(D)(3)(o)(2). Mathematics

and science courses taken at a technology school with a certified teacher also qualify. *Id.* §§ 11-103.6(D)(2)(i), 11-103.6(D)(3)(p). This broad language regarding the mathematics and science requirements permit high school students to take advanced mathematics and science courses taught outside the high school setting, and still apply those course credits to their graduation requirements, as long as the courses are approved for college admission requirements and the teacher is certified to teach that course.

Whether a teacher is providing mathematics or science instruction at a secondary level therefore depends on several factors. First, the course at issue must be a mathematics or science course, or a STEM block course. Second, if that course is not one of those listed in 70 O.S.Supp.2015, § 11-103.6(B)(2)-(3), the course must have content and/or rigor above Algebra I (for mathematics) or Biology (for science), and be approved for college admissions requirements. Third, the teacher must be certified to teach the subject area. Fourth, the course must be approved for credit by the State Board of Education and the independent district board of education. If 75 percent of the teaching assignment meets this criterion, the teacher is eligible for benefits under the Incentive Program. However, whether a specific teacher meets this criterion requires a case-specific analysis and is beyond the scope of an Attorney General Opinion.

### III.

#### CONCLUSION

Your specific question hinges on whether technical or vocational centers fall within the statutory language that requires participants to teach at a “secondary level public school.” State technology and vocational centers are supported by public taxation, and provide free education to students within the technology district, rendering them “public schools” under the statutory definition in the Oklahoma School Code. Technology and vocational centers provide instruction to high school students, which fits the statutory definition of “secondary level” instruction. But whether the mathematics or science instruction is “secondary level” and would qualify under the teaching requirement depends on the specific courses taught, and whether those specific courses have been approved for college admissions requirements.

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

- 1. Technology and/or vocational centers are “public schools” providing “secondary level” instruction for the purposes of Title 70, Section 698.3 of the Oklahoma Statutes.**
- 2. If at least 75 percent of a technical and/or vocational teacher’s teaching assignment consists of courses that are (1) listed in Title 70, Section 11-103.6(B)(2)-(3) of the Oklahoma Statutes, or have content and/or rigor above Algebra I for mathematics**

**and Biology for science and are approved for college admissions, (2) are courses that the teacher is certified to teach, and (3) are approved for credit by the State Board of Education and the independent district board of education, that teacher is eligible to receive benefits under the Teacher Shortage Employment Incentive Program, subject to the procedural requirements of the program.**

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

A.J. STEWART  
ASSISTANT ATTORNEY GENERAL

## ACTIVE SUPERVISION OPINIONS

Early in 2015, the United States Supreme Court decided the case *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015). In that case, the North Carolina dental regulation agency had sent cease and desist letters to non-dentist providers of teeth whitening services throughout North Carolina. *Id.* at 1108. The North Carolina agency apparently sent those letters on the theory that providing teeth whitening services constituted the practice of dentistry and hence was forbidden to all but dentists. *Id.* The Federal Trade Commission disagreed, finding the agency liable for a violation of federal antitrust law. *Id.* at 1108–09.

In the past, state agencies have typically enjoyed immunity from federal antitrust law under a doctrine often called *Parker* immunity. *See Parker v. Brown*, 317 U.S. 341, 350–52 (1943). The Federal Trade Commission maintained, however, that *Parker* immunity did not apply because North Carolina’s dental regulation agency was commanded by a board composed almost entirely of dentists, members of the very profession regulated by the Board. *See N.C. Dental*, 135 S.Ct. at 1109, 1114.

The Supreme Court agreed: invoking older precedents on extending *Parker* immunity to private entities, the Court imposed two requirements on any state agency seeking to assert *Parker* immunity. First, the agency must act pursuant to a “clearly articulated state policy.” *See id.* at 1112, 1114. Second, the agency’s actions must be “actively supervis[ed]” by an arm of state government controlled by individuals with political accountability and who do not participate in the regulated market. *See id.* Active supervision requires a supervising entity that has the power to “veto or modify” a particular action. *N.C. Dental*, 135 S.Ct. at 1116 (citing *Patrick v. Burget*, 486 U.S. 94, 102–03 (1988)). The supervision must actually be applied in every case; a mere possibility of supervision is not adequate. *See Patrick*, 486 U.S. at 100–03. Because the decisions of North Carolina’s dental agency, controlled by dentists, were not actively supervised by any other part of state government, the Supreme Court held that *Parker* immunity did not apply.

The Supreme Court’s decision placed most States, including Oklahoma, in a precarious position: States regulate many, many professions through boards composed largely of members of that profession. Although some, including the Federal Trade Commission, maintained that actual antitrust liability was unlikely to result in most circumstances, the Attorney General of Oklahoma took action to institute a program that could provide the requisite “active supervision” necessary to establish *Parker* immunity.

The Governor of Oklahoma issued Executive Order 2015-33 on July 17, 2015. That Order applied to boards and commissions with a majority of members who are also members of the regulated profession or otherwise active participants

in the regulated market. The Order required those boards and commissions to forward all actions with potential anticompetitive effects to the Attorney General's Office for review.

On August 17, 2015, the Attorney General issued a letter responding to the Order and clarifying the authority and the procedures for enacting this program. First, the Attorney General invoked the authority to issue Attorney General Opinions as a means for conducting reviews of agency actions. As the Oklahoma Supreme Court has recognized, an Attorney General Opinion is "binding upon the state official affected by it and it is their duty to follow and not disregard those opinions." *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765. The Court added that this "duty continues until a judgment of a court of competent jurisdiction relieves the public official of the burden of compliance." *Id.*

Second, the Attorney General's August 17 letter directed applicable agencies to request review for each action that could have an anticompetitive effect, including discipline of licensees or denials of applications for failure to meet requirements. Each request would be followed with a decision in the form of a concise Attorney General Opinion discussing whether the action falls within the agency's statutory mission.

The Attorney General Opinions that follow are the opinions issued under this program during 2015.

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# ACTIVE SUPERVISION OPINIONS OF THE ATTORNEY GENERAL

## OPINION 2015-1A

John A. Foust, Pharm.D., D.Ph.  
Executive Director

September 1, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that you intend to take as Executive Director of the Oklahoma State Board of Pharmacy. The action you contemplate taking is to send a letter to a licensed pharmacist ordering him to cease all compounding activities at a pharmacy until deficiencies discovered at the pharmacy during an inspection have been remedied. The proposed requirements for curing these deficiencies include equipment testing results, an updated policy and procedure manual following United States Pharmacopeia (USP) guidelines, documentation regarding the way the pharmacy sets beyond-use dates, documentation of the pharmacist's training, and chemical tests including media-fill and glove sample tests. In addition, the proposed action requires the pharmacist to cease compounding commercially available products without a patient care justification; to keep regular logs of cleaning, equipment calibration, temperature, humidity, and pressure; and to remove outdated drugs from inventory.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The practice of pharmacy includes compounding drugs. 59 O.S.Supp.2014, § 353.1(28)(b). The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.2011, § 353.7(14), and the Board has promulgated rules regulating pharmacies, see, e.g., OAC 535:15-3-2. The rules require that equipment be well-maintained, e.g., OAC 535:15-10-52(c)(8), that clear policies to be in place for compounding pharmacy staff, OAC 535:15-10-52(e), 59, and that beyond-use dates in a compounding pharmacy be set according to chemical testing or USP guidelines,

OAC 535:15-10-61. The rules include pharmacist training requirements for compounding pharmacies, OAC 535:15-10-52(a), (d), and they specify the use of media-fill and glove sampling techniques to test sterility at such facilities, OAC 535:15-10-52(f)(4), (5), (7), (8). The rules make clear that compounding pharmacies should only provide drugs that are not commercially available unless a patient need is present. OAC 535:15-10-53. The rules also have broad requirements for cleanliness, temperature controls, and equipment maintenance. OAC 535:15-10-52(c)(8), 55(c), 56(c), (e). They even require outdated drugs to be removed from active inventory for all pharmacies. OAC 535:15-3-11(c).

The action seeks to enforce the rules described above and to prevent any person from being harmed by a compounded drug prepared improperly or in unsanitary conditions. The action is thus adequately connected to the policy goals of the State of Oklahoma, as articulated in the above-described statutes and regulations.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support or the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL

**OPINION 2015-2A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to suspend the certificate of a licensee for failure to pay an annual fee due June 30, 2015.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2014, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to issue certificates to individuals who wish to engage in real estate appraisal, *id.* §§ 858-704(A), 858-706(B)(3). Each of these certificates lasts for three years and automatically expires at the end of the term if the certificate holder takes no action to renew the certificate. 59 O.S.2011, § 858-714. However, during the life of the certificate, the holder must pay annual registry fees. 59 O.S.Supp.2014, § 858-708; OAC 600:10-1-18. The Board allows certificate holders to surrender the certificate prior to its expiration if they no longer wish to pay these annual fees. OAC 600:10-1-12(a).

The proposed action seeks to discipline a certificate holder for failure to pay annual fees without surrendering the certificate. These fees would be paid into the Oklahoma Certified Real Estate Appraisers Revolving Fund to pay for the operating expenses of the Real Estate Appraisers Board. 59 O.S.Supp.2014, § 858-730. Failure to pay such fees could thus undermine the Legislature's policy to fund this agency with user fees rather than with tax revenues.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to collect fees from certified real estate appraisers.

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL

**OPINION 2015-3A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action is to revoke the license of a Licensed Professional Counselor who began a romantic relationship with a former client within five years of the termination of a counselor-client relationship.

The Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1901–1920, authorizes the Board of Behavioral Health Licensure to prescribe rules of professional conduct governing Licensed Professional Counselors. 59 O.S.Supp.2014, § 1905(A)(2). The rules of professional conduct contained in the Board’s administrative rules require that “[Licensed Professional Counselors] . . . not engage in any activity that is or may be sexual in nature with a former client for at least five (5) years after the termination of the counseling relationship.” OAC 86:11-3-3(e).

The action seeks to enforce the rule against relationships with former clients of the last five years. That rule is contained in the same section generally protecting client welfare including in areas such as financial dealings, discrimination, recordkeeping, and conflicts from dual relationships. Violation of the rule could reflect unfavorably on the profession of counselors and may be the result of exploitation stemming from the professional-client relationship.

It is, therefore, the official opinion of the Attorney General that the Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to hold counselors to high standards of professional conduct.

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL

**OPINION 2015-4A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action seeks to discipline—pursuant to a consent order—a Licensed Marital and Family Therapist for accepting a \$600 monetary gift from a client with a mental health disability. The discipline includes reimbursement of the gift, payment of a \$1,200 fine, payment of \$210 in costs, and probation with payments of the costs of supervision.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2014, §§ 1925.1–1925.18, authorizes the Board of Behavioral Health Licensure to prescribe rules of professional conduct governing Licensed Marital and Family Therapists. 59 O.S.Supp.2014, § 1925.5(A)(3). The rules of professional conduct contained in the Board’s administrative rules require that “[Licensed Marital and Family Therapists] . . . not exploit the trust and dependency of” clients. OAC 86:16-5-1(c). Licensed Marital and Family Therapists must therefore avoid expanding a client relationship to areas such as business dealings. *Id.* Further, the rules required that professionals “shall not use their professional relationship with clients to further their own interests.” OAC 86:16-5-1(d). The rules also require that fees be set prior to a therapy relationship. OAC 86:16-5-7.

The action seeks to hold a licensed professional to standards of professional conduct. The rules of the Board of Behavioral Health Licensure generally require licensed marital and family therapists not to use their position of power in a professional-client relationship for their own gain at the expense of a client, and compensation for therapy services must be set before entering the relationship. The receipt of substantial monetary gifts beyond fees paid for professional service may reflect compromised professional advice and may stem from exploitation of clients.

It is, therefore, the official opinion of the Attorney General that the Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to hold counselors to high standards of professional conduct.

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL

**OPINION 2015-5A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action seeks to discipline—pursuant to a consent order—a Licensed Marital and Family Therapist for submitting an expert report to a court without conducting any face-to-face interviews with the subject of the report and with no experience or education related to the preparation of expert reports for court. The discipline requires the therapist to take a continuing education class on forensics or ethics within 90 days.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2014, §§ 1925.1–1925.18, authorizes the Board of Behavioral Health Licensure to prescribe rules of professional conduct governing Licensed Marital and Family Therapists, 59 O.S.Supp.2014, § 1925.5(A)(3). The rules of professional conduct contained in the Board’s administrative rules require that “[Licensed Marital and Family Therapists] . . . may perform forensic services” where the results “may, or are intended to be, later furnished to a trier of fact or other decision maker” so long as the therapist meets the conditions set out in the rules. OAC 86:16-5-3(n). The conditions include “demonstrat[ing] competence . . . in the subject matter relevant to the issues in question, as determined by the court” and “conduct[ing] a thorough examination of the person who is the subject of their forensic analysis.” OAC 86:16-5-3(n)(1), (4).

The action seeks to hold a licensed professional to standards of professional conduct in the important area of providing materials to a court of law. The rules of the Board of Behavioral Health Licensure generally require licensed marital and family therapists to establish competence when preparing reports or other materials and to perform thorough examinations when preparing such reports. The failure to conduct any face-to-face interviews with the subject of a report would likely fail to show adequate thoroughness, and the lack of any training in the preparation of documents for a court could undermine the therapist’s competence in the subject matter of the documents presented to a court.

It is, therefore, the official opinion of the Attorney General that the Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to hold counselors to high standards of professional conduct

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL

**OPINION 2015-6A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action seeks to discipline—pursuant to a consent order—a Licensed Behavioral Practitioner for unprofessional conduct involving taking a minor client out of the office, traveling some distance, and staying overnight at the home of a therapist’s relative. The discipline requires the therapist to wind down her practice, void any billing to the Oklahoma Healthcare Authority, and retire her license.

The Licensed Behavioral Practitioner Act, 59 O.S.2011 & Supp.2014, §§ 1930–1949.1, authorizes the Board of Behavioral Health Licensure to prescribe rules of professional conduct governing Licensed Behavioral Practitioners, 59 O.S.Supp.2014, § 1934(A)(2). The rules of professional conduct contained in the Board’s administrative rules require that Licensed Behavioral Practitioners “ensure that their services are used appropriately” and that they “shall not use their relationships with clients for personal advantage, profit, satisfaction, or interest.” OAC 86:21-7-1. Further, the rules prohibit specific conduct falling under the rubric of having “[n]on-professional relations with clients.” OAC 86:21-7-4.

The action seeks to hold a licensed professional to standards of professional conduct. Counselors and therapists should strive to maintain professionalism in their relationships with clients and, per the Board’s administrative rules, should “ensure that their services are used appropriately.” OAC 86:21-7-1. The conduct described may undermine the professionalism of Licensed Behavioral Practitioners and does not project the image of a professional relationship.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to hold counselors to high standards of professional conduct.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-7A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action is to, pursuant to a consent order, require a Licensed Marital and Family Therapist Candidate to close the business where the Candidate provided unlicensed therapy services; review the rules of the Board; write a paper on lessons learned from the disciplinary process; and pay a \$500 fine. The Candidate provided therapy services without the requisite license or supervision, held himself out as having a license he did not have, and falsely advertised that he offered full bilingual services.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2014, §§ 1925.1–1925.18, authorizes the Board of Behavioral Health Licensure to prescribe rules of professional conduct governing Licensed Marital and Family Therapists, 59 O.S.Supp.2014, § 1925.5(A)(3). The Act also requires candidates for licensure as Licensed Marital and Family Therapists to comply with the rules promulgated by the Board. *Id.* § 1925.6(B)(4). The statutes also broadly prohibit holding oneself out as a Licensed Marital and Family Therapist or practicing such therapy without actually holding a license. 59 O.S.2011, § 1925.10; *cf. id.* § 1925.3. Candidates for licensure specifically must not refer to themselves as Licensed Marital and Family Therapists, OAC 86:16-5-9, and they must also only provide service and accumulate hours under supervision with the requisite documentation, OAC 86:16-11-5(b). Finally, statutes and rules prohibit misleading or false advertising or statements with respect to providing marital and family therapy services. 59 O.S.Supp.2014, § 1925.15(A)(5); OAC 86:16-5-8.

The action seeks to hold a candidate for licensure as a Licensed Marital and Family Therapist accountable to legal requirements that the candidate not engage in misleading conduct and only provide therapy services under the supervision of an experienced practitioner. Deviation from these legal requirements could undermine the integrity of the profession and result in harm to consumers from being misled and from receiving subpar services from inexperienced, unsupervised professionals in the sensitive area of psychological therapy.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure that candidates for licensure as marital and family therapists operate under the supervision of experienced practitioners and engage in no misleading or false advertising.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-8A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

September 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take. The proposed actions are to deem non-qualifying the applications for licensure as Licensed Professional Counselors (LPCs) and Licensed Marital and Family Therapists (LMFTs) of some twenty-eight applicants because their academic transcripts do not include all of the coursework required in the administrative rules of the State Board of Behavioral Health Licensure. The applicants, the licenses they seek, and the deficiencies in their coursework are attached as Appendix A.

Both the Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1901–1920, and the Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2014, §§ 1925.1–1925.18, impose educational requirements on applicants for licensure. The Licensed Professional Counselors Act requires, among other things, that an applicant have at least sixty semester hours of counseling-related course work, including at least a master’s degree in a counseling field. 59 O.S.Supp.2014, § 1906(C)(1). The Board has the power under the statute to “define what course work qualifies as ‘counseling-related’” as well as what qualifies as a “‘counseling field.’” *Id.* The Board’s implementing rules for Section 1906 make those determinate, OAC 86:11-9-1, and lay out several knowledge areas necessary for a qualifying degree, OAC 86:11-9-2. Those areas include at least one course in human growth and development; one course in abnormal human behavior; two courses in appraisal and assessment techniques; at least two courses in counseling theories and methods; a professional orientation or ethics course; a course in research; a practicum or internship with at least 300 clock hours; and at least five courses from a substantial list of relevant knowledge areas. OAC 86:11-9-2(a). An additional requirement is that any remaining coursework needed to arrive at sixty semester hours must also come from any knowledge area listed above. OAC 86:11-9-2(b).

Likewise, the Marital and Family Therapist Licensure Act requires that applicants have a “master’s degree or a doctoral degree in marital and family therapy, or a content-equivalent degree as defined by the Board.” 59 O.S.Supp.2014, § 1925.6(C)(1). The Board’s implementing rules for content-equivalent degrees require three courses in theoretical foundations of marital and family systems; three courses in assessment and treatment in marital and family therapy; three courses in human development; a course in ethics and professional studies; a course on research; and a practicum or internship with at least 300 clock hours. OAC 86:16-7-5.

Each of these statutes reveals the Legislature's policy that these particular professions—LPCs and LMFTs—be educationally qualified before they practice. The action seeks to enforce that policy by holding as incomplete the applications of those individuals who have not completed all education requirements and offering them the opportunity to complete the additional requirements to obtain licensure.

It is, therefore, the official opinion of the Attorney General that the Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma's policy to ensure Licensed Professional Counselors and Licensed Marital and Family Therapists obtain educational qualifications before practicing their professions.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**ATTORNEY GENERAL OPINION  
2015-8A  
APPENDIX A**

1.	Amy Register	LPC	One course in abnormal human behavior;  One additional course in any knowledge area listed in OAC 86:10-9-2(a)
2.	Andrea Brown	LMFT	Two courses in human development
3.	Angela Bond	LPC	One additional course in appraisal and assessment techniques
4.	Angela Gilmore	LMFT	One course in human development
5.	Angela Williams-Smith	LPC	One course in abnormal human behavior
6.	Bethany Ford	LPC	One additional course in counseling theories and methods
7.	Brennan Hunter	LMFT	One additional course in assessment and treatment in marital and family therapy;  Three courses in human development;  One course that is a practicum or internship
8.	Cassie Latimer	LPC	One course in abnormal human behavior;  One course in professional orientation or ethics
9.	Catherine Rose	LPC	One additional course in appraisal and assessment techniques
10.	Christopher Bentley	LPC	One additional course in appraisal and assessment techniques
11.	Claudia Mays	LPC	One additional course in appraisal and assessment techniques
12.	Deborah Chesser	LPC	One course in abnormal human behavior
13.	Dustie Nelson	LPC	One additional course in any knowledge area listed in OAC 86:10-9-2(a)

- |     |                       |     |  |
|-----|-----------------------|-----|--|
| 14. | Elizabeth Young       | LPC | <p>One course in human growth and development;</p> <p>One course in abnormal human behavior;</p> <p>One additional course in appraisal and assessment techniques;</p> <p>One additional course in counseling theories and methods;</p> <p>One course in professional orientation or ethics</p> |
| 15. | Elizabeth Zanetti     | LPC | <p>One additional course in appraisal or assessment techniques</p>   |
| 16. | Gina Rappa-Serrao     | LPC | <p>One course in abnormal human behavior;</p> <p>One additional course in appraisal and assessment techniques</p>  |
| 17. | Juliann Gillette      | LPC | <p>Two additional courses in any knowledge areas listed in OAC 86:10-9-2(a)</p>  |
| 18. | Kellie Schultz        | LPC | <p>One course in abnormal human behavior;</p> <p>One additional course in appraisal and assessment techniques;</p> <p>Two additional courses in any knowledge areas listed in OAC 86:10-9-2(a)</p>   |
| 19. | Kenyotta Eugene Cross | LPC | <p>One additional course in appraisal and assessment techniques;</p> <p>One course in professional orientation or ethics;</p> <p>Two additional courses in any knowledge areas listed in OAC 86:10-9-2(a)</p>  |
| 20. | Linda Shepherd        | LPC | <p>One course in abnormal human behavior</p>   |

21.	Lori Metcalf	LPC	One course in abnormal human behavior; One course in professional orientation or ethics
22.	Maria Cicio	LPC	One course in abnormal human behavior
23.	Martin Stampley, Jr.	LPC	One additional course in appraisal and assessment techniques; One additional course in any knowledge area listed in OAC 86:10-9-2(a)
24.	Mary Densman	LPC	One additional course in any knowledge area listed in OAC 86:10-9-2(a)
25.	Nicole Lawson	LMFT	Two courses in theoretical foundations of marital and family systems
26.	Ronald Wood	LPC	One additional course in any knowledge area listed in OAC 86:10-9-2(a)
27.	Shyreeta Hearne	LPC	One additional course in any knowledge area listed in OAC 86:10-9-2(a)
28.	Rebecca Mary	LMFT	Two additional courses in theoretical foundations of marital and family systems; Two additional courses in assessment and treatment in marital and family therapy; Two additional courses in human development; One course in ethics and professional studies; One course that is a practicum or internship

**OPINION 2015-9A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

September 22, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to a consent agreement—a fine of \$1,000 on licensee number 627, a new motor vehicle dealer. The dealer allowed a consumer to take delivery of a new vehicle and, rather than storing a trade-in vehicle, sold it instead. When financing for the sale of the new vehicle could not be completed, the trade-in vehicle was unavailable to be returned to the consumer. This violated a take-and-store provision in the written Retail Delivery Agreement between consumer and dealer.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed . . . [\$1,000] against a dealer per occurrence” for several reasons, including “fail[ure] or refus[al] to perform any written agreement with any retail buyer involving the sale of a motor vehicle.” 47 O.S.Supp.2014, § 565(A)(5)(d). Other reasons include “false or misleading advertising,” unlawful bundling of features, and committing “fraudulent act[s].” *Id.* § 565(A)(5)(a), (b), (f). Enforcement powers against violations of agreements and false advertising are related to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practices,” and to “foster and keep alive vigorous and healthy competition.” 47 O.S.2011, § 561. The action seeks to advance this policy by holding dealers to their agreements.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicle Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the public interest and prohibit unfair practices in the sale of new motor vehicles by holding dealers to their written agreements with consumers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-10A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

September 22, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to consent agreements—fines of \$1,000 each on licensees 465, 533, and 818 for false or misleading advertising. Each new motor vehicle dealer advertised either in print or on Internet websites large, conspicuous prices that depended on the existence of qualifications including status as a current or former member of the military, status as a recent college graduate, and/or trading in a vehicle of a competitor’s make.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed . . . [\$1,000] against a dealer per occurrence” for several reasons, including “false or misleading advertising.” 47 O.S.Supp.2014, § 565(A), (A)(5)(b). Enforcement powers against false advertising are closely connected to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practice,” and to “prevent false and misleading advertising.” 47 O.S.2011, § 561. Here, the Commission’s implementing rules require that the “most conspicuous price or payment of a new motor vehicle, when advertised by a dealer, must be the full and total selling price for which the dealer will sell the vehicle to any retail buyer.” OAC 465:15-3-7(a). The most conspicuous price may *not* include qualifications that only apply to a subset of the retail public; such discounts or rebates, if allowed to be included at all, must be stated separately from the most conspicuous price and clearly identify the qualifying group. OAC 465:15-3-7(b)–(d). The action seeks to enforce the Legislature’s policy against false and misleading advertising by holding dealers to their most conspicuous prices in advertising.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to prevent false and misleading advertising in the sale of new motor vehicles.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-11A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

September 22, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to summarily suspend the license of Elizabeth Campbell, a licensed real estate broker, pending further proceedings over whether the licensee commingled personal and client funds in her trust account and after she failed to cease and desist business activities during a period of disability.

Oklahoma law authorizes the Commission to, “upon showing good cause, impose sanctions” on licensees. 59 O.S.2011, § 858-312. Good cause includes actions “[c]ommingling with the licensee’s own money or property the money or property of others which is received and held by the licensee.” *Id.* § 858-312(16). Further, the Commission’s administrative rules—authorized by 59 O.S.2011, § 858-208(1)—require real estate brokers operating as sole proprietors to cease business activities upon the death or disability of the real estate broker. OAC 605:10-9-6(2).

The action is intended to further two separate but important policies of this State. First, the action seeks to enforce real estate brokers’ obligations not to commingle client funds with their own money, a rule geared toward preventing the conversion or embezzlement of such money to the broker’s own use. Second, the action seeks to ensure that the death or disability of a real estate broker results in the orderly transition of client services to other professionals.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policies against commingling of client and real estate broker funds and its policies regarding professional conduct of real estate brokers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-12A**

Chris Ferguson, Director  
Oklahoma Funeral Board

September 23, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Funeral Board intends to take. The proposed action is to—pursuant to consent order in complaint 15-08—require payment by a licensee of costs and penalties totaling \$900. Licensee failed to timely renew a permit for marketing prepaid funeral services contracts in calendar year 2014 and then belatedly obtained a valid surety bond or letter of credit to accompany an application for a permit for calendar year 2015.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2014, §§ 395.1–396.33, authorizes the Funeral Board to take enforcement action against licensees for failure to comply with laws governing prepaid funeral services contracts, *see* 59 O.S.Supp.2014, §§ 396.12c(12), (13). The Funeral Board’s administrative rules also prohibit failure to comply with such laws. OAC 235:10-7-2. The laws governing prepaid funeral services contracts require those marketing such contracts to obtain (and then annually renew) a permit from the Insurance Commissioner of Oklahoma, 36 O.S.2011, §§ 6121(A), 6124(A), and furnish a bond to the Commissioner in a statutorily determined amount, 36 O.S.Supp.2014, § 6125(I). However, unless the permittee intends to actually market the contracts, nothing in the prepaid funeral services statutes *require* a permittee to renew its permit—even having outstanding contracts only triggers ongoing reporting requirements, not a permitting requirement. *See, e.g.*, 36 O.S.2011, § 6128. Instead, it can only be said that one has violated the law if one *markets* a prepaid funeral services contract without renewing a permit. *See id.* § 6121(A).

Nothing in the official orders of the Oklahoma Insurance Department or the Board’s consent order make a finding that the licensee actively marketed prepaid funeral services contracts during relevant periods. Further, the Insurance Department has already imposed fines on the licensee. The action is intended to ensure that funeral services providers comply with the rules governing marketing of prepaid funeral services contracts, but the rules do not require a permit to be renewed—they only require that the sale of contracts be done while the seller has a permit. This office cannot conclude that the statutes articulate a state policy to impose fines and penalties on a licensee at *two* state agencies for failing to perform actions that are *not* mandatory in the first place, which appears to be the result of this action based on the record.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board lacks adequate support for the conclusion that this action advances statutory policies of the State of Oklahoma. The action is thus **disapproved**.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-13A**

Chris Ferguson, Director  
Oklahoma Funeral Board

September 23, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Funeral Board intends to take in agency complaint numbers 15-79, 15-80, 15-82, and 15-83. Pursuant to consent orders, the Board intends to impose administrative fines and costs ranging from \$450 to \$700 because the four licensees failed to timely file annual reports detailing existing prepaid funeral services contracts—the differences in fines arising from the lengths of delay in filing the reports.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2014, §§ 395.1–396.33, authorizes the Funeral Board to take enforcement action against licensees for failure to comply with laws governing prepaid funeral services contracts, *see* 59 O.S.Supp.2014, §§ 396.12c(12), (13). The Funeral Board’s administrative rules also prohibit failure to comply with such laws. OAC 235:10-7-2. The laws governing prepaid funeral services contracts require those marketing such contracts to obtain a permit from the Insurance Commissioner of Oklahoma, 36 O.S.2011, §§ 6121(A), 6124(A), and then to file annual reports documenting new and outstanding prepaid funeral services contracts, *id.* §§ 6128–29.

The action seeks to ensure that funeral services providers comply with rules governing prepaid funeral services contracts. Such contracts require the payment of substantial money today for services to be provided in the future. Timely compliance with reporting requirements ensures that oversight of the financial integrity of those marketing these contracts remains effective.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect consumers who purchase prepaid funeral services contracts.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-14A**

Amy Hall, Executive Secretary  
Board of Examiners for Speech-Language  
Pathology and Audiology

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding a proposed action of the Board of Examiners for Speech-Language Pathology and Audiology. The proposed action is to suspend the license of Licensee 3377, a speech-language pathologist, until the completion of the terms of a deferred sentence for Medicaid fraud. The licensee pleaded nolo contendere to one count of felony Medicaid fraud involving \$2,500 of billing. The five-year deferred sentence also requires payment of restitution, costs, and a fine totaling \$5,146.14.

The Speech Pathology and Audiology Licensing Act, 59 O.S.2011 & Supp.2015, §§ 1601–1622, seeks to “safeguard the public health, safety and welfare, and to protect the public from being misled by incompetent, unscrupulous and unqualified persons.” 59 O.S.2011, § 1602. The Act contains numerous provisions authorizing discipline in the event a licensee engages in criminal or fraudulent conduct, including upon the entry of a plea of nolo contendere to a felony. *See, e.g., id.* § 1619(A)(8); *see also id.* § 1619(A)(1), (A)(3), (A)(7). The Board’s implementing rules also prohibit charging for services not rendered, and they require reporting all violations of ethical rules. OAC 690:15-1-4(1)(G); OAC 690:15-1-3(6)(A).

The action seeks to uphold the statutory standards of the speech-language pathology profession, which clearly authorize discipline upon conviction of a felony. The action can thus be said to prevent harm from “unscrupulous and unqualified persons.” 59 O.S.2011, § 1602.

It is, therefore, the official opinion of the Attorney General that the Board of Examiners for Speech-Language Pathology and Audiology has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-15A**

Amy Hall, Executive Secretary  
Board of Examiners for Speech-Language  
Pathology and Audiology

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Examiners for Speech-Language Pathology and Audiology intends to take in case number 15-15 before the Board. The proposed action is to require that a licensed clinical experience intern take an ethics course as a sanction for practicing speech-language pathology after her license expired. Her license expired on April 17, 2015, but she continued to practice until May 8, 2015.

The Speech Pathology and Audiology Licensing Act, 59 O.S.2011 & Supp.2015, §§ 1601–1622, seeks to “safeguard the public health, safety and welfare, and to protect the public from being misled by incompetent, unscrupulous and unqualified persons.” 59 O.S.2011, § 1602. The Act requires that individuals have a license before practicing speech-language pathology or audiology, *id.* § 1604(A). The Act also contemplates practice as a supervised intern. *See id.* § 1605(A)(2), (C). The Board’s implementing rules state that a license to practice as an intern runs for one year from the date of issuance and automatically terminates at the end of that year unless action is taken to seek an extension. OAC 690:10-5-5.

The action seeks to “safeguard the public health, safety and welfare” 59 O.S.2011, § 1602. by ensuring that an individual taking steps to practice speech-language pathology adhere to the rules governing the profession, including the rules on length of practice as a licensed intern.

It is, therefore, the official opinion of the Attorney General that the Board of Examiners for Speech-Language Pathology and Audiology has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-16A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and  
Parts Commission

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take. The proposed action is to accept a consent agreement that requires the payment of fines by four individuals and the surrender of a used motor vehicle dealer's license by the business RCM Motors, LLC. Two of the individuals licensed at RCM Motors, LLC abandoned the licensed location and began selling vehicles from their own homes. Two licensed salespersons of RCM Motors, LLC also sold vehicles from their homes, which they purchased with their own funds.

The Oklahoma statutes governing used motor vehicle dealers require that such dealers include an established place of business with their application for a license. 47 O.S.Supp.2014, § 583(B)(1)(c). The Commission has the authority to discipline licensees who do not maintain an established place of business or who operate from a changed address without informing the Commission. *Id.* § 584(A)(7)(a), (d). Further, licensed salespersons may only act as salespersons on behalf of a dealer, not as dealers acting in their own rights, and that only at the dealer's address listed on the salesperson license. OAC 765:15-3-1. The action seeks to enforce rules governing used motor vehicle dealers and salespersons regarding the maintenance of an established place of business and the requirement that only licensees buy and sell on their own accounts. These rules help maintain the accountability of both these types of licensees and reduce the risk that consumers will be misled or defrauded.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public from misleading or fraudulent practices.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-17A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and  
Parts Commission

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that Oklahoma Used Motor Vehicle and Parts Commission intends to take. The proposed actions are to deny two applications for licensure because they failed to include or produce criminal history reports from the Oklahoma State Bureau of Investigation (“OSBI”).

The used motor vehicle statutes require those seeking used motor vehicle licenses to submit applications on 1) “forms prescribed by the Commission” that 2) contain all information the “Commission deems necessary” to decide on the application. 47 O.S.Supp.2014, § 583(B)(1). The information collected by the Commission must be related to “business integrity” and “pertinent information consistent with the safeguarding of the public interest and the public welfare,” among other things. *Id.* § 583(B)(1)(b), (e). The Commission’s prescribed form for used motor vehicle dealer licenses—available at its website—requires in conspicuous, bold print that an applicant with a felony submit several pieces of documentation, including OSBI reports.

The action seeks to advance a statutory policy that the Commission consider an applicant’s business integrity and other information concerning the public interest and the public welfare before allowing an individual to become a licensed used motor vehicle dealer. The content of a criminal history containing felony convictions would be relevant under that statutory policy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public interest and the public welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-18A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and  
Parts Commission

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take. The proposed action is to impose fines totaling \$4,000 on a licensed used motor vehicle dealer, Legends Auto Sales, LLC. The Commission found that the licensee employed two unlicensed salespersons at least during 2013 and 2015.

The Oklahoma statutes governing used motor vehicle dealers require that any salespersons employed by such dealers obtain salesperson licenses from the Commission. 47 O.S.Supp.2014, § 583(A)(1), (2)(a). The statutes authorize fines against used motor vehicle dealers who “employ[] unlicensed salespersons or other unlicensed persons in connection with the sale of used vehicles.” *Id.* § 584(A)(7)(b). The action seeks to enforce the rules against employing unlicensed salespersons.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require licensure of used motor vehicle salespersons.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-19A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-013—impose an administrative penalty in the amount of \$4,000 and to suspend the license of a licensed land surveyor for two years. The action would also stay that license suspension so long as the licensee completes an ethics course and limits his practice to preparing mortgage inspection reports, not boundary surveys. The licensee had already been disciplined for incompetent and negligent preparation of certain land surveys in 2007. The licensee at that time had limitations placed on his license, which he violated by preparing and signing some six boundary surveys without required supervision. He also provided notarized statements to the Board that he had not prepared any such boundary surveys.

Oklahoma law provides that “[i]t shall be unlawful to practice . . . land surveying in this state . . . unless such person has been duly licensed.” 59 O.S.2011 § 475.1. The statutes grant the Board authority to set “minimum standards for the practice of . . . land surveying” and to place licenses on probation “subject to such conditions as the Board may specify.” 59 O.S.Supp.2014, § 475.8(A) (1), (4).

The action seeks to uphold the professional standards of land surveying. Land surveys are often relied on by individuals expending substantial sums of money on property. Mortgage inspection reports, while similar in some ways, do not have the same function and require less extensive surveying activities. The Board may believe, particularly after past disciplinary proceedings, that the licensee in this case has the requisite competence to prepare mortgage inspection reports but not to prepare full boundary surveys so that a limitation on his license serves the public interest. Such a limitation may protect consumers from making investments on areas not inside their property lines and may encourage land surveyors, including the licensee here, to continue to develop competence and excellence in the practice of land surveying.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring minimum standards of conduct in the practice of land surveying.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-20A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-014—reprimand and impose fines of \$500 each on a firm and an individual. The firm offered engineering services without a valid certificate of authorization, and the individual did the same without a certificate of licensure or a temporary permit to offer engineering services in Oklahoma.

Oklahoma state law, “[i]n order to safeguard life, health and property, and to promote the public welfare,” makes it “unlawful to practice or to offer to practice engineering . . . in this state . . . unless such person has been duly licensed.” 59 O.S.2011, § 475.1. Those offering engineering services through a firm must also seek a certificate of authorization at the firm level. 59 O.S.Supp.2014, § 475.21(A)(2). The action seeks to enforce these straightforward requirements by imposing \$500 fines each on an individual and a firm practicing or offering to practice engineering in Oklahoma.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring licensure of professional engineers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

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**OPINION 2015-21A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-016—reprimand and impose a fine of \$750 on a firm that offered engineering services in Oklahoma and entered into an engineering consulting agreement in Oklahoma without a valid certificate of authorization for this state.

Oklahoma state law, “[i]n order to safeguard life, health and property, and to promote the public welfare,” makes it “unlawful to practice or to offer to practice engineering . . . in this state . . . unless such person has been duly licensed.” 59 O.S.2011, § 475.1. Those offering engineering services through a firm must also seek a certificate of authorization at the firm level. 59 O.S.Supp.2014, § 475.21(A)(2). The action seeks to enforce that straightforward requirement by imposing a fine of \$750 on a firm practicing or offering to practice engineering in Oklahoma.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring licensure of professional engineers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-22A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-017—impose a fine of \$1,000 on a firm that entered into an agreement to provide engineering services in Oklahoma without a valid certificate of authorization for this state. The order also requires the firm to cease and desist from practicing engineering in Oklahoma until it obtains a certificate of authorization.

Oklahoma state law, “[i]n order to safeguard life, health and property, and to promote the public welfare,” makes it “unlawful to practice or to offer to practice engineering . . . in this state . . . unless such person has been duly licensed.” 59 O.S.2011, § 475.1. Those offering engineering services through a firm must also seek a certificate of authorization at the firm level. 59 O.S.Supp.2014, § 475.21(A)(2). The action seeks to enforce that straightforward requirement by imposing a fine of \$1,000 on a firm with an agreement in place to practice engineering in Oklahoma and requiring that firm to obtain a certificate before practicing in the future.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring licensure of professional engineers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-23A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors

September 25, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-035—reprimand and impose fines of \$750 each on a firm and an individual. The firm offered engineering services and submitted electrical design proposals without a valid certificate of authorization in Oklahoma, and the individual licensed engineer knew or should have known that the firm lacked a certificate of authorization in Oklahoma.

Oklahoma state law, “[i]n order to safeguard life, health and property, and to promote the public welfare,” makes it “unlawful to practice or to offer to practice engineering . . . in this state . . . unless such person has been duly licensed.” 59 O.S.2011, § 475.1. Those offering engineering services through a firm must also seek a certificate of authorization at the firm level. 59 O.S.Supp.2014, § 475.21(A)(2). The Board may also discipline individual licensees who “[a]id[] or assist[] another person or entity in violating” that obligation. *See id.* § 475.18(A)(8). The action seeks to enforce the State’s licensing requirements by imposing \$750 fines each a firm practicing or offering to practice engineering in Oklahoma and the individual engineer who knew or should have known the firm lacked such a certificate of authorization.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring licensure of professional engineers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-24A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and  
Parts Commission

September 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take. The proposed action is to deny an application for a wholesale used motor vehicle dealer license. The applicant is a convicted felon whose criminal history involves several controlled dangerous substance convictions as well as convictions for violent offenses. The applicant was released from incarceration within the last two years.

Oklahoma statutes require the Commission to prepare application forms to collect information related to applicants' "financial standing," "business integrity," and "other pertinent information" related to "safeguarding . . . the public interest and the public welfare." 47 O.S.Supp.2014, § 583(B)(1)(a), (b), (e). The Commission has the authority to deny an application for a license "[o]n satisfactory proof of unfitness of the applicant." *Id.* § 584(A)(1). The same statute notes that a licensee may be disciplined if the licensee, among other things, "has been convicted of a crime involving moral turpitude." *Id.* § 584(A)(6)(c). The action thus seeks to uphold professional standards in the sale of used motor vehicles and "safeguard[] . . . the public interest and the public welfare." *Id.* § 583(B)(1)(e). The Commission could believe that the applicant's criminal history and recent release from incarceration do not display adequate qualifications for operating as a wholesale used motor vehicle dealer.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma's policy to safeguard the public interest and public welfare by ensuring applicants have business integrity, financial standing, and other qualifications.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-25A**

Gaylord Z. Thomas, Executive Director  
Oklahoma State Board of Examiners for  
Long-Term Care Administrators

September 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take. The proposed actions are to issue letters of concern and/or reprimand and require continuing education classes from a licensed administrator and a certified assistant administrator. The licensed administrator, acting as the supervisor for the certified assistant administrator, allowed the assistant to work as the administrator of record in more than one long-term care facility, a violation of administrative rules.

State law governing long-term care administrators allows the Board to “[d]evelop, impose, and enforce standards which must be met . . . in order to receive a license or certification as a long-term care administrator.” 63 O.S.2011, § 330.58(1). These standards must be “designed to ensure that long-term care administrators will be individuals who are of good character[,] . . . are otherwise suitable, and . . . are qualified to serve as long-term care administrators.” *Id.* The Board has developed two tiers of licensure: licensed administrators and certified assistant administrators. *See* OAC 490:15-1-1, 15-1-4. The former may oversee more than one long-term care facility and generally have more qualifications and responsibilities while the latter may only oversee one facility under the supervision of a licensed administrator. *See, e.g.*, OAC 490:15-1-4(c). The action seeks to enforce these rules by requiring education for first-time violators.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to ensure the qualifications of those who oversee long-term care facilities.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-26A**

Gaylord Z. Thomas, Executive Director  
Oklahoma State Board of Examiners for  
Long-Term Care Administrators

September 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take. The proposed action is to—pursuant to a settlement agreement—issue a letter of concern, impose a fine of \$1,000, and require additional education for licensee 3263 in cases 15-017(D) and 15-035(HB). The licensee, a licensed nursing home administrator—a category within long-term care administrators—failed to report allegations of resident mistreatment in two instances.

State law governing long-term care administrators requires the Board to “[d]evelop, impose, and enforce standards which must be met . . . as a long-term care administrator.” 63 O.S.2011, § 330.58(1). Consistent with that obligation, the Board’s rules provide grounds for imposing discipline on long-term care administrators, including the “[f]ailure to comply with State or federal requirements applicable to the facility.” OAC 490:10-5-3(b)(9). State law requires nursing home administrators, both as long-term care facility personnel and insofar as they oversee a nursing home facility, to report to both the Oklahoma State Department of Health and the Department of Human Services any allegations of exploitation of vulnerable adults. 43A O.S.2011, § 10-104(A)(1), (B)(6); OAC 310:675-7-5.1(b). The action seeks to hold a long-term care administrator accountable to the reporting requirements under Oklahoma law by imposing a fine and requiring additional education. Adherence to such reporting requirements ensures that state authorities can protect vulnerable long-term care residents.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect residents of long-term care facilities.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-27A**

Gaylord Z. Thomas, Executive Director  
Oklahoma State Board of Examiners for  
Long-Term Care Administrators

September 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take. The proposed action is to issue a letter of concern and impose education requirements on a licensed nursing home administrator—a subset of licensed long-term care administrators—for negligence in failing to adhere to internal policies governing investigatory procedures after a resident made allegations of sexual abuse. The licensee agreed to the terms of the discipline as part of a settlement agreement.

State law governing long-term care administrators requires the Board to “[d]evelop, impose, and enforce standards which must be met . . . as a long-term care administrator.” 63 O.S.2011, § 330.58(1). Consistent with that obligation, the Board’s rules provide grounds for imposing discipline on long-term care administrators, including where an administrator’s conduct or lack of conduct amounts to “[g]ross negligence, or negligence that constitutes a danger to the public health, welfare or safety of the residents.” OAC 490:10-5-3(b)(5).

Further, state law requires nursing home facilities—which a nursing home administrator has the duty of overseeing—to forward investigative reports to the Oklahoma State Department of Health and to post and maintain complaint procedures. OAC 310:675-7-5.1(m). State law also requires nursing home facilities to conspicuously post their complaint procedures near the administrator’s office area within the facility. OAC 310:675-7-6.1(a).

The action seeks to hold a licensed long-term care administrator, in this case a nursing home administrator, accountable to internal policies governing investigation procedures following abuse allegations. Adherence to investigation procedures may have importance for public policy both because the results of an investigation form the basis for reports to agencies of the State of Oklahoma and because others, such as the residents of long-term care facilities, may in some circumstances rely on the integrity of investigations both when making a complaint and even when choosing a long-term care facility in which to reside.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the “public health, welfare or safety of the residents” of long-term care facilities.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-28A**

Richard Pierson, Executive Director  
Oklahoma Board of Licensed Alcohol  
and Drug Counselors

September 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to extend the duration of probation and supervised practice imposed on licensee no. 603 after that licensee did not comply with a consent agreement and order imposing probation. The consent agreement was entered on July 16, 2012, after the licensee plead nolo contendere to a felony count of child abuse; it required, among other things, documenting that licensee did not provide treatment to individuals below the age of eighteen. The licensee failed to provide that documentation, and the Board intends to extend probation for one year.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1870–1885, authorizes the Board to place “a licensee on probation” for “good cause.” 59 O.S.2011, § 1875(6)(c). The Board’s professional rules require that a licensee not “violate a state or federal statute if the violation directly relates to the duties and responsibilities of the counselor.” OAC 38:10-3-4(a). The Board may require various materials to be submitted to assess the fitness of a licensee to provide alcohol and drug counseling services. OAC 38:10-5-3. The action seeks to enforce a prior order supervising a licensee to ensure that no legal violations harming children occur. Documenting supervision under a prior order reasonably encourages compliance with that order and can protect the public welfare.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure Oklahomans receive drug and alcohol treatment from competent, qualified providers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-29A**

Richard Pierson, Executive Director  
Oklahoma Board of Licensed Alcohol  
and Drug Counselors

September 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to require licensee no. 1128 to either complete the inactive license process or have the license suspended. Licensee no. 1128 agreed to conditions on licensure that required, among other things, seeking mental health treatment and submitted to drug screenings. The licensee stopped complying with those conditions and expressed an interest in placing the license in inactive status. However, the licensee has not completed the inactive license process.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1870–1885, requires the Board to “[d]etermine eligibility for . . . licensure,” “[i]ssue . . . licenses,” and “[u]pon good cause shown,” “place a holder of . . . a license on probation,” 59 O.S.2011, § 1875(4), (5), (6)(c). The administrative rules also allow licensees to place their licenses on inactive status for up to two years upon payment of a \$25 fee. OAC 38:10-11-1(8). The action seeks to hold a licensee accountable to the Board’s determination of that person’s qualifications to provide alcohol and drug counseling services while adhering to the Board’s rules pertaining to inactive status.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure that Oklahomans receive alcohol and drug counseling services from competent, qualified providers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-30A**

Richard Pierson, Executive Director  
Oklahoma Board of Licensed Alcohol  
and Drug Counselors

September 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to deny a request for reinstatement of a license that expired due to failure to seek renewal over three years ago.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1870–1885, requires that “a person whose . . . license has been expired for more than one (1) year shall not be reinstated. A person may reapply for a new . . . license.” 59 O.S.2011, § 1878(D). The action seeks to enforce this straightforward requirement contained in statute. Such enforcement ensures that those who initially meet the qualifications required for licensed alcohol and drug counselors, *see* 59 O.S.Supp.2014, § 1876, continue to be able to meet such requirements after having not been licensed to practice in Oklahoma for a substantial period of time.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure Oklahomans receive drug and alcohol treatment from competent, qualified providers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-31A**

Richard Pierson, Executive Director  
Oklahoma Board of Licensed Alcohol  
and Drug Counselors

September 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to deny the application for licensure of the applicant Greg Walston, who pleaded guilty to a felony charge of driving under the influence in 2014.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1870–1885, authorizes the Board to deny the application for licensure of any person who has “[b]een convicted of or pleaded guilty or nolo contendere to a felony,” 59 O.S.2011, § 1881(A)(1). The Board has a policy of denying any application whose felony conviction or plea occurred less than five years prior to application. Such a policy seeks to ensure that individuals offering counseling services in the areas of alcohol and drug abuse be well-qualified and competent. Further, in this particular instance a conviction that involves alcohol or drug abuse militates against finding the applicant to be well-qualified.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure Oklahomans receive alcohol and drug abuse treatment from competent, qualified providers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-32A**

Richard Pierson, Executive Director  
Oklahoma Board of Licensed Alcohol  
and Drug Counselors

September 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to void applications for failure to pass or failure to register for the required examination within one year of a notice of eligibility. Three applicants—Elsie Winston, Marlene Jackson, and Lou Leake—failed to register, while two other applicants—Jacinta Dike and Glenna Jones—did not pass the examination after taking it on several occasions.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2014, §§ 1870–1885, authorizes the Board to deny or approve applications for licenses, 59 O.S.2011, § 1875(5), (6)(a). An application for licensure can only be approved upon passage of an examination. 59 O.S.2011 & Supp.2014, §§ 1876(C)(2), 1877(A)(1). Prior to September 21, 2014, the Board’s administrative rules required that a person must register for the exam within one year of notice of eligibility to sit for the exam. OAC 38:10-7-7(d)(3) (2006) These rules continue to apply to applicants who submitted their applications before September 21, 2014. These actions seek to ensure that those providing alcohol and drug counseling services have qualifications shown by passage of an examination. The Board may believe that denying the applications of those who have failed the examination several times along with those who have failed to even register for the examination may advance that policy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to ensure Oklahomans receive alcohol and drug abuse treatment from competent, qualified providers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-33A**

Amy Hall, Executive Secretary  
Board of Examiners for Speech-Language  
Pathology and Audiology

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Examiners for Speech-Language Pathology and Audiology intends to take in case number 15-17 before the Board. The proposed action is to issue a Letter of Caution that is not confidential and may be considered in future disciplinary proceedings. The licensee in the case engaged in a variety of activities that reflected negatively on maintaining confidentiality of client records, including using a personal cell phone to store confidential client communications, including videos of clients, and not securing confidential client records left in a vehicle during a home visit to a client or brought with the licensee inside during a home visit to a client. The letter will encourage the licensee to ensure best practices in safeguarding client confidentiality are instituted.

The Speech Pathology and Audiology Licensing Act requires the Board to issue a code of ethics to govern speech-language pathology and audiology practice. 59 O.S.2011, § 1611. The code of ethics prepared by the Board and included in its administrative rules requires that licensees “not reveal to unauthorized persons any professional or personal information obtained from the person served professionally, unless required by law or unless necessary to protect the welfare of the person or the community.” OAC 690:15-1-4(1)(E). The action seeks to uphold that rule of confidentiality by cautioning a licensee to enact best practices to safeguard client information.

It is, therefore, the official opinion of the Attorney General that the Board of Examiners for Speech-Language Pathology and Audiology has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism and ethics in the speech-language pathology and audiology profession.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-34A**

Lyle Kelsey, Executive Director  
State Board of Medical Licensure and Supervision

October 13, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take against licensee 22856. The proposed action is to suspend the licensee for twenty days; impose a fine of \$50,000; restrict the licensee's ability to supervise other healthcare professionals to an orthopedic practice for five years; restrict the licensee's ability to dispense controlled substances for five years; and require the licensee to engage in continuing education in prescribing medications. The licensee took on the role of medical director of a business other than the licensee's primary orthopedic practice, allowed nurses and other personnel to dispense medication under the licensee's authority, and then never conducted any oversight such as reviewing charts, seeing patients face-to-face, or otherwise. The Board found him guilty of or in violation of several related provisions of state and federal law.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2014, §§ 480–519, prohibits a range of unprofessional conduct by doctors, including failing to keep medical records regarding controlled substances; prescribing drugs without “sufficient examination and the establishment of a valid physician-patient relationship;” and prescribing controlled substances “in excess of the amount considered good medical practice” or “without medical need” based on medical standards. 59 O.S.2011, § 509(10), (12), (16). The Board's administrative rules contain similar proscriptions against, for example, “[i]ndiscriminate or excessive prescribing, dispensing or administering” of controlled substances. OAC 435:10-7-4(1); *see also*, *e.g.*, OAC 435:10-7-4(2), (6), (7).

Oklahoma law, including statutes enacted by the Legislature, thus displays a policy of ensuring that licensed medical doctors prescribe, dispense, and administer controlled substances only with clinical justification and only then with adequate documentation and record-keeping. The action seeks to enforce that requirement—without prohibiting a professional from practice altogether—through temporary penalties, additional education, and license restrictions that prevent the licensee from unilaterally or through participation in other businesses improperly dispensing controlled substances.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-35A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0515-61. The proposed action is to place the licensee on probation for five years after it was established that the licensee had been diverting addictive drugs for personal use and for the use of an employee. During the probation, the licensee may not administer, prescribe, or dispense scheduled controlled dangerous substances without written permission from the Board; the licensee must pay costs of \$3,854; the licensee must make regular appearances before the Board; the licensee must allow unannounced office visits by Board representatives; the licensee must maintain a contract for addiction treatment services; the licensee must provide notice of the probation to any current or future employer; and Board staff may require production of relevant documents.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline licensees who “dispens[e], prescrib[e], administer[] or otherwise distribut[e] any drug, controlled substance or other treatment . . . for other than [a] medically accepted therapeutic or experimental or investigational purpose,” 59 O.S.2011, § 637(A)(2)(g). It also authorizes discipline for failure to keep records related to controlled substances, *id.* § 637(A)(2)(m), and for being habitually addicted to “habit-forming drugs,” *id.* § 637(A)(12). The action seeks to enforce these requirements, which ensure that physicians do not use their privileges to abuse or enable others to abuse controlled substances, and reasonably does so without absolutely barring the licensee from practicing medicine.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-36A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0115-07. The proposed action is to defer a prosecution and impose educational and therapy requirements after a licensee’s unprofessionally disruptive conduct—including through unprofessional language, attitude, and conduct with other professionals—led to termination from a residency program. The educational requirements include courses in boundaries and professionalism, ethics and professionalism, and treatment in anger management.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline a licensee for unprofessional conduct including “acting in a manner which results in final disciplinary action by any . . . hospital or medical staff of such hospital,” 59 O.S.2011, § 637(A)(2)(f). The Board may also discipline a licensee if “guilty of personal offensive behavior, which would include, but not be limited to obscenity, lewdness, molestation” and other actions. *Id.* § 637(A)(13). The action seeks to hold a professional accountable to these standards of professionalism—without barring the professional from practice—by requiring additional education.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism in the medical profession.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-37A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0112-10. The proposed action is to alter conditions on a licensee's continuing ability to practice in a case where it was established that the licensee had been overprescribing controlled substances with unclear diagnoses supporting the prescriptions. The new conditions include completion of a clinical judgment educational program and monitoring of controlled substances prescriptions after lifting a restriction on the prescription of controlled substances.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline licensees who “dispens[e], prescrib[e], administer[] or otherwise distribut[e] any drug, controlled substance or other treatment . . . for other than [a] medically accepted therapeutic or experimental or investigational purpose,” 59 O.S.2011, § 637(A)(2)(g). It also authorizes discipline for failure to keep records related to controlled substances. *Id.* § 637(A)(2)(m). The action seeks to continue ongoing discipline to enforce these requirements by ensuring that the licensee has the clinical competence to practice without violating the requirements and, for the near-future, ensuring no further violations occur.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-38A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0614-80. The proposed action is to place the licensee on probation for five years after it was established that the licensee had been overprescribing controlled substances with unclear diagnoses supporting the prescriptions. During the probation, the licensee may not administer, prescribe, or dispense scheduled controlled dangerous substances; the licensee must complete education requirements in medical record keeping and prescribing controlled substances; the licensee must pay costs of \$10,518; the licensee must make regular appearances before the Board; the licensee must allow unannounced office visits by Board representatives; the licensee must provide notice of the probation to any current or future employer; and Board staff may require production of relevant documents.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline licensees who “dispens[e], prescrib[e], administer[] or otherwise distribut[e] any drug, controlled substance or other treatment . . . for other than [a] medically accepted therapeutic or experimental or investigational purpose,” 59 O.S.2011, § 637(A)(2)(g). It also authorizes discipline for failure to keep records related to controlled substances. *Id.* § 637(A)(2)(m). The action seeks to continue ongoing discipline to enforce these requirements by ensuring that the licensee has the clinical competence to practice without violating the requirements and, for the near-future, ensuring no further violations occur.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-39A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0713-67. The proposed action is to deny a request for modification of an order imposing conditions on the licensee. The initial discipline in the case arose because the licensee obtained patients' contact information from medical records and sent sexually suggestive messages and pictures to patients. Discipline included various monitoring requirements and required, at a minimum, quarterly counseling sessions. The licensee requested that the counseling requirement be lifted, which was denied.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline a licensee for unprofessional conduct including “acting in a manner which results in final disciplinary action by any . . . hospital or medical staff of such hospital,” 59 O.S.2011, § 637(A)(2)(f). The Board may also discipline a licensee if “guilty of personal offensive behavior, which would include, but not be limited to obscenity, lewdness, molestation and other acts of moral turpitude.” *Id.* § 637(A)(13). The action seeks to hold a professional accountable to these standards of professionalism—without barring the professional from practice—by requiring counseling that may prevent future misconduct.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to uphold standards of professional in the medical profession.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-40A**

Billy H. Stout, Board Secretary

October 13, 2015

State Board of Medical Licensure and Supervision

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take against respiratory care practitioner licensee 117. The proposed action is to reinstate the license under indefinite probation terms. The licensee had been initially disciplined in 2003—resulting in a voluntary surrender of the license—for fraudulently prescribing hydrocodone for himself under another doctor’s name, diverting fentanyl from a patient and using it, and working under the influence of valium. In 2013, the Board reinstated the license under indefinite probation terms. A few months later, the Board and licensee entered an agreement for the licensee to stop practicing because of external circumstances.

The Board’s proposed action seeks to once again reinstate the license under indefinite probation terms. The probation terms include informing employers and others about the discipline; releasing medical records of the licensee; being available for personal appearances; attending substance abuse treatment programs; and submitting to random drug testing, among other monitoring requirements.

The Respiratory Care Practice Act, 59 O.S.2011 & Supp.2014, §§ 2026–2045, authorizes the Board to discipline respiratory care practitioners who are “addicted to, or ha[ve] improperly obtained, possessed, used or distributed habit-forming drugs or narcotics,” 59 O.S.2011, § 2040(4). The action seeks to enforce this policy by authorizing the licensee to practice as a respiratory care practitioner while monitoring the practitioner for substance abuse problems that could impact patient safety and undermine the State’s effective regulation of controlled dangerous substances. The initial violations, including several forms of drug diversion and working under the influence of drugs, pose serious problems. The Board could reasonably believe that strenuous monitoring is necessary to protect the public health while allowing the licensee to participate in the healthcare market.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-41A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take regarding licensee 19233. The Board had revoked the license in 2003 and reinstated it in 2012 with restrictions on the ability to perform surgeries pending completion of a year-long fellowship in spinal surgery approved by the Accreditation Council for Graduate Medical Education. In 2014, the Board modified its fellowship requirement to any year-long orthopedic fellowship. Afterwards, the licensee completed around six months of orthopedic fellowship. The licensee requested that restrictions on ability to perform surgeries be removed, claiming that the licensee's six months of experience in programs in France and Japan were sufficient to meet the year-long requirement. The Board intends to deny that request and require another six months of fellowship in line with its original year-long requirement.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2014, §§ 480–519, authorizes the Board to place conditions on a license to practice medicine as part of the remedy in a disciplinary action, 59 O.S.2011, §§ 506(A), 509.1(4), (8). Here, a license was reinstated more than nine years after revocation. A reasonable condition on that reinstatement would be to ensure the licensee's competence to perform skill-intensive surgeries critical to patient health. The Board required a year-long fellowship, and in this action is enforcing that initial requirement to ensure licensee's competence.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-42A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

October 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to the reinstatements of physician's assistant license 699 and medical licenses 11663, 25353, and 24742. The proposed action is to impose restrictions on the professional practice of each licensee in conjunction with reinstating each license. Each set of restrictions includes common terms such as complying with applicable laws; furnishing copies of restriction documents to other states when seeking licensure or at hospitals; keeping current address information and maintaining the currentness of payments; and, upon request, turning over records or being personally available.

Licensee 699 had been investigated and voluntarily surrendered a license to avoid prosecution; that licensee will have additional restrictions, including not supervising other health professionals; a five-year term of probation; supervisors and job location approval; minimum supervision requirements; taking ethics courses; seeking counseling; not ingesting any controlled substances without medical justification; and completing a treatment contract with Oklahoma Health Professionals Program, Inc.

Licensees 11663 and 25353 will have medical licenses reinstated after a long period of non-practice. Licensees 11663 and 25353 will each have the basic terms along with additional terms, including seeking approval of employment positions or changes in responsibility and appearing at a one-year review. Licensee 11663 will be restricted to administrative medical positions while licensee 25353—after having possibly driven under the influence of alcohol or other substances last year—will have to send notices of any charges or violations involving driving under the influence of alcohol or other substances, including complaints at a place of employment involving intoxication or severe hangovers.

Licensee 24742, currently living and working in Texas, will also have a medical license reinstated after drug prescribing violations. That licensee will have the basic terms but, like licensee 25353, will have to send notices of charges or violations involving substance abuse. Licensee 24742 will also have to submit to blood, hair, and urine testing with quarterly reports on results; limit medications ingested to those where a legitimate medical need exists; must give notice of any relapse; and must complete treatment under an existing Monitoring and Assistance Agreement with the Texas Physician Health Program running until August 22, 2018. If licensee 24742 seeks to move to Oklahoma, the licensee must seek approval and must switch treatment to Oklahoma Health Professionals Program, Inc.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2014, §§ 480–519, authorizes the Board require “satisfactory evidence of professional competence and good moral character” when reinstating a license to practice medicine, 59 O.S.2011, § 495h. The Board’s administrative rules clarify that “[i]ndiscriminate or excessive prescribing, dispensing or administering of” controlled substances as well as the “habitual or excessive use of any drug which impairs the ability to practice medicine” qualify as unprofessional conduct. OAC 435:10-7-4(1), (3). The conditions on reinstatement described above seek to ensure that licensees 11663, 25353, and 24742 have reasonable competence in practicing medicine and, for those who have had substance abuse issues in the past, that those issues are monitored so that the physicians have the opportunity practice.

The Physician Assistant Act, 59 O.S.2011 & Supp.2014, §§ 519.1–524, has similar provisions. A physician assistant must “[b]e of good moral character” and have requisite educational qualifications to seek certification. 59 O.S.2011, § 519.4(1). The rules governing physician assistants bar “[h]abitually us[ing] intoxicating liquors or habit-forming drugs.” OAC 435:15-5-11(1). The conditions imposed on licensee 699 ensure that the licensee will be able to practice with reasonable competence while monitoring any substance abuse issues.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-43A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.001.16. The proposed action is to enter a supplemental order requiring completion of a course in professional boundaries after professional evaluation. The initial disciplinary action involved inappropriate conduct including showing physical intimacy with a patient and passing cash to the patient at Mabel Bassett Correctional Center.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline on nurses who fail to “conform to the minimum standards of acceptable nursing,” who are “guilty of unprofessional conduct,” and who “[f]ail[] to maintain professional boundaries with patients,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (12). The action supplements a prior disciplinary proceeding involving these requirements by having the licensee undergo additional education to, ideally, prevent future violations and ensure patients receive uncompromised patient care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, welfare, and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-44A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take. The proposed action is to require completion of a chemical dependence course and weekly attendance at a drug or alcohol treatment program for four months in Board case 3.092.16. The registered nurse had been bound in a prior agreed order requiring an evaluation of alcohol and drug dependence and allowing further ordered treatment.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The action seeks to enforce an order of the Board ensuring the nurse receives treatment for alcohol or drug dependence. Requiring such treatment can achieve the public health goal of protecting patients from compromised nursing care while allowing nurses to continue to work and participate in the profession.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to advance the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-45A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.111.16. The proposed action is to suspend the licensed practice nurse's license after the nurse failed to submit to drug testing pursuant to a prior agreed order and then failed to appear at the Board hearing. The prior agreed order arose after the Board became aware of prior alcohol and drug crimes committed by the nurse. The nurse will have the opportunity to seek reinstatement.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The action seeks to enforce this requirement after the nurse declined to submit to drug testing. Suspending the nurse's license can protect patients from compromised nursing care until the nurse makes a satisfactory showing of no chemical dependence.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-46A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.157.16. The proposed action is to revoke the registered nurse's license for a minimum period of five years. To be eligible for reinstatement, the nurse must also submit documentation of an evaluation of fitness to practice as well as administrative penalties and costs totaling \$5,206.29. The nurse had engaged in a course of abusive conduct in at least three documented situations that included failing to assess a patient with sepsis and pushing a patient to the ground, resulting in a hematoma on the patient's forehead.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (8). The action seeks to enforce these serious and important rules by preventing the nurse from practicing for some time and then requiring a showing that she is fit to practice at the end of that period. Nurses are entrusted with significant responsibilities when caring for patients, and they must be prepared to fulfill those responsibilities in a way that preserves and advances patient health and safety.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-47A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take. The proposed action is to reinstate a license and then temporarily suspend it in Board case 3.163.16. The licensee had been making progress in the Peer Assistance Program when the program asserted it had evidence the licensee had violated the program's terms, resulting in a revocation of the license. The licensee disputed that evidence, and the Board here intends to reinstate the license and immediately suspend it until the licensee reenters the Peer Assistance Program and continues progress in the program.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The action seeks to allow the licensee to continue to participate in the nursing profession so long as the nurse complies with the requirements of the Peer Assistance Program, a drug and alcohol treatment program. Requiring such treatment can achieve the public health goal of protecting patients from compromised nursing care while allowing nurses to continue to work and participate in the profession.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to advance the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-48A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.168.16. Under a settlement agreement, a licensee will voluntarily surrender a license for two years. Afterward, prior to reinstatement, the agreement will require the licensee to complete classes in nursing law, nursing ethics, and critical thinking along with payment of a \$500 fine. In early 2014, the licensee forged or caused to be forged a signature on a return-to-work authorization after the licensee's own workplace injury. The authorization described continuing treatment and diagnosis information. The licensee also removed a coworker's purse containing controlled dangerous substances at another employer's place of business a little over two months later. On at least one occasion the licensee admitted taking the purse but stated it was a mistake.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses are “[f]ail[] to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . that, in the opinion of the Board, unnecessarily exposes a patient or other person to risk of harm,” 59 O.S.Supp.2014, § 567.8(B)(3). The action seeks to ensure that patients are not placed in danger from being in the charge of a nurse with a proclivity toward violent conduct by requiring additional education and evaluation rather than immediately revoking a license.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-49A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.169.16. The proposed action is to severely reprimand a registered nurse, require completion of three courses in nursing ethics and responsibilities, and impose administrative penalties and costs total \$2,188.89. While working an overnight shift, video surveillance showed the nurse sitting in a chair in the nurse's station of a post-partum unit for nearly four hours with a brief interruption. The nurse documented completion of vital signs and pain assessments at times that that surveillance showed the nurse sitting in the chair.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (8). The action seeks to enforce these serious and important rules by requiring the nurse to receive education about ethical obligations and documentation requirements as a nurse.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-50A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 3.177.16, 10.029.16, 10.032.16, and 10.052.16. The proposed actions are to require applicants for nursing licensure exams to take nursing law classes and reprimand them. Each applicant failed to disclose criminal history on their applications for licensure.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The actions seek to enforce this straightforward requirement by requiring additional education of the applicants and reprimanding them.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-51A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take. The proposed action is to enter a supplemental order requiring the registered nurse to complete a Nurse Refresher course by July 31, 2016, and then pay an administrative penalty of \$400 in Board case 3.178.16. Under the terms of the proposed order, the nurse's license will be suspended for three months upon failure to complete these terms. The nurse had been required to complete the course along with two others and pay the administrative penalty by July 31, 2015, pursuant to a prior agreed order.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse violates an “order of the Board,” 59 O.S.Supp.2014, § 567.8(B)(9). The action seeks to enforce an order of the Board requiring a nurse to meet certain educational requirements and pay penalties. Extending the time for compliance while attaching an automatic suspension will encourage compliance with the original agreed order between the registered nurse and the Board while offering ample opportunity for the nurse to comply.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to advance the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-52A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.182.16. The proposed action is to, pursuant to a settlement, severely reprimand a licensee, assess a \$500 fine, and require a course in nursing law. The licensee failed to disclose a larceny conviction on an application for license renewal in 2012.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The actions seek to enforce this straightforward requirement by requiring additional education of the licensee, reprimanding the licensee, and requiring payment of a \$500 fine.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-53A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.183.16. The proposed action is to, pursuant to a settlement, severely reprimand a licensee, assess a \$500 fine, and require a course in nursing law. The licensee, a licensed practical nurse, failed to disclose dropped charges for passing false checks on a 2015 license renewal application and then again on an application to retake the registered nurse examination.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The actions seek to enforce this straightforward requirement by requiring additional education of the licensee, reprimanding the licensee, and requiring payment of a \$500 fine.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-54A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.184.16. The proposed action is to, pursuant to a settlement, severely reprimand a licensee, assess a \$1000 fine, require a course in nursing law, and require an evaluation of fitness to practice by a licensed psychiatrist. The licensee was convicted in early 2015 both of reckless conduct with a firearm and violation of a protective order.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who are “guilty . . . any offense reasonably related to the qualifications, functions or duties of any licensee or an act of violence,” 59 O.S.Supp.2014, § 567.8(B)(2). The action seeks to ensure that patients are not placed in danger from being in the charge of a nurse with a proclivity toward violent conduct by requiring additional education and evaluation rather than immediately revoking a license.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-55A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.186.16. The proposed action is to require courses in nursing law as well as stress and anger management with conflict resolution; issue a severe reprimand; and fine the licensee \$500. The licensee was convicted of domestic assault in early 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline on nurses who are convicted of crimes involving acts of violence, 59 O.S.Supp.2014, § 567.8(B)(2). The action seeks to protect patient health and safety by ensuring that a nurse who has been convicted of a violent act receives education on how to handle stressful situations without responding in anger, an important skill when providing nursing care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, welfare, and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-56A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 3.188.16, 3.198.16, 3.199.16, 10.036.16, and 10.043.16. The proposed actions are to require applicants to take nursing licensure exams to complete nursing law courses and two submit to twice-per-month alcohol and drug testing until an alcohol and drug treatment evaluation can be conducted and reviewed by the Board in each case. The applicant in case 3.188.16 has a criminal history including violent conduct and public intoxication. The applicant in case 3.198.16 has a criminal history including violent conduct and drive under the influence. The applicant in case 3.199.16 has a criminal history including evading arrest and minor in consumption (from 2015). The applicant in case 10.036.16 has a criminal history including driving under the influence, the latest from 2014. The applicant in case 10.043.16 has a criminal history including public intoxication offenses, the latest from 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who are “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients.” 59 O.S.Supp.2014, § 567.8(B)(4). Each applicant has a criminal history showing potential alcohol and drug abuse problems. The actions seek to prevent patients from receiving compromised nursing care because of alcohol and drug abuse by nurses. The action seeks to provide screening and, eventually, treatment rather than merely barring applicants for the nursing profession.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-57A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.193.16. The proposed action is to require courses in nursing law, patient rights, and critical thinking; issue a severe reprimand; and fine the licensee \$1,000. The licensee verbally abused patients and failed to change dressings as ordered by a physician on at least two occasions in late 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline on nurses who fail to “conform to the minimum standards of acceptable nursing,” who are “guilty of unprofessional conduct,” and who are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (8). The action seeks to protect patient health and safety by disciplining a nurse who failed to change wound dressings who verbally abused patients. The Board may believe that the discipline imposed will discourage the licensee from future violations and deter other potential violators.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, welfare, and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-58A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.203.16. The proposed action is to impose a severe reprimand, a fine of \$500, and a course in nursing law. The applicant—a licensed practical nurse seeking licensure as a registered nurse—failed to report criminal history on the licensure application and on prior occasions as a licensed practical nurse. Further, the criminal history involves dishonest conduct: one conviction included passing false checks.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The action seeks to enforce this straightforward requirement on applicant, already a licensee under a different type of license, by requiring additional education of the applicant and imposing fines.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-59A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 10.033.16 and 10.034.16. The proposed action in case 10.033.16 is to grant an application for a registered nurse license by endorsement with a severe reprimand and the conditions that the applicant pay a \$500 fine and complete a class in nursing ethics. The applicant had falsified the application by failing to report criminal history involving larceny. The proposed action in case 10.034.16 is to also grant an application by endorsement with a severe reprimand, a \$1,000 fine, and a class in nursing ethics. That applicant will also be required to complete drug and alcohol testing twice a month until an evaluation for alcohol and drug dependence is completed. That applicant had been convicted of driving under the influence twice and had voluntarily surrendered a license in another state.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” when a nurse is guilty of crimes involving dishonesty, or when nurses apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a), (2), (4). The actions seek to uphold these requirements by imposing drug testing and, otherwise, assessing administrative penalties and requiring education while allowing these professionals to continue to practice.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-60A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 10.037.16. The proposed action is to temporarily suspend the license of an applicant, if the applicant passes the required licensure exam, until the applicant begins participation in the Peer Assistance Program, an alcohol and drug treatment program. If the applicant does not begin participation within 60 days of passage of the licensure exam, the applicant's license will be revoked for two years. The applicant has a criminal history involving driving under the influence and also obtained a substance abuse evaluation that recommended treatment.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline for nurses who are “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients.” 59 O.S.Supp.2014, § 567.8(B)(4). The action seeks to ensure that patients do not receive compromised nursing care because of alcohol or drug abuse while allowing the applicant to proceed through the licensure process.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-61A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 10.038.16, 10.039.16, 10.040.16, and 10.041.16. The proposed actions are to deny these four applications for licensure by endorsement. Each applicant failed to disclose criminal history or other relevant facts including charges or convictions ranging from driving while intoxicated to assault. Board staff attempted to discuss these problems and suggest conditions on licensure for each of these applicants, but the applicants did not respond.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The actions seek to ensure that nurses, who are entrusted with significant responsibilities when documenting patient care, will be honest and truthful. Denial of these applications after the applicants declined to acknowledge and accept conditions on licensure will ensure that only qualified nurses will be authorized to practice.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-62A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in cases 10.044.16 and 10.045.16. The proposed actions are to require applicants for nursing licensure exams to take nursing law and critical thinking classes. The applicant in case 10.044.16 had a criminal history of misdemeanors including a public intoxication conviction in 2013 while the applicant in case 10.045.16 has a criminal history including dropped charges for passing bad checks and a conviction for larceny.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to discipline nurses who commit crimes involving dishonesty as well as those who are “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(2), (4). The actions seek to discourage and prevent unprofessional conduct in the future by requiring the applicants to seek education.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-63A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to settlement agreements in Board cases 3.006.16, 3.036.16, and 3.093.16. The proposed action is to refer each licensee to the Peer Assistance Program, a drug and alcohol abuse treatment program. If the licensees do not enter the program or default from the program, an automatic two-year license suspension will go into effect; further, a fine of \$1,500 will be assessed before the reinstatement of a suspended license. The license in Board case 3.093.16 will also undergo a temporary license suspension until entry into the Program; the other licensees have already had temporary suspensions put into effect. The licensees in cases 3.006.16 and 3.036.16 were tested positive for addictive drugs during their shifts, and the licensee in case 3.093.16 had a criminal history of drug and alcohol violations followed by a substance abuse evaluation recommending treatment.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The actions seek to protect the patients’ health and safety from the potentially dangerous consequences of habitual use of alcohol and drugs. The Board may believe that treatment will effectively reduce those dangers while building in automatic consequences that will prevent nurses who default from treatment from providing compromised nursing care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-64A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to settlement agreements in Board cases 3.014.16 and 3.200.16. The licensee, in each case, defaulted the Peer Assistance Program, a drug and alcohol treatment program. The proposed action is to accept the voluntary surrender of each nurse's license for a period of two years. Reinstatement of each licensee will require reentry into the Peer Assistance Program. If the licensee fails to reenter the Program or defaults from it after reinstatement, an automatic five-year revocation of the license will occur followed by a \$1,500 fine prior to any further reinstatement of the license.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The actions seek to protect the patients' health and safety from the potentially dangerous consequences of habitual use of alcohol and drugs. Given that each licensee has defaulted from drug and alcohol treatment, the Board may believe that temporary removal from the nursing profession will prevent compromised nursing care while future monitored drug and alcohol treatment may allow these licensees to practice again in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-65A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.033.16. The proposed action is to place a license on probation that requires the nurse to complete a term of supervised practice some time within the next two years. The action also requires payment of \$640.81 in investigation costs. The nurse had been disciplined by the Texas Board of Nursing, which required supervised practice and completion of five educational courses. The nurse finished the courses but has not conducted supervised practice. The Texas discipline occurred after the nurse failed to identify patients on at least two occasions—once while putting in feed tubes and another when administering medication—while in another instance the nurse, without a physician’s order, had administered to a patient a drug to which that patient was allergic.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline after nurses are disciplined in other jurisdictions as well as when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm,” 59 O.S.Supp.2014, § 567.8(B)(3), (10). The action seeks to ensure that the licensee’s nursing skills rise to minimum standards and do not endanger patient health or safety. The Board may believe that temporary supervised practice can adequately ensure patient health is preserved.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-66A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to settlement agreements in Board cases 3.116.16, 3.161.16, and 3.194.16. The proposed action in the first two cases requires the licensees to each take a class in nursing law and a class in the role of licensed practical nurses in long-term care while imposing a severe reprimand and a \$500 fine. The action in the third case requires classes in nursing law and nursing ethics along with a severe reprimand a \$500 fine. In the first case, 3.116.16, the nurse observed a skin tear and properly dressed it but then did not document the injury or change the dressing for about two weeks before it was discovered. In the second case, 3.161.16, the nurse failed to document an injury or perform assessments after patient complaints, then later failed to document both a physician's order and the actual administration of a drug. In the third case, 3.194.16, the nurse documented administration of a drug for several days even though it had not been dispensed and was not available.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The action in each case seeks to ensure that the licensee’s nursing skills rise to minimum standards and do not endanger patient health or safety. The Board may believe that being disciplined and fined and that additional education will ensure safe nursing practice in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-67A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.155.16. The proposed action is to accept the voluntary surrender of the nurse's license for two years, after which the license will be temporarily suspended until the nurse enters the Peer Assistance Program, a drug and alcohol treatment program. If the licensee fails to enter the program or defaults from it, an automatic two-year revocation will ensure. Reinstatement after that revocation would require payment of a \$3,500 fine.

The licensee failed to disclose a misdemeanor conviction in a 2012 renewal application and then failed to disclose that and a second misdemeanor—this one involving driving under the influence of alcohol with substance abuse treatment requirements—in 2014. Further, the licensee failed to notify other professionals or document an assessment of a patient after a fall, which later turned out to be a hip fracture.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The Act also authorizes discipline when nurses engage in deceit or misrepresentation in applications for licensure or renewal or when nurses’ habitual use of alcohol or drugs poses a threat to patient health and safety, *id.* § 567.8(B)(1)(a), (4).

The action seeks to advance several statutory objectives, including the protection of patient safety through adequate standards of nursing care. It also seeks to ensure patients do not receive compromised nursing care due to nurses’ use of drugs and alcohol, and to enforce straightforward standards of honesty in the application process. The Board may believe that temporary removal from the profession followed by monitored drug and alcohol treatment will protect patients and, in the future, allow reentry of this professional to the practice of nursing.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-68A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.160.16. The proposed action is to severely reprimand a nurse, impose a \$500 fine, and require courses in nursing law and the role of registered nurses in long-term care. The licensee, a registered nurse, failed to direct a supervised licensed practical nurse to properly document or assess a reported patient injury.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The action seeks to ensure that the licensee’s nursing skills rise to minimum standards and do not endanger patient health or safety, particularly in the context of supervising other nurses. The Board may believe that completion of additional educational requirements and undergoing discipline will ensure adequate supervision in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-69A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.162.16. The proposed action is to severely reprimand a nurse, impose a \$1,000 fine, and require courses in nursing law and the role of registered nurses in long-term care. The licensee failed to disclose criminal history in renewal applications in 2011 and 2013. The licensee also failed to notify superiors about a deterioration in condition of a foot wound that, two weeks later, resulted in admission to a hospital with a diagnosis of sepsis.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The Act also authorizes discipline when nurses engage in deceit or misrepresentation in applications for licensure or renewal. *Id.* § 567.8(B)(1)(a). The action seeks to ensure that the licensee’s nursing skills rise to minimum standards and do not endanger patient health or safety. The action also enforces requirements of honesty during the license application process. The Board may believe that completion of additional educational requirements and undergoing discipline will ensure adequate nursing care in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-70A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.167.16. The proposed action is to accept the voluntary surrender of the nurse's license for one year and require entry into the Peer Assistance Program, a drug and alcohol treatment program, upon reinstatement. Failure to enter or default from the program after reinstatement will automatically result in a two-year license revocation and a \$6,000 fine assessed before any further reinstatement. The licensee failed to disclose criminal history in past license renewal applications to the Board, was convicted of felony fraud involving obtaining controlled dangerous substances in 2014, and was diverting drugs from a place of employment for several months during 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The Act also authorizes discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients.” *Id.* § 567.8(B)(4). The action here seeks to protect the safety of the public from compromised nursing care involving the diversion of drugs and falsified documents by preventing the licensee's participation in the nursing profession for a year. The Board may believe that monitored drug and alcohol treatment in the future will allow this professional to continue practicing nursing, however.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-71A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.173.16. The proposed action is to severely reprimand a nurse, impose a \$1,000 fine, and require completion of four educational courses including one in nursing law. The licensee failed to report abuse allegations and provided copies of un-redacted protected health information to a third party for a non-medical purpose.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The Act also authorizes discipline when nurses fail to comply with other legal obligations, *id.* § 567.8(B)(9), while other law provides that allegations of abuse must generally be reported, 43A O.S.2011, § 10-104(A). The action seeks to ensure that the licensee’s nursing skills rise to minimum standards of respect for confidentiality and also to comply with other legal obligations, including those requiring reporting of abuse allegations. The Board may believe that completion of additional educational requirements and undergoing discipline will ensure adequate nursing care and compliance with all legal requirements in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-72A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to settlement agreement in Board case 3.189.16. The licensee defaulted from the Peer Assistance Program, a drug and alcohol treatment program, after more than two years of successful treatment. The proposed action is to allow the licensee to reenter the Peer Assistance Program. If the licensee fails to enter the Program or defaults again, the license will be revoked for five years with a fine of \$2,000 assessed prior to any reinstatement.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients,” 59 O.S.Supp.2014, § 567.8(B)(4). The actions seek to protect the patients’ health and safety from the potentially dangerous consequences of habitual use of alcohol and drugs. Given the licensee’s prior course of successful treatment, the Board may reasonably believe that the prospect of a five-year license revocation and the resumption of monitored alcohol and drug treatment may encourage the licensee’s future success and allow the licensee to continue practicing as a nurse.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-73A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.192.16. The proposed action is to accept the voluntary surrender of the nurse's license for two years and require entry into the Peer Assistance Program, a drug and alcohol treatment program, upon reinstatement. Failure to enter or default from the program after reinstatement will automatically result in a five-year license revocation and a \$6,500 fine assessed before any further reinstatement. The licensee failed to disclose extensive criminal history in four license renewal applications to the Board over the past few years and defaulted from the Peer Assistance Program.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses apply for licenses with deceit or material misrepresentations, 59 O.S.Supp.2014, § 567.8(B)(1)(a). The Act also authorizes discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients.” *Id.* § 567.8(B)(4). The action here seeks to protect the safety of the public from compromised nursing care involving the diversion of drugs and falsified documents by preventing the licensee's participation in the nursing profession for two years. The Board may believe that monitored drug and alcohol treatment in the future will allow this professional to continue practicing nursing, however.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-74A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a settlement agreement in Board case 3.196.16. The proposed action is to accept the voluntary surrender of a license for two years and, prior to reinstatement of the license, requiring four educational courses to be completed and payment of \$500. Further, reinstatement requires supervised practice of twelve months at a home care agency to be completed within two years of reinstatement. The licensee has already been disciplined twice in the past, and in this case failed to follow resuscitation procedures for a patient even though the patient's medical-legal status and current health status indicated resuscitation should be performed.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing . . . [that] unnecessarily exposes a patient or other person to risk of harm” and when they are “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (8). The action seeks to ensure that the licensee’s nursing skills rise to minimum standards and do not endanger patient health or safety. The Board may believe that completion of additional educational requirements followed by supervised practice may allow this nurse to return to the profession in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-75A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board case 10.042.16. The proposed action is to deny an application for licensure by endorsement. The applicant failed to report prior disciplinary actions, which included a revocation of license in one state and the voluntary surrender of a license in another state. The applicant has a history of drug diversion and medical record falsification offenses.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when nurses apply for licenses with deceit or material misrepresentations and when nurses are disciplined in other jurisdictions, 59 O.S.Supp.2014, § 567.8(B)(1)(a), (10). The Act also authorizes discipline when a nurse is “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients.” *Id.* § 567.8(B)(4). The action here seeks to protect the safety of the public from compromised nursing care involving the diversion of drugs and the falsification of medical records where the application for licensure shows falsification and past discipline has occurred for those reasons.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-76A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take with respect to guidelines on delegation of nursing tasks to non-licensed persons. The current guidelines omit any mention of advanced practice registered nurses. The proposed action is to include them in the guidelines, thereby clarifying that they may not delegate nursing tasks to unlicensed persons without clear legal authority.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, defines the practice of nursing for each type of nursing license, including the tasks nurses must carry out, 59 O.S.Supp.2011, § 567.3a(3), (4), (5). Further, “[n]o person shall practice or offer to practice registered nursing, practical nursing, or advanced practice nursing in this state unless the person” complies with the Act by, for example, obtaining a license. *See id.* § 567.14(A). Thus, nurses may only delegate tasks to unlicensed persons consistent with standards of the nursing profession and the law of unlicensed practice when legal authority exists to do so—if, for example, an act is not part of the practice of nursing or, if it is, a statute nonetheless allows it to be delegated. The Board’s guidelines clarify and explain these requirements to licensees, and the amendment seeks to ensure advanced practice nurses understand that the same rules apply to them. The statutes do not make a distinction on this score between advanced practice nurses and other nurses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-77A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take with respect to Board complaints 14-002 and 14-028. The proposed action is to impose a one-year suspension on the licensee who was the subject of those complaints. During a one-year probation stemming from earlier complaints, the licensee prepared fraudulent work logs for purposes of evading full review—under the terms of probation—of work assignments. The licensee also performed appraisals for federally related transactions without legal authority.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2014, §§ 858-700–858-732, authorizes the Board to discipline licensees who engage in an “act or omission involving dishonesty, fraud, or misrepresentation with the intent to substantially benefit the certificate holder,” 59 O.S.2011, § 858-723(C)(5). Given evidence that the licensee attempted to dishonestly evade the terms of a prior disciplinary order, the Board may reasonably believe that suspension is necessary to deter future fraudulent behavior and to ensure compliance with its overall disciplinary scheme.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to improve the reliability of real estate appraisals, particularly when connected to financial transactions.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-78A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take. The proposed action is to enter a supplemental order assessing an administrative penalty of \$500 in Board case 3.083.16. The registered nurse had been bound in a prior agreed order requiring compliance with the Board's Supervised Practice Guidelines for two years. The registered nurse began work at a hospital without that hospital's agreement to participate in the supervision program, a violation of the Guidelines by the nurse.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “guilty of unprofessional conduct” or violates an “order of the Board,” 59 O.S.Supp.2014, § 567.8(B)(7), (9). The action seeks to enforce an order of the Board requiring compliance with a supervision program. Supervision of a professional during a period of probation or otherwise can be an important form of discipline that allows the professional to continue working. Enforcing the requirements of supervision, including that the employer have agreed to participate and meet the requirements of a supervisory program, is essential to supervision's role as a form of a discipline.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to advance the public health, safety, and welfare by allowing supervised practice as a form of professional discipline.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-79A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 3.159.16, 3.176.16, 3.181.16, 3.195.16, and 3.202.16. The proposed actions are to reinstate the license with conditions in each case after each license lapsed without being renewed.

The licensee in case 3.159.16 is a registered nurse who failed to disclose discipline in another state and will receive a \$500 fine, a severe reprimand, and will be required to take nursing ethics and law classes. The licensee in 3.176.16 is a licensed practical nurse who has been convicted of obtaining property under false pretenses; that licensee will be fined \$500, reprimanded, and will be required to take a nursing law class. The licensee in 3.181.16 engaged in unlicensed practice after the lapse of a license; that licensee will be fined \$1,500, severely reprimanded, and required to take a nursing law class. The licensee in 3.195.16 failed to disclose a misdemeanor violation of compulsory education charge in several applications and will be severely reprimanded, must pay a \$500 fine, and will be required to take a nursing law class. The licensee in 3.202.16 had two alcohol-related misdemeanor convictions, including one in the last year. That licensee will be reprimanded, will be required to take a nursing law class, will be fined \$500, and will be required to submit to drug and alcohol testing.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to discipline nurses who apply for licenses with deceit or material misrepresentations as well as nurses who are “intemperate in the use of alcohol or drugs, which use the Board determines endangers or could endanger patients” and nurses who are convicted of crimes involving dishonesty, 59 O.S.Supp.2014, § 567.8(B)(1)(a), (2), (4). The Act also prohibits the practice of nursing without a license in compliance with the Act. *See* 59 O.S.2011, § 567.14. The actions seek to ensure that applicants seeking to reinstate their licenses will not provide compromised nursing practice by disciplining them for conduct characterized by dishonesty or to ensure they are not habitually using alcohol or drugs or to encourage compliance with the Act’s licensure requirements.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-80A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 15, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to an agreement in Board case 3.040.16. The Board continued a before-scheduled hearing and intends to require a licensee to notify the Board of any change in employment, work assignment, or supervisor within three business days. The licensee is being disciplined on allegations of failing to meet minimum standards of nursing practice, which may have contributed to the death of a patient.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline in a variety of circumstances, including for failing to meet the minimum standards of nursing practice, 59 O.S.Supp.2014, §§ 567.8(A), (B)(3). The Act also states that the Board shall have jurisdiction over licensees to discipline them *even if* their licenses lapse. *Id.* § 567.8(K). The Act thus displays a policy of retaining jurisdiction in the Board throughout a disciplinary process. The action is intended to ensure the Board remains aware of the location and work responsibilities of a licensee undergoing discipline for providing compromised nursing care, and the Board may believe this awareness is necessary for the ongoing discipline process.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-81A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take with respect to Board complaints 14-040, 14-041, 14-042, and 15-025, each of which pertain to licensee 13021CRA. The proposed action is to accept the voluntary surrender of the respondent's license and cease disciplinary proceedings. The allegations throughout the complaints involve a variety of errors in appraisal preparation, including a lack of due diligence, incomplete work files, and errors in basic descriptions of the subject properties and comparable properties.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2014, §§ 858-700 – 858-732, authorizes the Board to discipline licensees who are “[n]egligen[t] or incompeten[t] in developing an appraisal, in preparing an appraisal report, or in communicating an appraisal” to others, 59 O.S.2011, § 858-723(C)(8). The Board's administrative rules authorize the surrender of a license. OAC 600:10-1-12(a). Given evidence that the respondent made numerous errors on several appraisals and that the license surrender was voluntarily chosen by the licensee rather than imposed by the Board, the action may ensure that no compromised valuations are issued by this licensee in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to improve the reliability of real estate appraisals, particularly when connected to financial transactions.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-82A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take with respect to the application for credentials of David L. Standridge. The proposed action is to deny the application because of the applicant's prior felony conviction for obtaining money by false pretenses.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2014, §§ 858-700 – 858-732, requires the Board to deny applications for certain credentials if the applicant has a felony conviction at any time that involved “fraud, dishonesty, a breach of trust, or money laundering,” 59 O.S.Supp.2014, § 858-717. The action seeks to enforce this straightforward statutory requirement that attempts to promote the integrity of real estate appraisals by barring individuals with relevant criminal history from entering the profession. Obtaining money by false pretenses is clearly a crime involving fraud and dishonesty.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to improve the reliability of real estate appraisals, particularly when connected to financial transactions.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-83A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take with respect to licensees 12785CRA and 12879CRA. The proposed action is to issue a letter of concern to each licensee pointing out an apparent lack of due diligence in appraisals conducted by each licensee that were meant to be reviews of another licensee's appraisal. The apparent lack of due diligence stemmed from the licensees' failure to properly gather information necessary for making a credible appraisal, in this case using comparable land sales from outside the relevant market when at least some comparable properties were available and could be known by physically visiting the subject property.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2014, §§ 858-700 – 858-732, authorizes the Board to discipline licensees who are “[n]egligen[t] or incompeten[t] in developing an appraisal, in preparing an appraisal report, or in communicating an appraisal” to others, 59 O.S.2011, § 858-723(C)(8). The action seeks to ensure that real estate appraisals are prepared competently and thoroughly, particularly at the information gathering stage. The Board may reasonably believe that the context in which these review appraisals were performed warrants the issue of a letter of concern rather than full disciplinary proceedings, which may be more appropriate upon future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to improve the reliability of real estate appraisals, particularly when connected to financial transactions.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-84A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the State Board of Veterinary Medical Examiners in Board case CX-15-083. The proposed action is to issue a Notice of Possible Violation—merely informing the person that an activity is likely illegal—to the respondent for engaging in the unlicensed practice of veterinary medicine. The respondent, not a licensee, agreed to meet an undercover officer to crop a dog’s ears. Cropping dog ears, a potentially significant surgical procedure, can involve the use of sedatives; physically cutting off a portion of the dog’s ears, and post-procedure care necessary to prevent infections.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2014, §§ 698.1 - 698.30b, authorizes the Board to discipline persons who violate the Act, 59 O.S.2011, § 698.14a(E)(22). The Act makes it a violation to practice or attempt to practice veterinary medicine without a license, *id.* § 698.18(A), and performing a surgery on an animal falls within the practice of veterinary medicine, *id.* § 698.11 (A)(1). The action seeks to provide notice concerning the requirement that individuals obtain a veterinary license before practicing veterinary medicine, and cropping a dog’s ears—a surgical operation—comes within the practice of medicine. The Board may believe that notice is an appropriate first step before pursuing formal disciplinary proceedings.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-85A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the State Board of Veterinary Medical Examiners in Board case CX-15-070. The proposed action is to issue a Notice of Possible Violation—informing the recipient that an activity is likely illegal—to the respondent, not a licensee, because she appears listed as a veterinarian on a professional profile website.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2014, §§ 698.1–698.30b, authorizes the Board to discipline persons who violate the Act or who use “any false, fraudulent or deceptive statement in any document connected with the practice of veterinary medicine,” 59 O.S.2011, § 698.14a(E)(9), (22). The Act makes it a violation to represent oneself as a veterinarian or make representations inducing that belief when one lacks a veterinary license. *See id.* § 698.11(A)(3), 698.18(A). The action seeks to provide notice concerning the requirement that only licensed veterinarians represent themselves as veterinarians, which may be important for signaling to the public that a person is qualified to perform veterinary medicine. The Board may believe that notice rather than disciplinary proceedings is an appropriate step under the circumstances.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-86A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the State Board of Veterinary Medical Examiners in Board case CX-15-071. The proposed action is to issue a Notice of Possible Violation— notifying the recipient that an activity is likely illegal—to the respondent, not a licensee, for signing an animal’s international health certificate with a veterinarian’s signature while the veterinarian was out of the country.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2014, §§ 698.1–698.30b, authorizes the Board to discipline persons who violate the Act or a rule promulgated under the Act in addition to those who use “any false, fraudulent or deceptive statement in any document connected with the practice of veterinary medicine,” 59 O.S.2011, § 698.14a(E)(9), (22). The Board’s rules prohibit fraudulently issuing a “certificate of veterinary inspection.” OAC 775:10-5-30(2)(I). The action seeks to provide notice concerning the requirement that only veterinarians issue health certificates following an inspection, that any such inspection be thorough, and that the certificate be truthful. Health certificates are used and relied upon in the regulation of international travel of animals to ensure that animals do not transmit diseases from one geographic area to another. The Board may believe that a warning offers appropriate deterrence to future potentially violative actions.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-87A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken by the State Board of Veterinary Medical Examiners in Board case CX-14-040. The proposed action is to extend a term of probation for one year following the licensee's attempt to substitute other fluid samples for the licensee's own fluid samples during a drug and alcohol test. The probation was initially imposed because of drug and alcohol use.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2014, §§ 698.1–698.30b, authorizes the Board to discipline persons who engage in the “[h]abitual use or abuse of alcohol or of a habit-forming drug or chemical which impairs the ability of the licensee or certificate holder to practice veterinary medicine,” 59 O.S.2011, § 698.14a(E)(12). The action seeks to enforce the Board's prior order requiring drug and alcohol testing, which the Board may believe is necessary to ensure that any use of alcohol or drugs by the licensee does not lead to compromised veterinary medicine while allowing the veterinarian to continue practicing.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-88A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take pursuant to a consent agreement. The proposed action is to suspend the broker associate license of Scott Alan Briggs for 90 days and also impose a fine of \$2,000. The licensee signed the name of a Commission representative—without that person’s knowledge or consent—on a form submitted to the Hawaii Real Estate Commission as part of an application for licensure in Hawaii.

Oklahoma law authorizes the Commission to discipline licensees who engage in “conduct which constitutes untrustworthy, improper, fraudulent, or dishonest dealings.” 59 O.S.2011, § 858-312(8). The action seeks to discipline a licensee who has engaged in dishonest conduct. Honesty is a vital component of many professions, and real estate in particular requires that those buying or selling property be able to trust the statements and actions of their real estate agents. The Commission may believe that a temporary suspension and fine will adequately deter future conduct that would compromise the trust placed in real estate agents by the public.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from fraud and breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-89A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take pursuant to a consent agreement. The proposed action is to impose a fine of \$1,500 on Magda Buckner, a licensed sales associate. The licensee failed to disclose to the Commission one misdemeanor conviction and one felony conviction for driving under the influence.

Oklahoma law authorizes the Commission to discipline licensees who are convicted of “a crime involving moral turpitude.” 59 O.S.2011, § 858-312(8), (15). It is the Commission’s position that a felony of driving under the influence is a crime of moral turpitude because of the dangers it poses. Further, licensees must notify the Commission of felony convictions. 59 O.S.2011, § 858-301.2. The action seeks to discipline a licensee who has failed to fulfill statutory duties and who has endangered the public by operating a motor vehicle while under the influence of drugs or alcohol. The Commission may believe that a fine will adequately deter future dangerous conduct as well as actions that would compromise the trust placed in real estate agents by the public.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-90A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to impose a fine of \$750 on Robert Cunningham, Jr., an individual licensee, and a fine of \$250 on Jan Cunningham Realty Incorporated, an entity licensee. The licensees, acting as property managers, failed to timely provide a landlord with a copy of the lease agreement upon request and to timely remit a security deposit to the landlord at the termination of the applicable property management agreement.

Oklahoma law authorizes the Commission to discipline licensees who fail “within a reasonable time . . . to remit any monies, documents, or other property coming into possession of the licensee which belong to others.” 59 O.S.2011, § 858-312(6). The action seeks to enforce the statutory duty to turn over money and documents in a reasonable time frame to ensure that real estate agents do not purposefully or inadvertently breach the trust of the public. The Commission may reasonably believe that a copy of a lease agreement can be delivered to a landlord promptly upon request, and a security deposit can be sent to a landlord promptly at the end of a property management agreement. A fine may adequately deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-91A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to revoke the license of Cody Jacob Engle, a licensed sales associate, after his December 2013 felony conviction for unlawful possession of a controlled dangerous substance with intent to distribute within 2000 feet of a public park along with a misdemeanor conviction of possession of drug paraphernalia.

Oklahoma law authorizes the Commission to discipline licensees who are unworthy to act as real estate licensees because of conviction for a “crime involving moral turpitude.” 59 O.S.2011, § 858-312(15). The action seeks to prevent an individual who has recently been convicted of a crime involving the illegal distribution of drugs from practicing as a real estate agent. The Commission may reasonably believe that the amount of trust placed in real estate agents—including controlling money, making representations relied upon by the public, and being physically present in numerous locations with families, at times with prescription drugs available—is not compatible with a recent tendency to engage in unlawful activities involving drugs.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-92A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take pursuant to a consent agreement. The proposed action is to impose a fine of \$500 on Jennifer Renae Harmon, a licensed sales associate, after she failed to notify the Commission about a change of current home address within ten days—the Commission had been actually unable to locate the licensee for several weeks after receiving a complaint.

Oklahoma law authorizes the Commission to discipline licensees who disregard the Commission's administrative rules. 59 O.S.2011, § 858-312(9). The Commission's rules unequivocally require written notification to the Commission of a change of home address within ten days of the change. OAC 605:10-11-2(g). The action seeks to enforce this straightforward requirement in circumstances that, through a significant time gap, show a disregard for the rule. Maintaining a correct address enables professional licensing boards to communicate with licensees, which allows them to notify a licensee about important developments, locate the licensee in the event of a dispute, and even remind the licensee about renewal obligations. The Commission may believe that a fine will deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma's policy to effectively regulate professional real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-93A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to deny the license application of Emerson Alexander Martin. In February 2014, Martin received a deferred sentence and a probation term for driving under the influence and for actual physical control of a vehicle under the influence. The deferred sentence remains in effect until April 2017, and Martin had an outstanding balance of costs and fines of \$1,465.50.

Oklahoma law requires that applicants for real estate sales associate licenses be “person[s] of good moral character.” 59 O.S.Supp.2014, § 858-302(A). Elsewhere, the Commission may discipline licensees who are “[u]nworth[y] to act as a real estate licensee” because of “a crime involving moral turpitude.” 59 O.S.2011, § 858-312(15). It is the Commission’s position that felonies involving driving under the influence of drugs or alcohol represent a disregard for public safety and are crimes of moral turpitude. Further, Oklahoma law restricts licensure as real estate agents of those with felony convictions for a specified period of time after the end of a sentence. *See id.* § 858-301.1(A)-(C). The statutes exhibit a policy of not allowing licensure as real estate agents of those who have recently committed serious crimes. The Commission may reasonably believe that a recent conviction for a crime that endangers public safety and which has an outstanding balance of fines and costs does not show current “good moral character.” Real estate agents are entrusted to handle others’ money; make truthful representations relied upon in major purchases; and even with physical safety when driving between and showing real estate properties to the public. The action seeks to advance that policy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-94A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to deny the license application of DeAnna Louise Williams. Williams received a deferred sentence for felony Medicaid fraud after entering an *Alford* plea—criminal law plea that protests innocence but still allows sentencing through admission that the strength of evidence held by prosecutors would prove a case beyond a reasonable doubt. The Oklahoma Health Care Authority is also withholding \$553,858.03 because of the fraudulent claims in the case. The deferred sentence remains in effect until 2018.

Oklahoma law requires that applicants for real estate associate licenses be “person[s] of good moral character.” 59 O.S.Supp.2014, § 858-302(A). The law authorizes the Commission to discipline licensees who are convicted of fraud or other similar offenses. 59 O.S.2011, § 858-312(19). Further, Oklahoma law generally disfavors licensure of those with felony convictions for a specified period of time after the end of a sentence. *See id.* § 858-301.1(A)-(C). The statutes exhibit a policy of not allowing licensure as real estate agents of those who have recently committed felonies, particularly those that could pose harm to others, because real estate agents are entrusted to handle others’ money; make truthful representations relied upon in major purchases; and even with physical safety when driving between and showing real estate properties to the public. Given the magnitude of the alleged fraud and the acknowledged evidence of that fraud evinced by the applicant’s *Alford* plea, this action seeks to advance the policy against licensure of those recently involved in crime.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public from breaches of trust by real estate agents.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-95A**

Chris Ferguson, Executive Director  
Oklahoma Funeral Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Funeral Board intends to take pursuant to a consent order regarding Board complaint 15-04. The proposed action is to impose fines and costs on a funeral director in charge and on the funeral home—\$1000 for the funeral director, \$1500 for the funeral home, and \$442.50 in costs jointly—because merchandise offered for sale incidental to burial or funeral services did not have clearly marked prices.

Oklahoma law obligates “[a]ny organization or person offering for sale caskets or other articles of merchandise incidental to burial or funeral services” to “prominently display thereon the retail price” of the caskets or other merchandise. 36 O.S.2011, § 6127. The action seeks to enforce that straightforward requirement by imposing fines on licensees.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public ensuring clear pricing of funeral services merchandise, including caskets.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-96A**

Chris Ferguson, Executive Director  
Oklahoma Funeral Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Funeral Board intends to take pursuant to a consent agreement with respect to Board complaint 15-64. The proposed action is to impose a total of \$7,276.50 in fines, costs, and restitution jointly on a funeral home, two licensees, and an unlicensed person because the unlicensed person was allowed and did negotiate and make arrangements for an at-need funeral. The action also requires the resignation of the funeral director-in-charge from the funeral home, six hours of additional continuing education for both licensed persons, a two-year probationary period for the funeral home, and the repair of the grave in the case, which was incompetently prepared.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2014, §§ 395.1-396.33, makes it clear in several sections that only licensees may negotiate and make arrangements for at-need funeral services, 59 O.S.2011, §§ 396.3a(1), 396.6, 396.12a. The action seeks to enforce this requirement, which ensures that families dealing with a recent death can make arrangements for a funeral with individuals licensed to serve them. The Board may believe that the actions taken in this instance will effectively deter unlicensed practice in the future and ensure that licensed funeral directors and funeral homes adequately supervise and properly delegate to unlicensed personnel.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to ensure licensed individuals provide at-need funeral services.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-97A**

Chris Ferguson, Executive Director  
Oklahoma Funeral Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Funeral Board intends to take in agency complaint 15-81. Pursuant to a consent orders, the Board intends to impose administrative fines and costs totaling \$3,437.50 and a 60-day suspension on a funeral director. The funeral director failed to timely file annual reports detailing existing prepaid funeral services contracts, and the instant violation marks the licensee's fourth violation involving prepaid funeral contracts.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2014, §§ 395.1-396.33, authorizes the Funeral Board to take enforcement action against licensees for failure to comply with laws governing prepaid funeral services contracts, 59 O.S.Supp.2014, §§ 396.12c(12), (13). The Funeral Board's administrative rules also prohibit failure to comply with such laws. *See* OAC 235:10-7-2. The laws governing prepaid funeral services contracts require those marketing such contracts to obtain a permit from the Insurance Commissioner of Oklahoma, 36 O.S.2011, §§ 6121(A), 6124(A), and then to file annual reports documenting new and outstanding prepaid funeral services contracts, *id.* §§ 6128-6129. The action seeks to ensure that funeral services providers comply with rules governing prepaid funeral services contracts. Such contracts require the payment of substantial money today for services to be provided in the future. Timely compliance with reporting requirements ensures that oversight of the financial integrity of those marketing these contracts remains effective. The Board may believe that continued violations from this licensee require significant consequences.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect consumers who purchase prepaid funeral services contracts.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-98A**

Chris Ferguson, Executive Director  
Oklahoma Funeral Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the Oklahoma Funeral Board with respect to Board complaint 15-77. The proposed action is to file a formal complaint against a funeral home, a funeral director there, and an unlicensed person after the unlicensed person performed actions that can only be performed by a licensed funeral director. The unlicensed person had been licensed in the past but has failed to renew for 2014 and 2015, and at least one check paying for renewal was returned for insufficient funds.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2014, §§ 395.1-396.33, makes it clear in several sections that only licensees may negotiate and make arrangements for at-need funeral services, 59 O.S.2011, §§ 396.3a(1), 396.6, 396.12a. The action seeks to enforce this requirement, which ensures that families dealing with a recent death can make arrangements for a funeral with individuals licensed to serve them. Filing a formal complaint to initiate proceedings may uncover additional evidence to aid a determination of whether a violation of the statute's clear requirements has occurred.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to ensure licensed individuals provide at-need funeral services.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-99A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to a consent agreement—a fine of \$1,000 on licensee 824 for false or misleading advertising. The licensee advertised either in print that it would offer specific values for certain years, makes, and models of vehicles, and it advertised its most conspicuous price on other vehicles with a condition that another vehicle be traded in with a specific value.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed One Thousand Dollars . . . against a dealer per occurrence” for several reasons, including “false or misleading advertising.” 47 O.S.Supp.2014, § 565(A), (A)(5)(b). Enforcement powers against false advertising are closely connected to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practice[],” and to “prevent false and misleading advertising.” 47 O.S.2011, § 561. Here, the Commission’s implementing rules require a dealer not include with its most conspicuous vehicle price a qualification such as requiring an acceptable trade-in. OAC 465:15-3-7(b). Further, licensees may not advertise amounts or ranges of amounts that they will offer for trade-in vehicles. OAC 465:15-3-14(8). The action seeks to enforce these requirements through a fine that the Commission may believe will deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to prevent false and misleading advertising in the sale of new motor vehicles.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-100A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose — pursuant to consent agreements — fines of \$100 each on licensees 628 and 711 along with a fine of \$500 on licensee 479 for employing unlicensed salespersons. The difference in amounts involves the length of time during which the salespersons worked without licenses.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed One Thousand Dollars . . . against a dealer per occurrence” for several reasons, including “employ[ing] unlicensed salespersons . . . or other unlicensed persons in connection with the sale of new motor vehicles.” 47 O.S.Supp.2014, § 565(A), (A)(7)(d). The action enforces this straightforward requirement of the statutes by imposing fines that deter failures to ensure that salespersons at new motor vehicle dealerships obtain valid licenses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require licensure of new motor vehicle salespersons.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-101A**

Teanne Rose, Executive Director  
State Board of Examiners of Psychologists

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Examiners of Psychologists intends to take. The proposed action is to inform an inquirer, by letter, that a doctoral program completed at a university in the United Kingdom does not have an accreditation that qualifies the inquirer to sit for the an exam to become licensed in psychology in Oklahoma.

The Psychologists Licensing Act, 59 O.S.2011 & Supp.2014, §§ 1351-1376, requires that applicants for licensure to practice psychology in Oklahoma have a doctoral degree accredited by the American Psychological Association (“APA”) or one “that meets recognized acceptable professional standards as determined by the Board,” 59 O.S.2011, § 1362(1). To meet the APA alternative standard under the Board’s administrative rules, a doctoral program must, first, be accredited by the Canadian Psychological Association or recognized by the National Registry of Health Services Providers in Psychology. OAC 575:10-1-2(c). Second, the rules require the doctoral program to meet several quality criteria, including being “an integrated, organized sequence of study” and having “an identifiable psychology faculty.” OAC 575:10-1-2(c)(4), (5).

The Legislature has directed the Board to determine what doctoral programs, beyond those accredited by the American Psychological Association, “meet[] recognized acceptable professional standards.” *See* 59 O.S.2011, § 1362(1). The Board must then allow individuals with such qualifications to continue in the process of becoming licensed in Oklahoma. Yet the standards identified by the Board exclude virtually every doctoral program located outside the United States and Canada, this despite the fact that the Board has identified quality criteria including the program having an “integrated, organized sequence of study” and “an identifiable psychology faculty,” OAC 575:10-1-2(c)(4), (5), indicating that it is the quality of a program, not its location on the globe, that matters. Nor do the statutes articulate any kind of policy to foreclose applicants from outside the United States or Canada from qualifying for licensure as psychologists in Oklahoma.

It is, therefore, the official opinion of the Attorney General that the State Board of Examiners of Psychologists does not have adequate support for the conclusion that this action advances policies of the State of Oklahoma. Offering informal guidance to an inquirer with a degree from a university outside the United States and Canada that they cannot be licensed in Oklahoma is **disapproved**.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-102A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take. The proposed action is to approve recommendations from the Formulary Advisory Council to approve the prescription of Versed and Etomidate in rapid sequence intubations by advanced practice registered nurses while denying requests to authorize the prescription of Propofol in rapid sequence intubations and Clozapine for suicidal schizophrenic patients.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1-567.20, authorizes the restriction of advanced practice registered nurses' prescription authority through the creation of an "exclusionary formulary," 59 O.S.2011, § 567.4a(9)(a). The statute sets up a process whereby a Formulary Advisory Council recommends changes to the exclusionary formulary which must be approved by the Board before they go into effect. *See id.*

The Council was presented with requests to authorize Propofol, Versed, and Etomidate for rapid sequence intubation and Clozapine for suicidal schizophrenic patients. In this instance, approving at least some drugs for prescription by advanced practice nurses in the rapid sequence intubation context will enable more qualified personnel to provide an important medical service—a particularly important one in time-critical practice areas such as hospital emergency rooms. The decision to approve Versed and Etomidate but not Propofol may be an entirely reasonable one given that Etomidate is the most common drug choice for the procedure and Versed has an available reversal agent such that approval of Propofol would be unnecessary.

The decision to reject Clozapine's availability for advanced practice registered nurses may also be reasonable given that the drug has distribution restrictions—it can only be ordered through a National Registry system because of concerns with how it affects white blood cell counts and other adverse effects. Further, it is not clear at all that there is a compelling need for nurses in particular to be able to prescribe the drug in addition to doctors.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-103A**

Randall A Ross, Executive Director  
Oklahoma Accountancy Board

October 27, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take with respect to Dennis L. Hampton, a formerly licensed Certified Public Accountant (“CPA”). The proposed action is to file an action in state district court seeking an injunction against the former CPA to prevent the CPA from holding out as a current CPA. Evidence indicates that the former CPA has been holding out as a current CPA and practicing as one despite lacking a valid certificate. In fact, the CPA had his certificate revoked in 2014.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2014, §§ 15.1–15.38, bars the use of the CPA title except by those properly certified by the Board, 59 O.S.2011, § 15.11(A), (B). The Act also authorizes the Board to seek injunctive actions in state district courts to prevent violations of that duty. *Id.* § 15.29A. Hailing an individual or company into court can be a costly exercise that deters participation in a market. However, Oklahoma law places a priority on accurate representations concerning licensing and certification—not least in the accounting realm. The Board has evidence indicating a misrepresentation to the public is occurring and may believe that legal proceedings are the best remedy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policies to protect the public from deception and to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-104A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board case 2064. The certificate holder failed to complete the required number of continuing professional education hours during the three-year period from 2011 to 2013 and again from 2012 to 2014. The proposed action is to impose on the certificate holder a fine of \$1,000 and costs of \$199.24 along with an order to complete the remaining number of education hours.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires all certificate holders of the board, including CPA certificate holders, to complete certain continuing professional education requirements over each three-year period, 59 O.S.2011, § 15.35(C). This requirement ensures that those practicing public accounting understand changes in applicable rules and continue to have up-to-date information and skills necessary to properly report financial information. The action seeks to enforce the statutory requirement while allowing a registrant who has failed to complete the required hours to continue practicing while coming into compliance. The Board may believe that a fine along with orders to complete remaining hours will effectively deter future lapses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-105A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board case 2065. The proposed action is to impose a fine of \$500 and costs of \$116.25. The certificate holder failed to obtain client consent before electronically filing a client’s tax return.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires CPAs to adhere to the Board’s professional code of conduct, 59 O.S.2011, § 15.14B(5). The Board’s code of conduct incorporates the American Institute of CPAs (“AICPA”) Code of Professional Conduct, OAC 10:15-39-1, which requires that a CPA “observe the profession’s technical and ethical standards,” AICPA Code of Prof’l Conduct § 0.300.060.01. The Internal Revenue Service requires that a paid tax preparer obtain signed consent before electronically filing a tax return. *E.g.*, I.R.S. Publ’n 1345, p. 19 (2014). The Board may reasonably believe that failure to obtain this consent falls below the accounting profession’s standards and that a fine will adequately deter future unprofessional conduct in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism in accounting.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-106A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board case 2066. The certificate holder failed to complete the required number of continuing professional education hours during the three-year period from 2011 to 2013 and again from 2012 to 2014. The proposed action is to, pursuant to a consent agreement, assess costs of \$199.24, and revoke the CPA’s certificate.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires all certificate holders of the board, including CPA certificate holders, to complete certain continuing professional education requirements over each three-year period, 59 O.S.2011, § 15.35(C). This requirement ensures that those practicing public accounting understand changes in applicable rules and continue to have up-to-date information and skills necessary to properly report financial information. The action seeks to enforce the statutory requirement with respect to a certificate holder that has agreed to accept revocation of the CPA credential.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-107A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Accountancy Board intends to take pursuant to consent agreements with respect to a certified public accountant (“CPA”) in Board cases 2067, 2069, and 2070. Each certificate holder failed to complete the required number of continuing professional education hours during the three-year period from 2012 to 2014. The proposed action is to impose on each certificate holder a fine of \$500 and costs ranging from \$219.24 to \$239.24 along with an order to complete the remaining number of education hours.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires all certificate holders of the board, including CPA certificate holders, to complete certain continuing professional education requirements over each three-year period, 59 O.S.2011, § 15.35(C). This requirement seeks to ensure that those practicing public accounting understand changes in applicable rules and continue to have up-to-date information and skills necessary to properly report financial information. The actions seek to enforce the statutory requirement while allowing those who have failed to complete the required hours to continue practicing while they come into compliance. The Board may believe that a fine along with orders to complete remaining hours will effectively deter future lapses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-108A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board case 2072. A firm, now licensed, had performed audit services for Oklahoma-based clients before it registered with the Board. The proposed action is to impose a \$500 fine and costs of \$715.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires firms that seek to provide certain professional services in Oklahoma—including auditing—to register and obtain permits from the Board, 59 O.S.2011 & Supp.2015, §§ 15.12A(A)(5), 15.15A. The action seeks to enforce the statutory requirement. The Board may believe that a fine will deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-109A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board file 2112. While filing a client’s taxes, a CPA made a mistake. The CPA did not attempt to correct the error in a timely manner. The proposed action is to privately reprimand the CPA.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires CPAs to adhere to the Board’s professional code of conduct, 59 O.S.2011, § 15.14B(5). The Board’s code of conduct incorporates the American Institute of CPAs (“AICPA”) Code of Professional Conduct, OAC 10:15-39-1, which requires that a CPA exercise due care when practicing accounting, AICPA Code of Prof’l Conduct § 0.300.060. The action seeks to enforce this requirement to act with due care; the Board may believe that a private reprimand will adequately deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism in accounting.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-110A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board file 2184. The CPA changed business records to gain unearned paid vacation and also used company funds to make a payment on a personal credit card. The CPA produced evidence indicating these occurrences were mistakes rather than intentional frauds. The proposed action is to issue a private reprimand.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires CPAs to adhere to the Board’s professional code of conduct, 59 O.S.2011, § 15.14B(5). The Board’s code of conduct incorporates the American Institute of CPAs (“AICPA”) Code of Professional Conduct, OAC 10:15-39-1, which requires that a CPA act with due care in professional responsibilities, AICPA Code of Prof’l Conduct 0.300.060. The action seeks to hold the certificate holder accountable to standards of professionalism. The Board may believe that a private reprimand will ensure that no additional mistakes occur.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism in accounting.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-111A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and Parts Commission

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take against the licensed used motor vehicle dealer Sooner Motorsports, LLC for failing to register a change in ownership of the business. The proposed action is to impose fines totaling \$6,000 and require the new owner to properly register with the Commission.

Oklahoma law requires that applicants for used motor vehicle dealer licenses submit a variety of information to determine whether the applicant is adequately qualified to operate a used motor vehicle dealership. *See* 47 O.S.Supp.2015, § 583(B)(1). Much of the required information pertains to the *person* who intends to operate a business, not the business entity. Yet the Commission allows an applicant to register a business entity such as an LLC as the actual dealer. *See* OAC 765:10-1-6(a). Thus, the Commission’s administrative rules reasonably require notification when a business entity changes ownership—along with assessment of the new owner as if making a new application. OAC 765:10-1-8. This appears to be an exercise of the Commission’s authority to revoke a license for a “[c]hange of condition after license is granted resulting in failure to maintain the qualifications for license”—the change of the person owning and, ultimately, responsible for the business. 47 O.S.Supp.2015, § 584(A)(4). The action seeks to enforce these requirements regarding the change of ownership of a business entity. The Board may believe that a fine will deter dealers from changing ownership without notice in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require licensure of used motor vehicle dealers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-112A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and Parts Commission

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take pursuant to a consent agreement with Tio Chuy's Auto Sales, LLC, a licensed used motor vehicle dealer. The proposed action is to fine the dealer \$500 for each calendar year in which the salesperson was employed without a license for a total of \$1,000. Further, the salesperson would not have been eligible for licensure because of noncompliance with Oklahoma tax law. *See* 68 O.S.2011, § 238.1(E).

Oklahoma law requires that used motor vehicle salespersons be licensed. 47 O.S.Supp.2015, § 583(A)(1). The Commission may impose fines on used motor vehicle dealerships employing unlicensed salespersons. 47 O.S.Supp.2015, § 584(A)(7)(b). The action comes squarely within the Commission's statutory authority to enforce the licensure requirement for used motor vehicle salespersons.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma's policy to require licensure of used motor vehicle salespersons.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-113A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and Parts Commission

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Used Motor Vehicle and Parts Commission intends to take with respect to the application for licensure of Joshua Schneider. The proposed action is to deny the application for a used motor vehicle salesperson license because the applicant failed to appear before the Commission for a criminal history interview.

Oklahoma statutes require the Commission to prepare application forms to collect information related to applicants' "financial standing," "business integrity," and "other pertinent information" related to "safeguarding . . . the public interest and the public welfare." 47 O.S.Supp.2014, § 583(B)(1)(a), (b), (e). The Commission has the authority to deny an application for a license "[o]n satisfactory proof of unfitness of the applicant." *Id.* § 584(A)(1). The same statute notes that a licensee may be disciplined if the licensee, among other things, "has been convicted of a crime involving moral turpitude." *Id.* § 584(A)(6)(c). The Commission requires that applicants convicted of felonies appear before the Commission for an interview before being granted a license. The Commission's official application form states this requirement in a clear, conspicuous location. The interview requirement ensures the Commission has adequate opportunity to gather information about an applicant's criminal history. The Commission may reasonably believe that the applicant's failure to appear deprives it of needed information for assessing the application for licensure.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma's policy to require licensure of used motor vehicle salespersons.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-114A**

Beth Carter, Executive Director  
Board of Chiropractic Examiners

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Chiropractic Examiners intends to take with respect to Board case 003-2015. The proposed action is to set requirements for reinstatement of a licensee. The licensee had been convicted and incarcerated for the felony of indecent exposure in 2012, at which point the license was suspended. The conditions for reinstatement include passing an examination on Ethics and Boundaries; passing a relicensure examination; paying a fine of \$1,000; completing thirty-two hours of continuing education; submitting a Fitness to Practice letter from the licensee's treating therapist; entering a program to monitor the licensee's treatment; and paying any reinstatement fees. The Board may also impose probation terms at the time of reinstatement.

The Oklahoma Chiropractic Practice Act, 59 O.S.2011 & Supp.2015, §§ 161.1–161.20, authorizes the Board to discipline licensees who are convicted of felonies, 59 O.S.2011, § 161.12(B)(1). The felony in this case was indecent exposure and resulted in incarceration. Licensed professionals may be alone with patients, and chiropractors in particular tend to physically touch clients. The action seeks to hold the licensee accountable to standards of interpersonal conduct necessary for practice as a professional chiropractor. The Board may reasonably believe that the conditions on reinstatement, if met, would show the capacity for the licensee to resume practice.

It is, therefore, the official opinion of the Attorney General that the Board of Chiropractic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect public health and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-115A**

Beth Carter, Executive Director  
Board of Chiropractic Examiners

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Chiropractic Examiners intends to take with respect to Board case 004-2015. The proposed action is to place a licensee on probation and impose a fine of \$2,000. The licensee pled guilty to two felonies involving insurance fraud in early 2015.

The Oklahoma Chiropractic Practice Act, 59 O.S.2011 & Supp.2015, §§ 161.1–161.20, authorizes the Board to discipline licensees who plead guilty to felonies, 59 O.S.2011, § 161.12(B)(1). Further, the Board’s rules prohibit “fraud, misrepresentation, or deception” with a specific reference to preparing fraudulent reports or records. OAC 140:15-7-5(12)(F). The felonies in this case involve insurance fraud. Licensed professionals are often trusted with clients’ money, confidential information, or physical health. They must generally be able to be trusted not to take advantage of this access. This action seeks to hold a licensed professional accountable to standards of professionalism necessary to the profession. The Board may believe that a fine and probation will adequately deter future violations.

It is, therefore, the official opinion of the Attorney General that the Board of Chiropractic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-116A**

Beth Carter, Executive Director  
Board of Chiropractic Examiners

November 2, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Chiropractic Examiners intends to take with respect to Board case 008-2015. The licensee pled guilty to a lewdness crime involving the offer to provide professional services in exchange for a sexual act. The licensee will be on probation until late 2016; must pay a fines totaling \$3,000; must pass an Ethics and Boundaries examination; and must have a female staff member present in the room when treating female patients until passage of the ethics examination. Failure to complete the examination within six months of the order will result in an automatic suspension of the license.

The Oklahoma Chiropractic Practice Act, 59 O.S.2011 & Supp.2015, §§ 161.1–161.20, authorizes the Board to discipline licensees who plead guilty to misdemeanors involving moral turpitude, 59 O.S.2011, § 161.12(B)(1). Further, the Board’s rules prohibit sexual relationships with patients. OAC 140:15-7-5(13)(A). Licensed professionals are often trusted with clients’ or patients’ money, confidential information, or physical health. They must generally be able to be trusted not to take advantage of clients or patients. This action seeks to hold a licensed professional accountable to standards of professional necessary to the profession. The Board may believe that the fines and educational processes it has proposed will deter future violations, particularly by this licensee.

It is, therefore, the official opinion of the Attorney General that the Board of Chiropractic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and safety.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-117A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with a licensed pharmacy 2-7217 and its owner. The proposed action is to revoke the pharmacy's license, impose a fine of \$15,000, and require the owner of the pharmacy to sell all interests in businesses entities owning pharmacies, to not take interests in pharmacies in the future, and to not become an employee or other person receiving compensation from a pharmacy in the future. The pharmacy and its owner had engaged in a pattern of conduct whereby drug representatives persuaded physicians to prescribe compounded products from the pharmacy, which could then be billed to insurance. The profits from preparing the compounded products were split with the drug representatives, the profits accruing to the pharmacy and owner amounting to some \$1,454,442.16. Further, the pharmacy allowed non-pharmacists to act as pharmacists; failed to keep proper records about drugs; failed to properly label and store drugs; and failed to maintain purity and sanitary standards when compounding drugs, among other things.

The Oklahoma Pharmacy Act, 59 O.S.2011 & Supp.2015, §§ 353–355.3, authorizes the Board to promulgate rules necessary for the regulation of pharmacies and pharmacists and for the protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has promulgated rules regulating pharmacies, *e.g.*, OAC 535:15-3-2. Those rules include ensuring that only pharmacists control access to drugs, OAC 535:15-3-13(a), that proper records are kept about drugs, OAC 535:15-3-2(b)(1)(C), that resulting compounded drugs contain between 90% and 110% of theoretically calculated quantities of active ingredients, OAC 535:15-10-8(f), and that various sanitary procedures be followed when compounding drugs, *e.g.*, OAC 535:15-10-14. Further, the rules state that drugs should only be dispensed when the prescription “has been issued for a legitimate medical purpose by an authorized prescriber acting in the usual course of the prescriber’s professional practice,” OAC 535:15-3-13(c), and the prescription was issued in the context of a “valid preexisting patient-prescriber relationship,” OAC 535:15-3-13(d).

The action seeks to enforce the rules described above and, given the pervasive extent of the violations, ensure the party most responsible for them is barred from carrying on a pharmacy business in the future without going before the Board. The Board may reasonably believe that the severity of the violations, the extent to which they call into question the legitimacy of the business, and their threat to the public health require the fines and other penalties proposed.

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It is, therefore, the official opinion of the Attorney General that the State Board of Pharmacy has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-118A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with pharmacy licensee 1-959 and pharmacist licensee 8635. The proposed action is to suspend and then reinstate and place on probation both licenses. The pharmacy licensee's sterile compounding permit would be suspended until the pharmacy is brought into compliance with United States Pharmacopeia guidelines for sterile compounding, a manual on policies and procedures has been supplied to the Board, the pharmacist licensee has obtained sixteen hours of education about sterile compounding, and a Board inspection of the pharmacy has been passed. The pharmacist licensee must also remove outdated medications from active inventory and adopt procedures for wastage and documentation. The pharmacy licensee would be fined \$2,000 and the pharmacist licensee \$38,000. Finally, the pharmacist licensee must attend an eight-hour law seminar during each of 2015 and 2016, and all continuing education during the five years of probation must be live.

The licensed pharmacy and its pharmacist-in-charge—the licensed pharmacist—had several deficiencies under sterile compounding rules, including the lack of a policy and procedure manual, the lack of a quality assurance program, the lack of a device for monitoring airflow with a clean room. The licensed pharmacist also failed to properly calibrate equipment, use proper beyond-use dates on compounds, insure all personnel had adequate training, and ensure various sanitary processes were followed.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The practice of pharmacy includes compounding drugs. 59 O.S.Supp.2015, § 353.137. The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has promulgated rules regulating pharmacies, *see, e.g.*, OAC 535:15-3-2. The rules require that equipment be well-maintained, *e.g.*, OAC 535:15-10-52(c)(8), that clear policies to be in place for compounding pharmacy staff, OAC 535:15-10-52(e); 15-10-59, and that beyond-use dates in a compounding pharmacy be set according to chemical testing or USP guidelines, OAC 535:15-10-61. The rules include pharmacist training requirements for compounding pharmacies, OAC 535:15-10-52(a), (d), and they specify the use of media-fill and glove sampling techniques to test sterility at such facilities, OAC 535:15-10-52(f)(4), (5), (7), (8). The rules make clear that compounding pharmacies should only provide drugs that are not commercially

available unless a patient need is present. OAC 535:15-10-53. The rules also have broad requirements for cleanliness, temperature controls, and equipment maintenance. OAC 535:15-10-52(c)(8); 15-10-55(c); 15-10-56(c), (e). They even require outdated drugs to be removed from active inventory for all pharmacies. OAC 535:15-3-11(c). It is, therefore, the official opinion of the Attorney General that the State Board of Pharmacy has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health and safety through the regulation of pharmacists.

The action seeks to enforce the rules described above and to prevent any person from being harmed by a compounded drug prepared improperly or in unsanitary conditions. The action is thus adequately connected to the policy goals of the State of Oklahoma, as articulated in the above-described statutes and regulations.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-119A**

Executive Director John A. Foust, D.Ph., Pharm.D.      November 6, 2015  
State Board of Pharmacy

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with licensee 15046. The proposed action is to suspend the license for five years, stay that suspension, and impose probation terms for the five-year probation period. The licensee must also pay fines of \$6,000; take an extra eight-hour education course on law; attend all live continuing education for each year from 2016 to 2020; and obtain an evaluation from Oklahoma Pharmacists Helping Pharmacists for fitness for duty, complying with any treatment plans recommended by that program. The licensee forged prescriptions for medication for herself and then filled them at her place of work and also simply stole drugs and money from her place of work.

The Oklahoma Pharmacy Act, 59 O.S.2011 & Supp.2015, §§ 353–355.3, authorizes the Board to promulgate rules necessary for the regulation of pharmacies and pharmacists and for the protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has promulgated rules regulating pharmacists, *see, e.g.*, OAC 535:10-3-1.1. The Board’s rules require that pharmacists not procure or possess commit theft while practicing pharmacy. OAC 535:10-3-1.2(15). The Pharmacy Act also requires that pharmacists not forge or alter prescriptions or possess drugs obtained through forged or altered prescriptions. 59 O.S.Supp.2015, § 353.24(A)(1). The action seeks to enforce these requirements, and a probationary period may be the best way to allow the licensee to continue practicing while deterring future violations.

It is, therefore, the official opinion of the Attorney General that the State Board of Pharmacy has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health and safety through the regulation of pharmacists.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-120A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with pharmacy licensee 70-5920 and pharmacist licensee 9252. The proposed action is to impose fines totaling \$3,000 on the pharmacy licensee and fines totaling \$2,000 on the pharmacist licensee, to require the pharmacist licensee to attend an eight-hour law seminar, and to require that all continuing education during 2016 be live events. The pharmacy licensee and the pharmacist licensee—the pharmacy’s pharmacist-in-charge—failed to remove outdated prescription drugs from the pharmacy for several years while failing to keep proper records.

The Oklahoma Pharmacy Act, 59 O.S.2011 & Supp.2015, §§ 353–355.3, authorizes the Board to promulgate rules necessary for the regulation of pharmacies and pharmacists and for the protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has promulgated rules regulating pharmacists, *see, e.g.*, OAC 535:10-3-1.1, and pharmacies, *see, e.g.*, OAC 535:15-3-2. The Board’s rules require that pharmacies remove drugs from inventory upon expiration and then remove them from the pharmacy within six months of expiration. OAC 535:15-3-11(c). The rules also require that a particular pharmacist be the pharmacist-in-charge with responsibility over the pharmacy, OAC 535:15-3-2(b), and that pharmacy and pharmacist must have a “proper record keeping system” for drugs, OAC 535:15-3-2(b)(1)(C). The action seeks to enforce these requirements through continuing education and fines.

It is, therefore, the official opinion of the Attorney General that the State Board of Pharmacy has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health and safety through the regulation of pharmacists.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-121A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with pharmacist licensee 12079. The proposed action is to suspend the license for fourteen consecutive days and place the licensee on probation for two years. The action also requires that the licensee not work as a pharmacist-in-charge; that the licensee obtain an evaluation and obtain treatment from Oklahoma Pharmacists Helping Pharmacists; that the licensee attend an eight-hour law seminar during 2016 and during 2017; and that all continuing education during the years from 2016 to 2020 be live. Finally, the action requires that the licensee complete a seminar on compounding before doing any compounding more complex than the combination of two commercially available products in a non-sterile environment. The pharmacist had been involving in a number of compounding violations while serving as a pharmacist-in-charge, including violations of patient confidentiality, failing to prepare and review compounding records to ensure no errors occurred, and ensuring that prescription drug orders were issued for legitimate medical purposes.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The practice of pharmacy includes compounding drugs. 59 O.S.Supp.2015, § 353.1(37)(b). The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has promulgated rules regulating pharmacies and other registrants with the Board, *see, e.g.*, OAC 535:15-3-2. The rules require that licensees “not violate patron confidentiality,” OAC 535:25-9-2, that pharmacists involved in compounding prepare and review records to ensure no compounding errors occur, OAC 535:15-10-3(c)(6), and that prescription drugs are only ordered for legitimate medical purposes, OAC 535:15-3-13(b), (c). The action seeks to enforce these rules that ensure pharmacies do not compromise patient confidentiality, introduce harmful errors, or dispense potentially dangerous prescription medications without valid medical justifications. The Board may reasonably believe that probation, restrictions on practice, continuing education requirements, and psychological treatment will ensure this licensee does not compromise health or safety.

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It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-122A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take pursuant to a consent agreement with pharmacist licensee 14630. The proposed action is to require that the licensee take an eight-hour law seminar and that all continuing education during 2016 and 2017 be live. The licensee misfilled prescriptions on twenty-one separate occasions.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.Supp.2015, § 353.7(14), and one such authorizes discipline when misfilling a prescription or drug order in a way that falls below the standard of care.

The action seeks to enforce the rule described above and to prevent any person from being harmed by taking the wrong drug because of a misfilled prescription. The Board may thus reasonably believe that this action will advance the public health.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-123A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take against wholesaler/distributor licensee 88-W-3749. The proposed action is to revoke the license because the licensee fraudulently withheld information about the criminal history of an individual who owned half of the licensee and who had decision-making authority within the licensee. The individual had been convicted of a felony. The licensee did not respond after receiving the complaint through certified mail.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The Act specifically prohibits willfully making false representations when procuring or attempting to procure a license under the Act. 59 O.S.2011, § 353.25(B). The action seeks to enforce the straightforward statutory requirement by revoking the license that was fraudulently obtained.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-124A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take against pharmacy technician permittee T-14454. The proposed action is to revoke the permit for failing to properly document and waste outdated medications along with the failure to file legally mandated reports concerning that wastage. The drugs that were not properly wasted or documented could not be accounted for.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has prohibited the failure to file legally mandated reports and failure to take actions that prevent the diversion of prescription drugs, OAC 535:25-9-8(2); 25-9-4(1). The action seeks to enforce these rules, and the Board may believe that effective prevention and deterrence of future violations requires revocation of the permit.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-125A**

Executive Director John A. Foust, D.Ph., Pharm.D.  
State Board of Pharmacy

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Pharmacy intends to take against pharmacy technician permittees T-3945, T-17398, and T-10419. The Board found that each permittee stole controlled dangerous substances from their employers and intends to revoke their permits.

The Oklahoma Pharmacy Act seeks to “promote, preserve and protect the public health, safety and welfare by and through the effective control and regulation of the practice of pharmacy” within the State. 59 O.S.2011, § 353(B). The Act authorizes the State Board of Pharmacy to promulgate rules necessary for the regulation of pharmacy and protection of public health, 59 O.S.Supp.2015, § 353.7(14), and the Board has prohibited theft of any material from an employer and violation of other applicable laws, OAC 535:25-9-3; 25-9-7. State law prohibits possession of a controlled dangerous substance not validly obtained pursuant to a prescription or otherwise. 63 O.S.Supp.2015, § 2-402(A)(1). The action seeks to enforce these requirements and protect the public health by preventing the disciplined parties from having ongoing access to controlled dangerous substances and, thus, deterring future violations.

It is, therefore, the official opinion of the Attorney General that the Executive Director of the State Pharmacy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-126A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 6, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take with respect to an inquiry by the United States Department of Transportation concerning whether Oklahoma-licensed registered nurses have the legal authority to examine and complete a Medical Examiner's Certificate for certain commercial motor vehicle drivers. The proposed action is to send a letter in response stating that Oklahoma-licensed registered nurses do not have such authority.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes registered nurses to provide a variety of services, including the assessment of health status, the planning of care strategies, and the provision of nursing care, 59 O.S.2011, § 567.3a(3). However, the Act does not authorize the diagnosis or examination of patients by registered nurses. *See id.* Instead, physicians generally perform this service. *See* 59 O.S.2011, §§ 492(C)(3)(a); 621. According to federal law, the examination for commercial drivers requires certification concerning impairments of limbs, medical histories and clinical diagnoses, and whether the driver currently suffers from a variety of diseases. 49 C.F.R. § 391.41(b) (2015). These services cannot be performed by a registered nurse; they require examination and diagnosis that goes beyond just nursing care or a nurse's assessment of health. The action seeks to communicate this difference to the federal government and appropriately reflects how Oklahoma law dispenses the authority to provide certain services according to the education and training received by medical professionals.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to ensure that only professionals with adequate training provide medical diagnostic services.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-127A**

Gaylord Z. Thomas, Executive Director

November 6, 2015

Oklahoma State Board of Examiners for Long-Term Care Administrators

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take with respect to case 14-96(HB). The proposed action is to issue a letter of concern to the licensee, a nursing home administrator, warning about potential violations of professional standards. The State Department of Health had reported the facility overseen by the licensee as having substandard care in nutrition for residents and in services designed to ensure resident well-being.

State law governing long-term care administrators allows the Board to “[d]evelop, impose, and enforce standards which must be met” by individuals seeking to become and serving as long-term care administrators. 63 O.S.2011, § 330.58(1), (3). The standards adopted by the Board include the responsibility of an administrator to “maintain the [nursing home]’s compliance with applicable laws, rules, and regulations.” OAC 490:10-13-2(a). A nursing home must comply with standards related to sanitary conditions, diet, and equipment, and supplies as determined by the State Department of Health. 63 O.S.2011, § 1-1925(3)–(6). The State Department of Health has promulgated these standards. *E.g.*, OAC 310:675-9-12.1. The action seeks to provide warning to a licensed professional concerning the need to achieve compliance with governing standards before potential violations further threaten public health and safety.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to safeguard public health and safety by ensuring the qualifications of those who oversee long-term care facilities.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-128A**

Gaylord Z. Thomas, Executive Director

November 6, 2015

Oklahoma State Board of Examiners for Long-Term Care Administrators

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take with respect to Kendi Glasgow, a certified assistant administrator. The proposed action is issue a letter of concern, require the licensee to take six units of continuing education, and impose attorney fee costs of \$450. The licensee worked for a licensed long-term care administrator at a facility that was that administrator's only responsibility.

State law governing long-term care administrators allows the Board to "[d]evelop, impose, and enforce standards which must be met" by individuals seeking to become and serving as long-term care administrators. 63 O.S.2011, § 330.58(1), (3). The standards adopted by the Board include the responsibility of an administrator to only use a certified assistant administrator when having responsibility of two or more facilities, OAC 490:10-13-3(k), along with the cognate obligation on assistants, OAC 490:15-1-4(b). The action seeks to enforce this straightforward requirement by imposing the discipline of additional education. The Board may reasonably believe that additional education requirements will deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that these actions advance the State of Oklahoma's policy to safeguard public health and safety by ensuring the qualifications of those who oversee long-term care facilities.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-129A**

Gaylord Z. Thomas, Executive Director

November 6, 2015

Oklahoma State Board of Examiners for Long-Term Care Administrators

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take pursuant to a consent agreement with respect to licensee 2199, a licensed nursing home administrator. The proposed action is to reprimand the licensee, assess fines and attorney fees totaling \$1,950, and require six additional units of continuing education. The licensee also owns the facility where the violation occurred.

State law governing long-term care administrators allows the Board to “[d]evelop, impose, and enforce standards which must be met” by individuals seeking to become and serving as long-term care administrators. 63 O.S.2011, § 330.58(1), (3). The standards adopted by the Board include the responsibility of an administrator to only use a certified assistant administrator when having responsibility of two or more facilities, OAC 490:10-13-3(k), along with the cognate obligation on assistants, OAC 490:15-1-4(b). The action seeks to enforce this straightforward requirement by imposing fines, additional education, and a reprimand. The Board may reasonably believe that discipline and additional education are necessary to deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to safeguard public health and safety by ensuring the qualifications of those who oversee long-term care facilities.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-130A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

November 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to suspend the license of licensee 12602CRA for failure to pay an annual fee due August 31, 2015.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to issue certificates to individuals who wish to engage in real estate appraisal, *id.* §§ 858-704(A), 858-706(B)(3). Each of these certificates lasts for three years and automatically expires at the end of the term if the certificate holder takes no action to renew the certificate. 59 O.S.2011, § 858-714. However, during the life of the certificate, the holder must pay annual registry fees. 59 O.S.Supp.2015, § 858-708; OAC 600:10-1-18. The Board allows certificate holders to surrender the certificate prior to its expiration if they no longer wish to pay these annual fees. OAC 600:10-1-12(a). The action seeks to enforce the requirement that certificate holders pay annual fees to continue to enjoy the privileges granted under the certificate. Payment of these fees may allow professional regulation to be funded by regulated professionals rather than out of the public fisc.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to collect annual fees from licensed professionals.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-131A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

November 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to issue a letter of concern to licensee 12675CRA for failing to properly prepare a work file for an appraisal despite the obligation to keep records for each appraisal assignment, as evinced by documents in the work file having dates reflecting information being added after the date the Board requested a copy of the work file.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to discipline licensees who violate “any of the standards for the development . . . of real estate appraisals as provided” in the Act, those who “violat[e] any of the provisions of the” Act, and those who violate “any of the provisions in the code of ethics set forth in” the Act, 59 O.S.Supp.2015, § 858-723(C)(6), (9), (13). The Act requires adherence to “the current edition of the Uniform Standards of Professional Appraisal Practice,” 59 O.S.2011, § 858-726, which is 2014-2015 edition of the Uniform Standards of Professional Appraisal Practice (“USPAP”). USPAP contains an ETHICS RULE that requires compliance with the RECORD KEEPING RULE. USPAP U-7. The RECORD KEEPING RULE requires that an “appraiser must prepare a workfile for each appraisal or appraisal review assignment.” This requirement ensures that an appraisal is performed diligently up to professional standards and allows subsequent reviews of that appraisal. The action seeks to enforce this requirement, and the Board may reasonably believe that a letter of concern is appropriate in the circumstances of the case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism among real estate appraisers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-132A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

November 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to discipline two out-of-state appraisers—Ben B. Boothe and Richard J Tibbenham—for attempting to end-run the temporary permit process for out-of-state appraisers. Mr. Boothe, who apparently surrendered a license in Texas in lieu of disciplinary proceedings, applied for a temporary permit in Oklahoma and, upon questioning about discipline in Texas, abandoned that temporary permit application, pursued a temporary permit under the other appraiser’s name, and then performed substantially all of the appraisal in Oklahoma. The proposed discipline is to impose on each appraiser a public reprimand, a fine of \$2,000, and a bar on temporary practice permits in Oklahoma for two years. The action also imposes joint liability up to around \$5,500 in costs on the appraisers and refers the second appraiser, Mr. Tibbenham, to the Appraisal Institute, a professional organization.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the issuance of temporary permits for out-of-state appraisers in standards-compliant jurisdictions that recognize Oklahoma-issued certificates, 59 O.S.Supp.2015, § 858-709(D). These permits attach to *appraisers*, not associations or firms, which are forbidden from receiving licensure under the Act. *See id.* § 858-709(D); 59 O.S.2011, 858-720. The conduct of the respondent appraisers here were a clear attempt to bypass the permit application process. The action imposes fine and requirements that the Board may reasonably believe are necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require registration of appraisers temporarily practicing in Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-133A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

November 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the State Board of Veterinary Medical Examiners in Board case CX-15-094. The proposed action is to issue a Notice of Possible Violation—informing the recipient that an activity is likely illegal—to the respondent, not a licensee, because the respondent possibly practiced veterinary medicine without a license by using thermography tools to determine the health status of horses and then by providing silver treatments with a nebulizer. The respondent has already been expelled from Remington Park, the location where the services were performed, at least once.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2015, §§ 698.1–698.30b, states that “[i]t shall be unlawful for any person to practice or attempt to practice veterinary medicine without a current license.” 59 O.S.2011, § 698.18(A). The practice of veterinary medicine includes “[d]iagnosing, surgery, treating, correcting, changing, relieving, or preventing animal disease, deformity, defect, injury or other physical or mental conditions including the prescribing or administering of any drug, medicine . . . or other therapeutic diagnostic substance or technique.” 59 O.S.2011, § 698.11(A)(1). Using a thermography tool to assess an animal’s health status and then treating conditions with substances from a nebulizer come within the statutory definition of veterinary practice. The action is designed to enforce the statutory provisions, and the Board may believe that notice rather than other enforcement proceedings is an appropriate step under the circumstances.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-134A**

Cathy Kirkpatrick, Executive Director  
State Board of Veterinary Medical Examiners

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the State Board of Veterinary Medical Examiners in Board case CX-15-091. The proposed action is to issue a Notice of Possible Violation—informed the recipient that an activity is likely illegal—to the respondent, not a licensee, because the respondent possibly practiced veterinary medicine without a license by assessing the health status of a dog and then dispensing flea-removal medication to the owner for the dog, including by changing the dosage size of the medication by cutting up a pill.

The Oklahoma Veterinary Practice Act, 59 O.S.2011 & Supp.2015, §§ 698.1–698.30b, states that “[i]t shall be unlawful for any person to practice or attempt to practice veterinary medicine without a current license.” 59 O.S.2011, § 698.18(A). The practice of veterinary medicine includes “[d]iagnosing, surgery, treating, correcting, changing, relieving, or preventing animal disease, deformity, defect, injury or other physical or mental conditions including the prescribing or administering of any drug, medicine . . . or other therapeutic diagnostic substance or technique.” 59 O.S.2011, § 698.11(A)(1). Determining the condition of a dog in order to ascertain a treatment option and then actually dispensing drugs to the dog’s owner very likely comes within the statutory definition of veterinary medicine. The action is designed to enforce the statutory provisions, and the Board may believe that notice rather than other enforcement proceedings is an appropriate step under the circumstances.

It is, therefore, the official opinion of the Attorney General that the State Board of Veterinary Medical Examiners has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the health, safety, and welfare of the people of Oklahoma.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-135A**

Richard Pierson, Executive Director

November 16, 2015

Oklahoma Board of Licensed Alcohol and Drug Counselors

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take pursuant to a consent agreement in a disciplinary action involving licensee Paul Plummer. The licensee had engaged in dual relationships with two clients by both serving as a counselor and leasing residential property to them. The proposed action is to require the licensee to complete three additional hours of continuing education focused on ethics, write a three-page essay on dual relationships, and appear before the Board to present the essay and demonstrate understanding of rules on dual relationships.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1870–1885, authorizes the Board to discipline licensees who “[e]ngage[] in unprofessional conduct as defined by rules promulgated by the Board,” 59 O.S.2011, § 1881(A)(6). The Board’s rules specifically require that, with respect to dual relationships with clients, licensees must “be aware of their influential positions with respect to clients, and shall not exploit the trust and dependency of clients” — including in financial or business relationships. OAC 38:10-3-3(e). The rule does not prohibit dual relationships, but it does require the licensee to take “professional precautions such as informed consent, consultation, supervision and documentation.” *Id.* The action seeks to enforce this requirement, and the Board may reasonably believe that educational steps will adequately deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to hold licensed alcohol and drug counselors accountable to standards of professionalism.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-136A**

Richard Pierson, Executive Director

November 16, 2015

Oklahoma Board of Licensed Alcohol and Drug Counselors

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed action is to deny the application of Ricardo Gomez for failing to meet the minimum number of supervised experience hours necessary to sit for the examination. The applicant also failed to appear at a November hearing to explain the applicant's progress in meeting the requirements without any notice or request of a continuance. The Board had allowed the applicant to make progress in meeting this requirement since 2007.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1870–1885, requires that an applicant for licensure “[s]uccessfully complete[] at least three hundred (300) hours of supervised practicum experience in the field of drug and alcohol counseling,” 59 O.S.Supp.2015, § 1876(G)(5). Further, the applicant must eventually pass an examination. *Id.* § 1876(C)(2). The action seeks to enforce the supervised experience requirement by denying the application. The Board may reasonably believe that the length of time afforded the applicant along with the applicant's failure to appear at the November hearing support denying the application.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that this action advances the State of Oklahoma's policy to ensure Oklahomans receive alcohol and drug abuse treatment from competent, qualified providers.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-137A**

Richard Pierson, Executive Director

November 16, 2015

Oklahoma Board of Licensed Alcohol and Drug Counselors

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed actions are to deny the applications for licensure of the applicants Ashley Wallace and Vincent Dike. Ashley Wallace pled guilty on October 7, 2015, to a misdemeanor that involving attempting to help obtain a controlled dangerous substance for another person apart from lawful means such as a prescription. Vincent Dike pled guilty on June 8, 2015, to several counts of felony Medicaid fraud.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1870–1885, authorizes the Board to deny the application for licensure of any person has been convicted of a felony, 59 O.S.2011, § 1881(A)(1). The Board may reasonable believe that very recent felonies involving fraudulent billing for medical or counseling-related services do not portend well for the applicant’s qualifications to competently and ethically serve as licensed alcohol and drug counselor—a professional that must be trusted to provide services and bill for them. The Act also authorizes the Board to deny an application for one convicted of a “misdemeanor determined to be of such a nature as to render the person convicted unfit to practice alcohol and drug counseling.” *Id.* § 1881(A)(2). The Board may reasonably believe that a misdemeanor conviction involving attempts to illicitly procure controlled dangerous substances raise sufficiently serious questions as to warrant denial of licensure for a drug and alcohol counselor.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to ensure Oklahomans receive alcohol and drug abuse treatment from competent, qualified providers.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-138A**

Richard Pierson, Executive Director

November 16, 2015

Oklahoma Board of Licensed Alcohol and Drug Counselors

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Licensed Alcohol and Drug Counselors intends to take. The proposed actions are to void applications for failure to pass the required examination. The applicants—Susan Hazelton and Mirlande Campbell—did not pass the examination after taking it on several occasions.

The Licensed Alcohol and Drug Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1870–1885, authorizes the Board to deny or approve applications for licenses, 59 O.S.2011, § 1875(5), (6)(a). An application for licensure can only be approved upon passage of an examination. 59 O.S.2011 & Supp.2015, §§ 1876(C)(2), 1877(A)(1). These actions seek to ensure that those providing alcohol and drug counseling services have qualifications shown by passage of an examination. The Board may reasonably believe that denying the applications of those who have failed the examination several times will advance that policy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Licensed Alcohol and Drug Counselors has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to ensure Oklahomans receive alcohol and drug abuse treatment from competent, qualified providers.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-139A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to a consent agreement—a fine of \$2,500 on licensee 395 for false or misleading advertising. The licensee used advertisements on its Internet website showing at least nine vehicles with values the licensee claimed to be the Manufacturer’s Suggested Retail Price (“MSRP”) that were in fact substantially higher than the MSRPs for those vehicles. The licensee then represented that it could offer substantial discounts from those inflated MSRPs.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed . . . [\$1,000] against a dealer per occurrence” for several reasons, including “false or misleading advertising.” 47 O.S.Supp.2015, § 565(A), (A)(5)(b). Enforcement powers against false advertising are closely connected to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practice,” and to “prevent false and misleading advertising.” 47 O.S.2011, § 561. The Board’s administrative rules specifically prohibit misrepresentations about claimed discounts, and they require discounts to represent savings from the MSRP. OAC 465:15-3-14(5). The action seeks to enforce the Legislature’s policy against false and misleading advertising by imposing fines to deter overstated discount claims and misrepresentations about MSRPs.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to prevent false and misleading advertising in the sale of new motor vehicles.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-140A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to a consent agreement—a fine of \$1,000 on licensee 697 for false or misleading advertising. The licensee issued Internet advertisements quoting as the most conspicuous price certain values that depended on the existence of very specific qualifications.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed . . . [\$1,000] against a dealer per occurrence” for several reasons, including “false or misleading advertising.” 47 O.S.Supp.2015, § 565(A), (A)(5)(b). Enforcement powers against false advertising are closely connected to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practice,” and to “prevent false and misleading advertising.” 47 O.S.2011, § 561. Here, the Commission’s implementing rules require that the “most conspicuous price or payment of a new motor vehicle, when advertised by a dealer, must be the full and total selling price for which the dealer will sell the vehicle to any retail buyer.” OAC 465:15-3-7(a). The most conspicuous price may *not* include qualifications that only apply to a subset of the retail public. Such discounts or rebates, if allowed to be included at all, must be stated separately from the most conspicuous price and clearly identify the qualifying group. OAC 465:15-3-7(b)–(d). The action seeks to enforce the Legislature’s policy against false and misleading advertising by holding dealers to their most conspicuous prices in advertising.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to prevent false and misleading advertising in the sale of new motor vehicles.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-141A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Motor Vehicle Commission intends to take. The proposed action is to impose—pursuant to a consent agreement—a fine of \$1,000 on licensee number 677, a new motor vehicle dealer. The dealer allowed a consumer to take delivery of a new vehicle and then, rather than storing the trade-in vehicle, sold it instead. When financing for the sale of the new vehicle could not be completed, the trade-in vehicle was unavailable to be returned to the consumer. This violated a storage provision in the written Retail Delivery Agreement between the consumer and dealer.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed . . . [\$1,000] against a dealer per occurrence” for several reasons, including “fail[ure] or refus[al] to perform any written agreement with any retail buyer involving the sale of a motor vehicle.” 47 O.S.Supp.2015, § 565(A), (A)(5)(d). Other reasons include “false or misleading advertising,” unlawful bundling of features, and committing “fraudulent act[s].” *Id.* § 565(A)(5)(a), (b), (f). Enforcement powers against violations of agreements and false advertising are related to the Legislature’s policy statement on new motor vehicles, which states that the new motor vehicle statutes exist to “promote the public interest and the public welfare,” to “prevent unfair practices,” and to “foster and keep alive vigorous and healthy competition.” 47 O.S.2011, § 561. The action seeks to advance this policy by holding dealers to their agreements.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicle Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the public interest and prohibit unfair practices in the sale of new motor vehicles by holding dealers to their written agreements with consumers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-142A**

Roy K. Dockum, Executive Director  
Oklahoma Motor Vehicle Commission

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Motor Vehicle Commission intends to take. The proposed actions are to impose—pursuant to consent agreements—fines on some twenty-eight new motor vehicle dealer licensees for employing unlicensed salespersons. The length of employment for each unlicensed salesperson was about three to four months, and the agreements impose fines of \$100 for each unlicensed salesperson employed. The specific licensees, the number of unlicensed persons employed, and the length of employment for each are attached as Appendix A.

Oklahoma law authorizes the Oklahoma Motor Vehicle Commission to “impose a fine not to exceed One Thousand Dollars . . . against a dealer per occurrence” for several reasons, including “employ[ing] unlicensed salespersons . . . or other unlicensed persons in connection with the sale of new motor vehicles.” 47 O.S.Supp.2015, § 565(A), (A)(7)(d). The actions enforce this straightforward requirement of the statutes by imposing fines that deter failures to ensure that salespersons at new motor vehicle dealerships obtain valid licenses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Motor Vehicles Commission has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to require licensure of new motor vehicle salespersons.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**ATTORNEY GENERAL OPINION 2015-142A****APPENDIX A**

<b>DEALERSHIP NAME</b>	<b>DEALERSHIP LICENSE #</b>	<b>SALESPERSON EMPLOYED UNLICENSED</b>		
		<b>FROM</b>	<b>UNTIL</b>	<b>FINE</b>
1. ADA DODGE CHRYSLER JEEP RAM	732	05/26/15	10/07/15	\$100
2. ACTION POWERSPORTS	515	06/09/15	10/07/15	\$100
3. ALTUS MOTORSPORTS	275	06/25/15	10/07/15	\$100
4. BARTLESVILLE CHRYSLER JEEP DODGE RAM	818	06/10/15	10/07/15	\$100
BARTLESVILLE CHRYSLER JEEP DODGE RAM	818	06/10/15	10/07/15	\$100
5. BATTISON HONDA	698	06/18/15	10/07/15	\$100
6. BELL CAMPER SALES	669	05/18/15	10/07/15	\$100
7. BIG RED SPORTS/IMPORTS	531	07/01/15	10/07/15	\$100
8. BILLINGSLEY HYUNDAI OF LAWTON	102	06/04/15	10/07/15	\$100
9. BOB HART CHEVROLET	199	07/16/15	10/07/15	\$100
10. BOLIN FORD	99	06/04/15	10/07/15	\$100
11. BYFORD CHRYSLER DODGE JEEP RAM	752	06/19/15	10/07/15	\$100
12. CARTER COUNTY HYUNDAI	626	07/13/15	10/07/15	\$100
13. CROWN AUTO WORLD BRISTOW	654	07/21/15	10/07/15	\$100
CROWN AUTO WORLD BRISTOW	654	07/21/15	10/07/15	\$100
14. DOUG GRAY CHRYSLER DODGE JEEP	219	06/23/15	10/16/15	\$100
15. JACKIE COOPER NISSAN	315	05/22/15	10/07/15	\$100
16. JAMATT RV SALES	668	06/03/15	10/16/15	\$100
17. JIM GLOVER CHEVROLET	1	06/09/15	10/16/15	\$100
JIM GLOVER CHEVROLET	1	06/09/15	10/16/15	\$100
18. JOHN VANCE MOTORS	362	06/15/15	10/19/15	\$100
19. MID-AMERICA AUTO GROUP	244	06/10/15	10/16/15	\$100
20. REGIONAL HYUNDAI	625	06/11/15	10/16/15	\$100
REGIONAL HYUNDAI	625	06/11/15	10/16/15	\$100
21. REYNOLDS FORD	153	06/29/15	10/16/15	\$100
22. RICK JONES BUICK GMC	76	06/02/15	10/16/15	\$100
23. SUBURBAN CHEVROLET	33	05/27/15	10/07/15	\$100
SUBURBAN CHEVROLET	33	05/27/15	10/07/15	\$100
SUBURBAN CHEVROLET	33	05/27/15	10/07/15	\$100
24. TOYOTA OF ARDMORE	100	06/02/15	10/16/15	\$100
25. TOYOTA OF LAWTON	813	06/11/15	10/16/15	\$100
26. VANCE COUNTRY FORD	299	06/15/15	10/19/15	\$100
27. VANCE CHRYSLER DODGE JEEP RAM	731	06/17/15	10/16/15	\$100
28. VANCE FORD LINCOLN	491	06/05/15	10/16/15	\$100

**OPINION 2015-143A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to an application for licensure by prospective licensee 31682. The licensee had been disciplined in Louisiana for alcohol abuse problems. The proposed action is to impose restrictions on the professional practice of the licensee in conjunction with granting the license. The discipline includes submission to period body fluid testing, only taking medications authorized by a treating physician who has been made aware of the discipline, an affirmative duty not to ingest prohibited substances including alcohol, submission of practice and treatment-related records on request, notice to the Board of any criminal charges, and notice to potential employers or other states of these restrictions. The licensee must also complete a drug and alcohol treatment program in Louisiana or, upon moving to Oklahoma, begin treatment in Oklahoma.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2015, §§ 480–519, authorizes the Board require “satisfactory evidence of professional competence and good moral character” when reinstating a license to practice medicine, 59 O.S.2011, § 495h. The Board’s administrative rules clarify that “[i]ndiscriminate or excessive prescribing, dispensing or administering of” controlled substances as well as the “habitual or excessive use of any drug which impairs the ability to practice medicine” qualify as unprofessional conduct. OAC 435:10-7-4(1), (3). The conditions on reinstatement described above seek to ensure that the licensee does not compromise care because of alcohol abuse.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-144A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

November 16, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to a reinstatement request by former licensee 20157. The licensee had been disciplined in Oregon for substance abuse. The proposed action is to impose restrictions on the professional practice of the licensee in conjunction with granting the license. The discipline includes submission to period body fluid testing, only taking medications authorized by a treating physician who has been made aware of the discipline, an affirmative duty not to ingest prohibited substances including alcohol, submission of practice and treatment-related records on request, notice to the Board of any criminal charges, and notice to potential employers or other states of these restrictions. The licensee must also comply with an existing agreement with the Drug Enforcement Agency and complete drug and alcohol treatment either in Oregon or Oklahoma.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2015, §§ 480–519, authorizes the Board require “satisfactory evidence of professional competence and good moral character” when reinstating a license to practice medicine, 59 O.S.2011, § 495h. The Board’s administrative rules clarify that “[i]ndiscriminate or excessive prescribing, dispensing or administering of” controlled substances as well as the “habitual or excessive use of any drug which impairs the ability to practice medicine” qualify as unprofessional conduct. OAC 435:10-7-4(1), (3). The conditions on reinstatement described above seek to ensure that the licensee does not compromise care because of alcohol abuse.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-145A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.013.16. The proposed action is to extend a licensed practice nursing licensee's term of probation to require six additional months of supervised practice. The licensee failed to follow a supervisor's instructions to prepare a central line dressing for a hemodialysis catheter, the licensee's second violation of probation after having failed to timely turn in reports on a prior occasion. The licensee is currently on probation after failing to address patient complaints about physical distress during the hours before that patient's death.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2015, § 567.8(B)(3), (7), (8). The action seeks to enforce these serious and important requirements by extending the period of time during which the licensee must be extensively supervised. Nurses are entrusted with significant responsibilities when caring for patients, and they must be prepared to fulfill those responsibilities in a way that preserves and advances patient health and safety. Refusing to address patient complaints about physical distress and failing to perform proper hygienic procedures on central lines can compromise patient safety.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-146A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 3.021.16 and 3.242.16. The proposed actions are to lift the licensees' temporary suspensions and order additional drug testing. Each licensee, under drug testing orders, submitted body fluid samples that were unobserved when taken, rendering the samples noncompliant with the Board's Body Fluid Testing Guidelines. In Board case 3.021.16, pursuant to a consent agreement, the licensee must undergo an additional three months of drug testing. In Board case 3.242.16, the licensee must undergo drug testing through the end of December 2015.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients and when a nurse fails to comply with an order of the Board, 59 O.S.Supp.2015, § 567.8(B)(4), (9). The actions stem from underlying concerns about the intemperate use of alcohol or drugs and also involve noncompliance with Board orders. Requiring additional drug testing to fulfill the purpose of those prior Board orders will advance the goal of monitoring for the use of drugs or alcohol and thus assessing any potential danger the licensees pose to patients.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that these actions advance the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-147A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take in Board cases 3.106.16 and 3.114.16. The proposed actions are to lift each licensee's temporary suspension and impose a fine of \$500. Although each licensee submitted an adequate number of body fluid samples from which the Board could make an evaluation about substance abuse problems, each licensee also submitted unobserved body fluid samples—those samples are noncompliant with the Board's body fluid testing guidelines—and the licensee in Board case 3.114.16 also failed to timely submit a prescriber medication report.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients and when a nurse fails to comply with an order of the Board, 59 O.S.Supp.2015, § 567.8(B)(4), (9). The actions stem from underlying concerns about the intemperate use of alcohol or drugs and also involve noncompliance with Board orders. Body fluid samples that do not comply with basic guidelines such as being observed when taken may threaten the integrity of a drug screening process, and the Board may thus reasonably believe that the penalties assessed here are necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that these actions advance the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-148A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.130.16. The proposed action is to require twice-a-month psychological counseling sessions that must be reported on quarterly to the Board for a period of at least six months or until the counselor determines any problems have been resolved. The licensee had failed a drug screen and underwent an evaluation for substance abuse issues, including body fluid testing.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(4), (9). The action stems from underlying concerns about the intemperate use of alcohol or drugs. The Board may reasonably believe that, after a period of regular drug screening and other evaluations of the licensee in this case, a minor obligation to engage in psychological counseling will enable the licensee to refrain from any drug or alcohol use that would be unprofessional or endanger patients.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-149A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.172.16. The proposed action is to impose a \$1,000 fine; issue a severe reprimand; require completion of education courses in nursing law, ethics, professional boundaries, and social networking; and require bimonthly body fluid testing until an evaluation for substance abuse issues can be completed. The licensee pled guilty to misdemeanors involving violent acts in June but failed to report the conviction on license renewal forms in July. The licensee also appeared at work showing obvious signs of heavy drinking.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse engages in misrepresentation in a license application, is “guilty of . . . any offense an essential element of which is fraud, dishonesty, or an act of violence,” or is “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(1)(a), (2), (4). The action enforces these straightforward requirements by imposing deterrent penalties and requiring body fluid testing and a substance abuse evaluation. The Board may reasonably believe that these requirements will effectively deter future violations while preventing substance abuse issues from affecting patient care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-150A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.174.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of educational courses in nursing law and ethics. The licensee failed to make a home health visit to an eighty year old man with a fractured vertebra, but she documented that she had done an assessment anyway.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2015, § 567.8(B)(3), (7), (8). The Board’s rules include the falsification of records as a form of unprofessional conduct. OAC 485:10-11-1(b)(3)(A). The action seeks to discipline a nurse for endangering a patient and falsifying records through the imposition of penalties and additional education. The Board may reasonably believe that penalties will deter future violations and that educational courses will provide information that gives the opportunity to make better decisions in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-151A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.216.16. The proposed action is to lift the temporary suspension of the license and refer the licensee to the Peer Assistance Program, a drug and alcohol treatment program. If the licensee does not enter the program or defaults from the program, the licensee will face a five-year license revocation and will be required to pay fines of \$19,000 before reinstatement. The licensee had been under prior discipline initiated in 2011 for diverting substantial amounts of drugs from the workplace. The licensee defaulted from a drug and alcohol treatment program in August 2015 when the license was temporarily suspended.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients and when a nurse “default[s] from the Peer Assistance Program,” 59 O.S.Supp.2015, § 567.8(B)(4), (11). The action enforces these requirements by imposing an obligation to pursue further drug and alcohol treatment. The Board may reasonably believe that additional treatment is consistent with the licensee’s obligation to provide uncompromised nursing care. The Board may also believe that the additional implications of another default from the treatment program are necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

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**OPINION 2015-152A**Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take against a licensed practical nurse pursuant to a consent agreement in Board case 3.217.16. The proposed action is to impose a \$1,000 fine, issue a severe reprimand, require courses in nursing law and the roles and responsibilities of licensed practical nurses and directors of nursing in long-term care, and to restrict the licensee from serving as a Director of Nursing for five years. The action also requires that, if the licensee attempts to serve as a Director of Nursing after five years, the licensee must notify the employer about this disciplinary order. The licensee, while serving as a Director of Nursing, failed to perform assessments or check vital signs of a patient who had just returned from an emergency department visit after pain complaints. The licensee then failed to perform or supervise others to perform health assessments or otherwise for some time. The licensee also failed to timely notify the physician about the results of an x-ray. The x-ray revealed the source of the patient's pain: a fractured rib. The licensee then failed to timely refer the patient for home health therapy.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (8). These serious requirements apply with special force to those nurses who serve as a Director of Nursing in a long-term care facility. Per administrative rules of the Oklahoma State Department of Health, a long-term care facility must have designate a Director of Nursing who shall “be responsible for all resident care including, but not limited to, the physical, mental, and psycho-social needs” of residents. OAC 310:675-13-5(c)(2). For a nurse who takes on the responsibilities of a Director of Nursing, the ethical requirements to ensure adequate nursing care is provided extends to all of the residents of a facility. *See* OAC 485:10-11-1(b)(4)(A), (D) (recognizing health and safety obligations vary based on level of responsibility and delegation of duties to other nursing professionals).

The action seeks to enforce these serious and important requirements by requiring additional education, imposing a fine, and barring the licensee from serving as a Director of Nursing for a period of time. The Board may reasonably believe

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continued . . . . .

that practice restrictions, penalties, and additional education will prevent future violations of the statutory mandate to ensure patient safety and health.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-153A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.218.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of educational courses in nursing law, delegation, and patient rights. The licensee failed to provide care and failed to supervise a certified nurse assistant to provide to a resident during a whole night shift. The resident spent the entire night in day clothes in a wheelchair—nor was the resident helped to the bathroom that night.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm” or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2015, § 567.8(B)(3), (8). The Board’s rules include the failure to adequately supervise subordinates as having the potential to jeopardize a patient’s health and safety. OAC 485:10-11-1(b)(4)(A). The action seeks to enforce standards of nursing care and supervision that resulted in compromised care for a patient. The Board may reasonably believe that penalties will deter future violations and that educational courses will provide information that gives the opportunity to make better decisions in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-154A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.219.16. The proposed action is to impose a \$500 fine; issue a severe reprimand; require completion of education courses in nursing law, obligations regarding controlled dangerous substances, and medication administration; and require bimonthly body fluid testing until an evaluation for substance abuse issues can be completed. The licensee failed to comply with physician medication orders regarding the sequence of dosages and timing of administration. The licensee also apparently made improper records concerning drugs taken from inventory for patient administration and wasted medications, including controlled dangerous substances, without witnesses.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm,” is “intemperate in the use of alcohol or drugs” in a way that could endanger patients, or is “guilty of unprofessional conduct as defined in the rules of the Board,” 59 O.S.Supp.2015, § 567.8(B)(3), (4), (7). Unprofessional conduct under the Board’s rules includes “inaccurate recording, falsifying, altering or inappropriate destruction of patient records” and the “failure to maintain proper custody and control of controlled dangerous substances” when working. OAC 485:10-11-1(b)(3)(A), (T).

The action enforces these requirements by imposing penalties and requiring monitoring for drug and alcohol issues. Failing to follow physician orders for medication has the potential to pose serious risks for patient health and safety, while keeping inaccurate records or wasting drugs without following proper procedures may result in drugs being diverted from a health care facility for illicit use. Fines and penalties may deter these violations of nursing standards, while the drug and alcohol monitoring ordered by the Board may be reasonably necessary to ensure that this particular licensee has not diverted drugs or is not motivated to do so because of issues with substance abuse.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-155A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to consent agreements in Board cases 3.223.16, 3.238.16, 10.031.16, 10.060.16, and 10.063.16. The proposed actions are to require that each applicant for licensure complete an educational course in nursing law and to reprimand them. Each applicant failed to disclose a conviction, arrest, or charge in the criminal history part of their application.

The applicants in cases 3.223.16 and 3.238.16 failed to report an arrest for assault and battery; in case 10.031.16, the applicant failed to report misdemeanor convictions for resisting an officer and possession of alcohol by a minor; in case 10.060.16, the applicant failed to report a misdemeanor conviction for driving while impaired; and in case 10.063.16, the applicant failed to report an overdrafting conviction.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licenses or impose discipline when persons falsify their applications for licensure; when they are “guilty of a felony, or any offense reasonably related to the qualifications, functions or duties of any licensee . . . , or any offense an essential element of which is fraud, dishonesty, or an act of violence, or for any offense involving moral turpitude”; and when they are “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(1)(a), (2), (4).

The Board’s application requires the disclosure of all criminal history so that the Board may make an informed decision on licensure of individuals with statutorily relevant criminal histories. These actions seek to enforce the statutory mandate that information on the application be fully truthful and complete. The Board may reasonably believe that, in the circumstances of these applicants, the nature of the convictions—including their status as misdemeanors and the length of time since they occurred—militate in favor reprimands and minor educational requirements.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-156A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to consent agreements in Board cases 3.224.16, 3.228.16, and 3.237.16. The proposed actions are to reinstate each license, issue severe reprimands to the licensees, require completion of a nursing law course, and impose fines ranging from \$100 to \$200. Each licensee allowed a license to lapse without renewal but continued to work as a nurse and has done so at least once in the past. The difference in fines arises from the length of time during which the licensee worked without a renewed license.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.51, prohibits the practice of nursing without a license in compliance with the Act, *see* 59 O.S.2011, § 567.14. A license must be renewed biannually. 59 O.S.2011, § 567.7(A). The action seeks to enforce the straightforward requirement that licensees renew their licenses to continue to be able to practice nursing. Periodic licensure renewal equips a professional regulation board with financial resources to administer its duties, facilitates its ability to locate licensees in the event of a dispute, and—where applicable—enables a board to assess compliance with continuing education requirements. The Legislature has clearly mandated that professional nurses exist in a regime of licensure with periodic renewal.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to require licensure of professional nurses.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-157A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.225.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of courses in nursing law, patient rights including confidentiality, nursing ethics, and social networking. The licensee accessed various records and charts belonging to a patient who was not placed under licensee's care nor who gave consent to licensee's access of records and charts.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline on licensees who are “guilty of unprofessional conduct as defined in the rules of the Board,” 59 O.S.Supp.2015, § 567.8(B)(7). The Board's rules clearly include the violation of patient confidentiality as a grounds for discipline. OAC 485:10-11-1(b)(3)(G). Requiring compliance with confidentiality rules advances the statutory mandate to ensure the safety and health of patients, *see* 59 O.S.Supp.2015, § 567.8(B)(8), and also adheres to the confidentiality obligations imposed by other provisions of state and federal law. The action seeks to enforce these rules in a straightforward case by imposing a penalty and requiring additional education. The Board may reasonably believe that these steps will effectively deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-158A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.226.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of educational courses in nursing law, ethics, and critical thinking. The licensee documented wound care and dressing changes even though that care was not actually performed.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2015, § 567.8(B)(3), (7), (8). The Board’s rules include the falsification of records as a form of unprofessional conduct. OAC 485:10-11-1(b)(3)(A). The action seeks to discipline a nurse for endangering a patient and falsifying records through the imposition of penalties and additional education. The Board may reasonably believe that penalties will deter future violations and that educational courses will provide information that gives the opportunity to make better decision in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-159A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.231.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of educational courses in nursing law and ethics. The licensee documented that the licensee administered medication to a patient even though the licensee had actually given the medication to an unlicensed person who gave them to the patient for self-administration.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2015, § 567.8(B)(3), (7), (8). The Board’s rules include the falsification of records as a form of unprofessional conduct. OAC 485:10-11-1(b)(3)(A). The action seeks to discipline a nurse for endangering a patient and falsifying records through the imposition of penalties and additional education. In addition to the problems associated with falsifying records by themselves, failing to administer medication and then claiming that one did so may result in compromised care that endangers patients from the lack of monitoring a drug’s effects. The Board may reasonably believe that penalties will deter future violations and that educational courses will provide information that gives the opportunity to make better decision in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-160A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.232.16. The proposed action is to impose a \$500 fine, issue a severe reprimand, and require completion of a course in nursing law. The licensee pled guilty to a crime involving theft in 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline on licensees who are “guilty of . . . any offense reasonably related to the qualifications, functions or duties of any licensee,” 59 O.S.Supp.2015, § 567.8(B)(2). The Board may be reasonably concerned that, given the access of nurses to the property of patients and health care facilities, a conviction for a crime related to theft may impact a nurse’s qualifications to perform the role of a nurse. The action imposes discipline reasonably related to the deterrence of theft.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-161A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Board of Nursing intends to take pursuant to consent agreements in Board cases 3.234.16 and 3.236.16. The proposed actions are to require completion of educational courses in nursing law, issue severe reprimands, and impose fines of \$1,000 in case 3.234.16 and \$500 in case 3.236.16.

The applicant in case 3.234.16 was convicted of bogus check charges but failed to disclose them on a licensed practical nurse application and on a renewal application before disclosing them in the current registered nurse application. Similarly, the applicant in case 3.236.16 was convicted of driving while intoxicated, failed to disclose the conviction on a prior license application in 2003, allowed the prior license to lapse, and then disclosed the conviction in the current application for reinstatement.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licenses or impose discipline when persons falsify their applications for licensure; when they are “guilty of a felony, or any offense reasonably related to the qualifications, functions or duties of any licensee . . . , or any offense an essential element of which is fraud, dishonesty, or an act of violence, or for any offense involving moral turpitude”; and when they are “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(1)(a), (2), (4).

The Board’s application requires the disclosure of all criminal history so that the Board may make an informed decision on licensure of individuals with statutorily relevant criminal histories. These actions seek to enforce the statutory mandate that information on the application be fully truthful and complete. Each of these licensees actually completed the licensing process under prior applications without disclosing their convictions to the Board. In these circumstances, the Board may reasonably believe that penalties and additional education are necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-162A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.235.16. The proposed action is to accept the application for licensure, temporarily suspend the license, and require entry into the Peer Assistance Program—a drug and alcohol treatment program—to reinstate the license. If the applicant fails to enter the program or defaults from the program, the license will be revoked for two years. The applicant had four convictions for misdemeanors involving alcohol and one felony conviction related to alcohol, two of which convictions the applicant failed to disclose on the application.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse nurses falsify their license applications, when they are “intemperate in the use of alcohol or drugs” in a way that could endanger patients, and when they “default[] from the Peer Assistance Program,” 59 O.S.Supp.2015, § 567.8(B)(1)(a), (4), (11). The action enforces these requirements by imposing an obligation to pursue drug and alcohol treatment. The Board may reasonably believe that additional treatment is consistent with the applicant’s obligation to provide uncompromised nursing care. The Board may also believe that revocation upon default from the treatment program is necessary to prevent compromised nursing care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-163A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.239.16. The proposed action is to impose a fine of \$1,000; require completion of educational courses in nursing law, ethics, documentation, and medication administration; require twelve months of supervised practice within the next two years; and require body fluid testing until a substance abuse evaluation can be completed.

The licensee administered medication in violation of physician orders as to timing of administrations several times, and on several occasions the licensee also failed to assess patients' reactions to narcotic medications before continuing treatment regimens involving those narcotics. The licensee failed to correctly document medication administrations on several occasions. The licensee was disciplined in Texas for these violations, failed to disclose that discipline in a license renewal application in Oklahoma, and failed to meet the terms of the discipline in Texas.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse nurses falsify their applications for license renewal, when they “[f]ail[] to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm,” when they are “intemperate in the use of alcohol or drugs” in a way that could endanger patients, and when they have “had disciplinary actions taken against” them in other jurisdictions, 59 O.S.Supp.2015, § 567.8(B)(1)(a), (3), (4), (10).

The action seeks to protect patient health and safety by imposing penalties that the Board may reasonably believe will deter future violations and by requiring education that may enable and encourage the licensee to provide uncompromised nursing care in the future. Supervised practice requirements and substance abuse monitoring may be necessary to ensure that licensee does not provide compromised nursing care and to correct any problems that may endanger the lives and health of patients.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-164A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take against a licensed practical nurse pursuant to a consent agreement in Board case 3.240.16. The proposed action is to impose a \$1,000 fine, require completion of twelve months of supervised practice within the next two years, and require completion of courses in wound care and registered nursing in long-term care. The licensee failed to perform dressing changes on one patient and fed another patient solid food even though the physician had ordered a puree diet for that patient because of difficulty swallowing and esophageal reflux diagnoses.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients” in a way that “unnecessarily exposes a patient or other person to risk of harm”; is “guilty of unprofessional conduct”; or is “guilty of any act that jeopardizes a patient’s life, health or safety,” 59 O.S.Supp.2014, § 567.8(B)(3), (7), (8). The action seeks to enforce these serious and important requirements by requiring additional education, imposing a fine, and requiring supervised practice for a period of time. The Board may reasonably believe that practice supervision, penalties, and additional education will prevent future violations of the statutory mandate to ensure patient safety and health.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-165A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 10.053.16. The proposed action is to deny an application for licensure. The applicant has a 1994 conviction for assault with a deadly weapon for which the applicant was eventually sentenced to prison; after being released in 2006, the applicant went on to face a convictions for stalking and for domestic abuse with a motor vehicle during 2013 and 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licensee for persons “guilty of a felony, or any offense reasonably related to the qualifications, functions or duties of any licensee . . . , or any offense an essential element of which is fraud, dishonesty, or an act of violence,” 59 O.S.Supp.2015, § 567.8(B)(2). The Board may be reasonably concerned that the acts of violence or threats of violence contemplated by the applicant’s criminal history—along with the recency of the last convictions—militates against grant of a license. Professional nurses may be faced with tense and difficult situations in which a violent reaction may harm patients.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-166A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 10.058.16. The proposed action is to accept an application for licensure by endorsement but impose a fine of \$500 and issue a severe reprimand. The applicant was disciplined for sexual harassment and unwelcome advances in Arkansas, completing the terms of discipline in August of 2015.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to discipline licensees who are “guilty of unprofessional conduct” or who have “had disciplinary actions taken against the individual’s [license] in this or any state, territory or country,” 59 O.S.Supp.2015, § 567.8(B)(7), (10). The Board may reasonably be concerned that the recency of the applicant’s violations along with a shift in the applicant’s jurisdiction require additional deterrence against future violations in Oklahoma.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-167A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 10.059.16. The proposed action is to grant the applicant's license by endorsement but require completion of an educational course in nursing law, issue a severe reprimand, and impose a \$500 fine. The applicant failed to disclose a driving while intoxicated conviction from 2010 in Missouri in the application for licensure by endorsement.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licenses or impose discipline when persons falsify their applications for licensure; when they are “guilty of a felony, or any offense reasonably related to the qualifications, functions or duties of any licensee . . ., or any offense an essential element of which is fraud, dishonesty, or an act of violence, or for any offense involving moral turpitude”; and when they are “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(1)(a), (2), (4).

The Board's application requires the disclosure of all criminal history so that the Board may make an informed decision on licensure of individuals with statutorily relevant criminal histories. The action seeks to enforce the statutory mandate that information on the application be fully truthful and complete. In these circumstances, the Board may reasonably believe that penalties and additional education are necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-168A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 10.061.16. The proposed action is to accept the application for licensure but require the applicant to take a course in nursing law and require body fluid testing until a substance abuse evaluation can be completed. The applicant has 2012 and 2014 convictions for public intoxication and driving under the influence (respectively).

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licenses when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients, 59 O.S.Supp.2015, § 567.8(B)(4). The action seeks to ensure that the applicant does not endanger patients by requiring substance abuse monitoring and an evaluation for substance abuse problems at the outset of the applicant’s professional career. The Board may reasonably believe that education and monitoring and treatment will prevent the applicant from providing compromised nursing care.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-169A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 10.065.16. The proposed action is to deny an application for licensure by endorsement. The applicant failed to disclose a misdemeanor conviction for criminal trespass to real property in the criminal history section of the application. Applicant did disclose a conviction for retail theft. The applicant failed to respond to the Board's request for information about the failure to disclose applicant's entire criminal history.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to deny licenses or impose discipline when persons falsify their applications for licensure; when they are “guilty of a felony, or any offense reasonably related to the qualifications, functions or duties of any licensee . . . , or any offense an essential element of which is fraud, dishonesty, or an act of violence, or for any offense involving moral turpitude,” 59 O.S.Supp.2015, § 567.8(B)(1)(a), (2). The Board's application requires the disclosure of all criminal history so that the Board may make an informed decision on licensure of individuals with statutorily relevant criminal histories. The action seeks to enforce the statutory mandate that information on the application be fully truthful and complete. In these circumstances, the Board may reasonably believe that the applicant's failure to disclose information and failure to respond to requests for information warrant the denial of a license. The applicant retains the ability to request additional proceedings.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-170A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to an agreement in Board case 3.040.16. The Board continued a before-scheduled hearing and intends to require a licensee to notify the Board of any change in employment, work assignment, or supervisor within three business days; the licensee must also inform the current employer and any future employers about the ongoing disciplinary proceedings. The licensee is being disciplined on allegations of failing to meet minimum standards of nursing practice, which may have contributed to the death of a patient. This is the second time a continuance has been sought.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2014, §§ 567.1–567.20, authorizes the Board to impose discipline in a variety of circumstances, including for failing to meet the minimum standards of nursing practice, 59 O.S.Supp.2014, §§ 567.8(A), (B)(3). The Act also states that the Board shall have jurisdiction over licensees to discipline them *even if* their licenses lapse. *Id.* § 567.8(K). The Act thus displays a policy of retaining jurisdiction in the Board throughout a disciplinary process. The action is intended to ensure the Board remains aware of the location and work responsibilities of a licensee undergoing discipline for providing compromised nursing care, and the Board may believe this awareness is necessary for the ongoing discipline process.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-171A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to an agreement in Board case 3.131.16. The proposed action is to lift the licensee's temporary suspension and order additional drug testing. The licensee, under a drug testing order, failed to submit to body fluid testing on November 3, 2015, after which the license was temporarily suspended pursuant to an existing Board order.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that could endanger patients and when a nurse fails to comply with an order of the Board, 59 O.S.Supp.2015, § 567.8(B)(4), (9). The action stems from underlying concerns about the intemperate use of alcohol or drugs and also involve noncompliance with Board orders. Requiring additional drug testing to fulfill the purpose of those prior Board orders will advance the goal of monitoring for the use of drugs or alcohol and thus assessing any potential danger the licensee pose to patients.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-172A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.212.16. The proposed action is to approve the application for licensure, require completion of courses in nursing law and critical thinking, issue a severe reprimand, and restrict the licensee from practice in home health, hospice, or agency nursing for two years. The licensee has four larceny convictions across 2008, 2010, and 2013.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline on licensees who are “guilty of . . . any offense reasonably related to the qualifications, functions or duties of any licensee,” 59 O.S.Supp.2015, § 567.8(B)(2). The Board may be reasonably concerned that, given the access of nurses to the property of patients and health care facilities, convictions of crimes related to theft may impact a nurse’s qualifications to perform the role of a nurse. The action prevents the licensee from working for some time in areas with higher risks from theft and otherwise allows the licensee to practice nursing, a result that the Board may believe reasonably protects the public.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-173A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.165.16. The proposed action is to place the licensee on probation for twelve months and restrict the licensee's practice to hospitals only. The action also requires completion of courses in medication administration, nursing documentation, critical thinking, and the roles and responsibilities of registered nurses. The action also imposes fines and costs totaling \$3,723.43 and includes a severe reprimand.

The licensee failed to perform and document a physical assessment of a patient in an emergency department who complained of severe pain, engaged in disruptive behavior, did not test positive for behavior-altering substances, did test positive in a pregnancy test. The licensee released the patient to police, after which the patient returned to the emergency department and was pronounced dead shortly thereafter. The medical examiner concluded that the likely cause of death was a ruptured ectopic pregnancy.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse “[f]ails to adequately care for patients or to conform to the minimum standards of acceptable nursing” in a way that “unnecessarily exposes a patient or other person to risk of harm,” is “guilty of unprofessional conduct,” or who is “guilty of any act that jeopardizes a patient’s life, health or safety.” 59 O.S.Supp.2015, § 567.8(B)(3), (7), (8).

The action arose from allegations that the licensee performed care below the minimum standard for nursing. After a hearing, the Board proposes to impose professional discipline that allows the licensee to continue practicing. A review of the events and licensee's actions may reasonably support the conclusion that licensee's failure to assess the patient may have resulted in an ectopic pregnancy not being discovered. The Board's discipline imposes penalties that the Board may reasonably believe will deter harmful conduct in the future while educational requirements and probation may equip the licensee to provide uncompromised nursing care in the future.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-174A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.205.16. The proposed action is to accept the voluntary surrender of the respondent's license for one year and, before reinstatement, require payment of a \$500 fine and completion of courses in nursing law, ethics, and critical thinking. Upon reinstatement, the licensee would be barred from practice in a hospice or home health setting for two years. The licensee stole money from a patient's spouse during a home health visit.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “guilty of unprofessional conduct,” 59 O.S.Supp.2015, § 567.8(B)(7). Unprofessional conduct includes the “appropriat[ion] without authority” of “medications, supplies or personal items of the patient.” OAC 485:10-11-1(b)(3)(D). The action enforces a prohibition against taking patients' property by imposing serious penalties and, even after reinstatement, temporarily restricting practice in a home health context. The Board may reasonably believe that these penalties are necessary to discourage and prevent future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-175A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take pursuant to a consent agreement in Board case 3.208.16. The proposed action is to lift the temporary suspension of the respondent's license, which will lapse because its expiration date predated this disciplinary action. The proposed action would then require a reinstatement application and condition any reinstatement on entry into the Peer Assistance Program, a drug and alcohol treatment program. The action would automatically revoke, for two years, the license upon default from or failure to enter the program. After such a revocation, the licensee would be required to pay a fine of \$1,500 before an additional reinstatement. The licensee tested positive for drugs in 2013 but could not be located for service because of a failure to notify the Board of a change in address. The Board eventually suspended the license in January 2014 and, in August of 2015, the licensee requested a hearing.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “intemperate in the use of alcohol or drugs” in a way that poses a danger to patients or when the nurse has “defaulted from the Peer Assistance Program,” 59 O.S.Supp.2015, § 567.8(B)(4), (11). The action enforces the requirement that nurses not engage in behavior involving alcohol or drugs that could pose risks to the health and danger of patients. The Board may reasonably believe that entry into a treatment program will allow this professional to continue practicing while obviating the risks of compromised patient care. The consequences of default may be necessary to deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-176A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 18, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take in Board case 3.211.16. The proposed action is to revoke the respondent's license for five years and impose several requirements to obtaining a reinstatement. The requirements include payment of fines and costs totaling \$3,736.25, submission to random drug screening for the two years prior to reinstatement, and documentation of participation in a substance abuse support group or system for two years prior to reinstatement. The licensee wrote physician orders for medication claiming they were for patients and then picked them up from a pharmacy without ever placing them in workplace inventory—in other words, licensee created false prescriptions and diverted the resulting drugs. The licensee then entered the Peer Assistance Program, defaulted, and later pled guilty to crimes involving attempts to gain, either through larceny or deception, controlled dangerous substances.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, authorizes the Board to impose discipline when a nurse is “guilty of . . . any offense an essential element of which is fraud, dishonesty, or an act of violence,” when a nurse is “intemperate in the use of alcohol or drugs,” when a nurse is “guilty of unprofessional conduct,” when a nurse has violated “an order of the Board,” and when a nurse has “defaulted from the Peer Assistance Program,” 59 O.S.Supp.2015, § 567.8(B)(2), (4), (7), (9), (11). Unprofessional conduct includes “presenting a forged prescription” and “diversion or attempts to divert drugs or controlled substances.” OAC 485:10-11-1(b)(3)(O), (U).

The action seeks to enforce these requirements that protect the public from illicit sources of controlled dangerous substances. The Board may reasonably believe that the licensee's conduct requires significant deterrence and that preventing future violations requires the revocation of a license and substantial evidence of treatment of substance abuse problems. The licensee's prior default from drug and alcohol treatment along with later criminal charges indicating additional attempts to gain illicit control of controlled dangerous substances militates in favor of the Board's serious penalties.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect patient health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-177A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

November 30, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Board of Nursing intends to take with respect to the Platt College Practical Nursing Program. The proposed action is to approve the program for two years and schedule a visit in one year to assess problem areas of the program.

Problem areas include ensuring that the program administrator has adequate time to fulfill administrative duties; ensuring that clinical evaluations measure student progression through clinical areas; improving admission, retention, and graduation policies to raise the number of students who complete the program and pass the licensure exam; and improving program evaluation activities to assess the program's success in teaching students in various areas. The last two problems were identified at the Board's prior meeting on the program in 2014.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, requires the Board to promulgate and enforce educational programs for licensed practical nurses, 59 O.S.2011, § 567.12(B). Programs must have an administrator who is a registered nurse with certain experience and qualified faculty. *Id.* § 567.12(B)(1)–(4).

The Board's standards require that a program administrator have adequate time to complete administrative duties if also teaching, OAC 485:10-5-3.2(c), and the Board's standards also require a systematic plan for evaluating the program and its educational outcomes, OAC 485:10-5-7(a). The Board's standards require that clinical experiences "prepare students for practice at the appropriate educational level," OAC 485:10-5-4.1(a), and that admission and graduation policies be designed to ensure that students maintain high completion and licensing examination passage rates. OAC 485:10-5-5(a)(9).

The action seeks to enforce the Board's standards for nursing education programs by allowing the program to continue operating at full capacity while requiring improvements in the program's deficiencies. The Board may reasonably believe that improvements can be made that would render the program fully compliant with state law while imposing monitoring more frequent than ordinary, *see* OAC 485:10-3-6(a)(1)(B), (C) (imposing visitation requirements three years after full approval and five years periodically after that), that could result in future action being taken.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-178A**

Amy Hall, Executive Secretary

November 18, 2015

Board of Examiners for Speech-Language Pathology and Audiology

This office has received your request for a written Attorney General Opinion regarding agency action that the Board of Examiners for Speech-Language Pathology and Audiology intends to take. The proposed action is to deny the application for renewal of a license of licensee 3274. The Oklahoma Tax Commission has notified the Board that the licensee is noncompliant with Oklahoma tax law.

The Speech Pathology and Audiology Licensing Act, 59 O.S.2011 & Supp.2015, §§ 1601–1622, requires the Board to take applications for licensure renewal, fix fees for them, and set standards of continuing education for them. 59 O.S.2011, §§ 1610(A)(2), 1615.1, 1616.1; *see also* OAC 690:10-9-2(a). However, Oklahoma law prohibits the Board from accepting renewal applications where the Oklahoma Tax Commission has determined a licensee is noncompliant with Oklahoma tax law and that licensee has not resolved that dispute. 68 O.S.2011, § 238.1(E).

It is, therefore, the official opinion of the Attorney General that the Board of Examiners for Speech-Language Pathology and Audiology has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism and ethics in the speech-language pathology and audiology profession.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-179A**

Charla Slabotsky, Executive Director  
Oklahoma Real Estate Commission

November 23, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Commission intends to take. The proposed action is to summarily suspend the license of David Nottingham, a licensed real estate broker, and two licensed broker entities—Home Finders of Lawton, Inc. and Nottingham Realty, Inc.—engaged in property management activities on behalf of landlords. The suspension would remain in effect pending further proceedings over whether the licensee misappropriated client funds and failed to produce trust account bank statements when requested by the Commission. Numerous landlord clients of the licensee complained that they had not received rent payments for the month of November, and evidence indicates that the licensee’s trust accounts contain substantially less funds than they should based on estimates of security deposits and monthly rent payments that should be held in those accounts.

Oklahoma law authorizes the Commission to, “upon showing good cause, impose sanctions” on licensees. 59 O.S.2011, § 858-312. Good cause includes “[f]ailing, within a reasonable time, to account for or to remit any monies . . . coming into possession of the licensee which belong to others” and “[c]ommingling with the licensee’s own money or property the money or property of others which is received and held by the licensee.” *Id.* § 858-312(6), (16). The Commission’s administrative rules clarify that compliance with a licensee’s statutory obligations with respect to trust accounts requires maintaining all client funds in the trust account, not diverting those funds, and not including licensee funds in it “except amounts sufficient to insure the integrity of the account and cover any charges made by the financial institution.” OAC 605:10-13-1(a), (b). Further, the licensee must maintain certain records about trust accounts and deliver them over to the Commission upon request. OAC 605:10-13-1(e), (k), (l); 605:10-17-4(18), (23).

The action seeks to enforce these requirements, which are intended to protect clients of licensed real estate brokers from having funds misappropriated. A temporary suspension may be necessary when potential misappropriations cover significant sums and the suspension will ensure that additional misappropriation does not occur while the Commission continues to investigate and gather facts.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policies ensuring that real estate brokers do not misappropriate client funds.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-180A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to an application for reinstatement by former physician assistant licensee 1298. The Board denied the application due to a failure of a motion of the Board reinstating the license to pass with a majority—the vote was evenly tied.

The licensee had been subject to disciplinary proceedings in 2014 for not being properly supervised by a physician and for being identified as a “doctor” to patients calling the licensee’s workplace. To resolve that prior discipline, the licensee entered a Voluntary Surrender of License in Lieu of Prosecution—a licensee’s voluntary decision available under Oklahoma statutes that requires an admission of guilt and surrender of license, *see* 59 O.S.2011, § 509.1(E).

The key issue underlying licensee’s difficulty with the Board on supervision and being identified as a “doctor” is that the licensee is also a licensed chiropractor. For example, during the hearing on the current reinstatement application, one Board member commented at length about the possibility of confusion between the licensee’s role as a physician assistant within conventional medicine and the licensee’s role as a chiropractor. As part of the current reinstatement application, licensee offered to take several steps to mitigate this possibility of confusion, including separating the physical workplaces where the two professions were performed. The licensee even verbally offered, at the hearing, to locate a chiropractic clinic in a separate county from where the licensee would perform physician assistant services.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2015, §§ 480–519, makes it a felony to practice medicine and surgery without a license, 59 O.S.2011, § 491(A)(1)–(2). The practice of medicine and surgery includes the use of phrases such as “physician,” “doctor,” or “M.D.” *See* 59 O.S.2011, § 492(A), (C)(5). However, the practice of medicine does not include the use of a designation such as “doctor” when that title “additionally contains the description of another branch of the healing arts for which one holds a valid license” in Oklahoma. *Id.* § 492(C)(5); *see also id.* § 492(D)(4), (9), (E)(2), (F). Thus, if Oklahoma law elsewhere authorizes chiropractors to use the title of “doctor,” the Act could not be said to prohibit licensee from using that title so long as it identified only the licensee’s practice as a chiropractor and not as a physician assistant.

Oklahoma law does recognize chiropractors as “doctors.” *See* 59 O.S.2011, § 161.2 (referring to a “chiropractic physician”); *id.* § 161.3(6) (referring to “[c]hiropractic physician” and “doctor of chiropractic”); *id.* § 161.15 (recognizing that “[d]octors of chiropractic” may sign death certificates as well as all other public health certificates on the same terms as osteopathic and allopathic physicians).

The Oklahoma Legislature, through the statutes, has evinced a policy of recognizing chiropractors as “doctors” or “physicians.” While the Board may be appropriately concerned about the possibility that confusion might arise from the licensee’s dual license-holding, the denial of licensee’s application for reinstatement cannot be said to advance a statutory policy, particularly in light of the licensee’s willingness to accept conditions of practice on the physician assistant license. Instead of denying the application, the Board should approve the application and impose conditions of practice on the physician assistant license that would reduce the likelihood of confusion. Those conditions may include location, patient, designation, and timing restrictions.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision lacks adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and ensure patient welfare. The action is hereby **disapproved**.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-181A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to an application for reinstatement by former medical doctor licensee 14117. The intended action is to deny the application. The licensee had been disciplined in 2012 for sexual misconduct involving patients. The licensee has applied for reinstatement on two prior occasions, making this the licensee's third application. As part of the application process, the licensee indicated a willingness to undertake work restrictions to minimize the risk of future sexual misconduct. For example, at the hearing, licensee's counsel indicated that upon reinstatement the licensee, a male, would attempt to work in all-male settings such as male correctional facilities.

The licensee also submitted, however, failing exam scores from the Special Purpose Examination, a professional competence exam for professionals seeking reinstatement. During the hearing, the Board specifically voted upon and approved on the record a motion essentially finding that licensee's failing exam score was the reason for the denial of the application.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2015, §§ 480–519, authorizes the Board require "satisfactory evidence of professional competence and good moral character" when reinstating a license to practice medicine, 59 O.S.2011, § 495h. The Board may reasonably believe that licensee's failing exam score fails to show adequate evidence supporting licensee's current professional competence.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-182A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to Board case 14-08-5033. The intended action is to revoke the licensee's medical license and fine the licensee \$30,000. The licensee was found to have prescribed controlled dangerous substances in an unprofessional and unsafe manner by, for example, not adequately examining patients before prescribing such substances. The licensee was also found to have failed to maintain office records.

The Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act, 59 O.S.2011 & Supp.2015, §§ 480–519, authorizes the Board to impose discipline on licensees who prescribe drugs “without sufficient examination and establishment of a valid physician-patient relationship” and those who prescribe “controlled substances or narcotic drugs in excess of the amount considered good medical practice or “without medical need,” 59 O.S.2011, § 509(12), (16). The Act also authorizes discipline where a physician fails to maintain medical records documenting evaluation and treatment of patients, including drug prescriptions. *Id.* § 509(18), (20). The action seeks to advance these requirements in a situation where a physician's ongoing and flagrant willingness to violate them both results in substantial additional income for the physician and has resulted in unsupportable distribution of controlled dangerous substances. The Board may reasonably believe that these circumstances require the severe discipline of license revocation and a significant fine to deter future violations.

It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-183A**

Billy Stout, M.D., Board Secretary  
State Board of Medical Licensure and Supervision

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Medical Licensure and Supervision intends to take with regard to a motion filed by former medical doctor licensee 23746. The motion requests that the Board issue a declaratory ruling invalidating a prior Board order accepting licensee's voluntary submittal to jurisdiction. The Board rejected that motion.

A voluntary submittal to jurisdiction is, essentially, the label given to agreed disciplinary orders entered by the Board; the negotiation and entry of such agreed orders, while perhaps prone to some criticism, is a common practice across professional licensing boards in Oklahoma. Such consent orders, often not expressly authorized by statutes, save significant State—and professional—resources in exchange for milder discipline than might otherwise occur.

Licensee's voluntary submittal occurred in 2014 after serious allegations of flagrant and ongoing sexual misconduct were made both criminally and before the Board. Those allegations ranged from 2008 to 2011; affected at least seventeen people, including patients and employees; and included innuendo, sexually explicit comments, solicitations, and physical advances. Licensee has never admitted guilt as to any of the allegations.

The complaint initiating licensee's discipline also included other allegations, including allegations that licensee had interfered with the Board's investigation and had falsified records.

Licensee's voluntary submittal to jurisdiction according to the Board's records included no admission of guilt but did include a statement that the licensee understood a hearing could result in discipline. The voluntary submittal also required the revocation of the license and that the discipline be submitted to a national database that would be viewed by medical licensing authorities in other states.

In his motion to the Board, the licensee advanced two legal theories to support vacatur of his voluntary submittal to jurisdiction. First, he argued that the Board did not have authority to approve the voluntary submittal to jurisdiction because the only possible statutory authority for accepting it did not have its requirements met.

In other words, rather than seeing his prior voluntary submittal as an agreed order, licensee views it as an attempt at a Surrender in Lieu of Prosecution. That process, peculiar to the Board and explicitly described in its statutes, requires an admission of guilt and the voluntary surrender of the license. *See* 59 O.S.2011,

§ 509.1(E). The advantage of such a surrender for a licensee is that it absolutely bars Board staff from engaging in any disciplinary proceedings, sparing a licensee from the expense and press of mounting a defense and also barring any discipline harsher than a revocation—including potentially significant fines. It is also a course that can be taken despite Board staff’s reluctance to allow it. In other words, there is no negotiating a Surrender in Lieu of Prosecution; there is only a question of whether the licensee’s attempt at one meets the statutory requirements. Here, there is no question that licensee’s voluntary submittal does not meet the statutory requirements for a Surrender in Lieu of Prosecution because the submittal does not contain an admission of guilt.

The question decided by the Board in passing upon licensee’s motion, then, is whether it has the legal authority to accept a voluntary submittal to jurisdiction—or, in other words, whether the Board can approve agreed orders negotiated by disciplinary respondents and Board staff. The Board’s administrative rules specifically recognize voluntary submittals, OAC 435:5-1-5.1, and the Administrative Procedures Act, 75 O.S.2011 & Supp.2015, §§ 250–323, also authorizes the entry of consent orders and agreed settlements unless specifically barred, 75 O.S.Supp.2015, § 309(E). Based on these authorities, it is apparent that—so long as the obligations imposed by an agreed order fall within a statutory range of actions authorized for a board and the procedural requirements for instituting disciplinary proceedings are met—a board has the authority to impose discipline according to a consent order with a respondent who agrees to the terms of the discipline, voluntarily waiving a full hearing. Here, the Board has statutory authority to, among other things, revoke a medical license. *See* 59 O.S.2011, § 509.1(A). Acceptance of consent orders in the form of voluntary submittals to jurisdiction is intended to advance the Board’s statutory mandate to “suspend, revoke or order any other appropriate sanctions against the license of any physician . . . for unprofessional conduct.” 59 O.S.Supp.2015, § 503; *see also* 59 O.S.2011, § 509.1(A). The Board may reasonably believe that accepting and enforcing such consent orders is legally appropriate and advances its statutory mission.

The licensee’s second argument was that the Board had lost the original copy of its order, does not have a legally adequate copy, and that there is a dispute as to the contents of the order. Looking to licensee’s own filings before the Board and evidence in the record before the Board, the Board could have concluded that these allegations are either false or irrelevant. There appears to be an order on file at the Board; it bears the signature of licensee; and it contains findings and terms that substantially mirror evidence as to the negotiation of the agreement. The order on file does not even substantially differ from licensee’s current position on the true agreement’s contents except that licensee alleges the true agreement “would not be considered discipline in any way by the Medical

Licensure Board” or that his relinquishment of his license could not “be in any way as a result of the prosecution of [his] case.” Mot. Declaratory Ruling and Mot. Vacate Order at 8. No evidence presented to the Board bore out these irrelevant and borderline frivolous claims. The Board’s rejection of this legal theory underlying the motion has some evidentiary support, and the Board may reasonably believe that rejecting these contentions would advance its statutory mission to discipline physicians who engage in unprofessional conduct.

The Board denied licensee’s motion, and it could have done so reasonably as to both legal theories underlying the motion. It is, therefore, the official opinion of the Attorney General that the State Board of Medical Licensure and Supervision has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect public health and ensure patient welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-184A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take. The proposed actions are to deny two requests by Licensed Professional Counselor applicants, Cathy Wahkinney and Clarissa Webb, to reduce the supervised experience requirement because of graduate coursework.

The Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1901–1920, provides that applicants for licensure as Licensed Professional Counselors must complete “[t]hree (3) years of supervised full-time experience in professional counseling,” 59 O.S.Supp.2015, § 1906(C)(2). The Act also provides, however, that graduate coursework can be substituted for up to two years of supervised experience at the rate of thirty graduate semester hours per one year of supervised experience. *Id.* Qualifying graduate coursework must be “beyond the master’s degree, provided that such hours are clearly related to the field of counseling and are acceptable to the Board.” *Id.* Here, neither applicant presented sufficient graduate coursework beyond the master’s degree—which requires sixty graduate semester hours in counseling-related coursework, *id.* § 1906(C)(1)—and the Board thus denied requests to reduce the supervised experience requirement. This action is intended to apply a straightforward statutory framework.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to protect the public health and welfare by requiring licensed counselors to have adequate experience and qualifications.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-185A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take. The proposed actions are to declare several degree programs in Oklahoma not content equivalent for qualifying for licensure as a Licensed Professional Counselor or Licensed Marital and Family Therapist. The degrees being declared not content equivalent for Licensed Professional Counselor licensure are the University of Oklahoma's Ph.D. in Special Education; the University of Central Oklahoma's Master of Arts in Substance Abuse Studies; and the University of Central Oklahoma's Master of Arts in Family and Child Studies - Family Life Education. The degrees being declared not content equivalent for Licensed Marital and Family Therapist licensure are the Oklahoma State University Master of Science in Family Relations and Child Development as well as the University of Oklahoma Master of Human Relations in Human Relations.

The Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1901–1920, requires that an applicant have a “at least sixty (60) graduate semester hours . . . of counseling-related course work. These sixty (60) hours shall include at least a master’s degree in a counseling field,” 59 O.S.Supp.2015, §1906(C)(1). Likewise, the Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2015, §§ 1925.1–1925.18, requires a “master’s degree or a doctoral degree in marital and family therapy, or a content-equivalent degree as defined by the Board,” 59 O.S.Supp.2015, § 1925.6(C)(1). The Board may believe that, upon the purpose of the above-mentioned degrees and the course-work required to obtain them, they do not qualify for licensure in the respective professions.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that these actions advance the State of Oklahoma's policy to protect the public health, safety, and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-186A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take. The proposed actions are to declare incomplete the applications of some twenty-four Licensed Professional Counselor applicants, listed in Appendix A along with specific deficiencies in coursework, for lacking sufficient coursework to qualify for a license.

The Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1901–1920, provides that applicants for licensure as Licensed Professional Counselors must complete a “master’s degree in a counseling field” with at least sixty graduate semester hours in “counseling-related course work,” 59 O.S.Supp.2015, § 1906(C)(1). The Board’s administrative rules clarify that counseling-related coursework must include at least one course in human growth and development; at least one course in dysfunctional human behavior; at two courses in client assessment techniques; at least one course in professional ethics; at least one course in research; a practicum or internship; and at least five courses of at least three semester hours each from a list of counseling-related fields. OAC 86:10-9-2(a)(1)–(8). The applicant must also have completed enough other coursework to reach sixty graduate semester hours. OAC 86:10-9-2(b). The action is intended to enforce these requirements that ensure professionals who seek to practice counseling under the auspices of a state license have adequate academic credentials. Declaring the applications incomplete and allowing the applicants to finish out the required coursework is a reasonable course of action on the Board’s part.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to protect the public health and welfare by requiring licensed counselors to have adequate qualifications.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**ATTORNEY GENERAL OPINION**  
**2015-186A**  
**APPENDIX A**

1. Chrystal Brassfield    Insufficient three-hour courses from knowledge areas listed in OAC 86:10-9-2(a)(8)
2. Nineka Dyson        Insufficient courses in core areas listed in OAC 10-9-2(a), including human growth and development, client appraisal and assessment, and research  
  
                                 Insufficient three-hour courses from knowledge areas listed in OAC 86:10-9-2(a)(8)
3. Gabriel Dominguez    Insufficient courses in core areas listed in OAC 10-9-2(a), including human growth and development, client appraisal and assessment, and professional ethics  
  
                                 Insufficient three-hour courses from knowledge areas listed in OAC 86:10-9-2(a)(8)  
  
                                 Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
4. Sascha Webb            Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment  
  
                                 Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
5. Amy Bowen              Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
6. Paul Owen                Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment  
  
                                 Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)

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| 7.  | Jeffrey Stewart    | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly research<br><br>Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)                        |
| 8.  | Haley Thompson     | Insufficient courses in core areas listed in OAC 10-9-2(a), including client appraisal and assessment as well as counseling theories and methods   |
| 9.  | Amanda Underwood   | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment   |
| 10. | Ann Gleason        | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment   |
| 11. | Adrian King        | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment<br><br>Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a) |
| 12. | Erica Davis        | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment   |
| 13. | Kevin Williams     | Insufficient courses in core areas listed in OAC 10-9-2(a), including client appraisal and assessment as well as research  |
| 14. | Charlotte Williams | Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment   |
| 15. | April Crawford     | Insufficient courses in core areas listed in OAC 10-9-2(a), including human growth and development as well as dysfunctional human behavior   |
| 16. | Mary Lawrence      | Insufficient courses in core areas listed in OAC 10-9-2(a), including dysfunctional human behavior as well as client appraisal and assessment  |

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continued . . . . .

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17. Kevin Sonntag      Insufficient courses in core areas listed in OAC 10-9-2(a), including dysfunctional human behavior, client appraisal and assessment techniques, counseling theories and methods  
Insufficient three-hour courses from knowledge areas listed in OAC 86:10-9-2(a)(8)  
Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
18. Anna Phifer      Insufficient courses in core areas listed in OAC 10-9-2(a), including human growth and development, dysfunctional human behavior, client appraisal and assessment, and professional ethics  
Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
19. Kelsey Smith      Insufficient courses in core areas listed in OAC 10-9-2(a), including human growth and development, client appraisal and assessment, and research
20. Douglas Lormand      Insufficient coursework to reach sixty graduate semester hours of counseling-related courses per OAC 86:10-9-1(a)
21. Tayler Hall      Insufficient courses in core areas listed in OAC 10-9-2(a), particularly client appraisal and assessment
22. Brenda Kay Kinnison      Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)
23. Jacqueline Reynolds Long      Insufficient coursework to reach sixty graduate semester hours from knowledge areas listed in OAC 86:10-9-2(a)One additional course in any knowledge area listed in OAC 86:10-9-2(a)
24. Gail Renee Cato-Strong      Insufficient courses in core areas listed in OAC 10-9-2(a), including client appraisal and assessment as well as professional ethics

**OPINION 2015-187A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take. The proposed actions are to declare incomplete the applications for Licensed Marital and Family Therapist licenses of Lisa Xing, Jessica Osborn, and Ansley Watkins for lacking sufficient coursework to qualify for a license. The first lacked sufficient courses in marital and family systems theory and human development; the second lacked sufficient coursework in marital and family systems theory and treatment in marital and family therapy; the last lacked sufficient coursework in marital and family systems theory, human development, and professional studies.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2015, §§ 1925.1–1925.18, provides that applicants for licensure as Licensed Professional Counselors must complete a “master’s degree or a doctorate degree in marital and family therapy, or a content-equivalent degree,” 59 O.S.Supp.2015, § 1925.6(C)(1). The Board’s administrative rules clarify that such a degree must include courses in marital and family systems theory; treatment in marital and family therapy; human development; professional studies; research; and an internship or practicum. OAC 86:15-5-3(b)(1)–(6). The action is intended to enforce these requirements that ensure professionals who seek to practice marital and family counseling under the auspices of a state license have adequate academic credentials. Declaring the applications incomplete and allowing the applicants to finish out the required coursework is a reasonable course of action on the Board’s part.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to protect the public health and welfare by requiring licensed counselors to have adequate qualifications.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-188A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action is to deny the application of Trina Johnson for licensure as a Licensed Marital and Family Therapist. The applicant's degree lacks most of the requirements for a degree in marriage and family counseling, including theoretical courses in marital and family systems; therapy in the marital and family context; human development; and professional ethics.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2015, §§ 1925.1–1925.18, requires that an applicant for a license as a Licensed Marital and Family Therapist obtain “[a] master’s degree or a doctoral degree in marital and family therapy, or a content-equivalent degree as defined by the Board,” 59 O.S.Supp.2015, § 1925.6(C)(1). The Board’s administrative rules include several requirements for a degree in marital and family therapy or a content-equivalent degree, including that the degree have three courses in theoretical marital and family systems; three courses in therapy in the marital and family context; three courses in human development; a course in ethics and professional studies; a course in research; and a practicum or internship. OAC 86:15-5-3(b)(1)–(6). This action is intended to advance the statutory policy that applicants for licensure as a marital and family therapist have an actual academic background in marital and family therapy. The Board may reasonably believe that the dearth of coursework in relevant areas in the applicant’s transcript belies applicant’s qualifications.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require academic qualifications of licensed counseling professionals.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-188A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Behavioral Health Licensure intends to take. The proposed action is to deny the application of Trina Johnson for licensure as a Licensed Marital and Family Therapist. The applicant's degree lacks most of the requirements for a degree in marriage and family counseling, including theoretical courses in marital and family systems; therapy in the marital and family context; human development; and professional ethics.

The Marital and Family Therapist Licensure Act, 59 O.S.2011 & Supp.2015, §§ 1925.1–1925.18, requires that an applicant for a license as a Licensed Marital and Family Therapist obtain “[a] master’s degree or a doctoral degree in marital and family therapy, or a content-equivalent degree as defined by the Board,” 59 O.S.Supp.2015, § 1925.6(C)(1). The Board’s administrative rules include several requirements for a degree in marital and family therapy or a content-equivalent degree, including that the degree have three courses in theoretical marital and family systems; three courses in therapy in the marital and family context; three courses in human development; a course in ethics and professional studies; a course in research; and a practicum or internship. OAC 86:15-5-3(b)(1)–(6). This action is intended to advance the statutory policy that applicants for licensure as a marital and family therapist have an actual academic background in marital and family therapy. The Board may reasonably believe that the dearth of coursework in relevant areas in the applicant’s transcript belies applicant’s qualifications.

It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to require academic qualifications of licensed counseling professionals.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-190A**

Eric Ashmore, Executive Director  
State Board of Behavioral Health Licensure

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the State Board of Behavioral Health Licensure intends to take with respect to licensee Donald Suggs. The proposed action is to, pursuant to a consent agreement, accept the surrender of a Licensed Professional Counselor license and impose several conditions on that license's reinstatement. Those conditions include receiving a mental health assessment and complying with any recommendations from it; receiving a substance abuse evaluation and fulfilling any recommendations from it; maintaining sobriety with supporting documentation for six months prior to filing an application; undergoing counseling by a Licensed Professional Counselor until discharged with a report on fitness to practice. As part of any undertaking to practice again, licensee must also personally appear before the Board to answer questions and undergo supervision in areas including professional conduct, dual relationships, and verbal boundaries with clients.

The licensee left employment in a facility by showing up, apparently intoxicated and carrying a beer container; removing personal belongings; and sending an unprofessional message to licensee's supervisor. Licensee left in circumstances indicating dual relationships and unprofessional conduct with clients, including invitations to perform work outside the facility at licensee's home and inappropriate discussion between licensee and one client about sexual intentions of licensee toward the client.

The Licensed Professional Counselors Act, 59 O.S.2011 & Supp.2015, §§ 1901–1920, authorizes the Board to discipline Licensed Professional Counselors who “[e]ngaged in unprofessional conduct as defined by the rules established by the Board,” 59 O.S.Supp.2015, § 1912(A)(5). The Board's administrative rules state that Licensed Professional Counselors must “not participate in, condone, or be associated with dishonesty, fraud, deceit or misrepresentation” and “shall not exploit their relationships with clients for personal advantage, profit, satisfaction, or interest.” OAC 86:10-3-1. They must also “not knowingly enter into a dual relationship(s),” OAC 86:10-3-3(c), and must “not render professional services while under the influence of alcohol,” OAC 86:10-3-4(b). The Board may reasonably believe that, based on licensee's conduct, a revocation of the license as well as the conditions on reinstatement identified in the order will adequately protect counseling clients while allowing licensee to reenter the profession in the future.

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It is, therefore, the official opinion of the Attorney General that the State Board of Behavioral Health Licensure has adequate support for the conclusion that these actions advance the State of Oklahoma's policy to protect the public health and welfare by ensuring licensed counselors provide services in a professional manner.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-191A**

John W. Maile, Executive Director  
Oklahoma Used Motor Vehicle and Parts Commission

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that Oklahoma Used Motor Vehicle and Parts Commission intends to take. The proposed actions are to deny three applications for licensure—Jessie Law’s application for a used motor vehicle salesperson license and Eric Fisher’s and Lavaul Newton’s applications for manufactured home salesperson licenses—because they failed to include or produce criminal history reports from the Oklahoma State Bureau of Investigation (“OSBI”).

The used motor vehicle statutes require those seeking used motor vehicle salesperson or manufactured home salesperson licenses to submit applications on 1) “forms prescribed by the Commission” that 2) contain all information the “Commission deems necessary” to decide on the application. 47 O.S.Supp.2015, § 583(A)(1), (B)(1). The information collected by the Commission must be related to “business integrity” and “pertinent information consistent with the safeguarding of the public interest and the public welfare,” among other things. *Id.* § 583(B)(1)(b), (e). The Commission’s prescribed forms both for used motor vehicle salesperson and manufactured home salespersons state that an OSBI report must be submitted.

The action seeks to advance a statutory policy that the Commission consider an applicant’s business integrity and other information concerning the public interest and the public welfare before allowing an individual to become a licensee. The content of a criminal history containing felony convictions would be relevant under that statutory policy.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Used Motor Vehicle and Parts Commission has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public interest and the public welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-192A**

Gaylord Z. Thomas, Executive Director

December 9, 2015

Oklahoma State Board of Examiners for Long-Term Care Administrators

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma State Board of Examiners for Long-Term Care Administrators intends to take in Board case A15-027(B). The proposed action is to issue a letter of concern to the licensee, a licensed Residential Care and Assisted Living Administrator, because the licensee appears to have served as a facility administrator before completing the licensure process.

State law governing long-term care administrators provides that “[i]t shall be unlawful and a misdemeanor for any person to act or serve in the capacity as a long-term care administrator unless the person is the holder of a license or certification as a long-term care administrator, issued in accordance with the provisions of this act.” 63 O.S.2011, § 330.59. This action seeks to enforce this straightforward requirement by warning a current licensee about the potential that illegal conduct occurred before licensure. The Board may reasonably believe that a letter of concern will adequately advance statutory policies in the context of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma State Board of Examiners for Long-Term Care Administrators has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to safeguard public health and safety.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-193A**

Kathy Hart, Executive Director

December 9, 2015

State Board of Licensure for Professional Engineers and Land Surveyors

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take. The proposed action is to—pursuant to a consent order in case 2015-061—impose fines totaling \$1,500 for failing to have evidence supporting claimed completion of biannual continuing education requirements.

Oklahoma law authorizes the Board to “[e]stablish continuing education requirements for renewal of professional engineering and professional land surveyor licenses.” 59 O.S.Supp.2015, § 475.8(A)(2). The Board’s administrative rules require completion of thirty professional development hours during each biennial licensure period. OAC 245:15-11-5(a). The Board’s rules also clarify that the licensee bears the “responsibility of maintaining records to be used to support credits claimed.” OAC 245:15-11-9(a). The Board’s rules obligate licensees to maintain these records for five years because they will be subject to audits. OAC 245:15-11-9(b). This action, the result of one such audit, thus enforces administrative rules. The Board may reasonably believe that the penalties imposed here will adequately deter future violations.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare by requiring licensed professional engineers and land surveyors to learn from ongoing continuing education.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-194A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant firm in Board case 2061. The firm had performed audit services for Oklahoma-based clients without registering with the Board. The proposed action is to impose a \$500 fine and costs of \$381.96. The firm must also register before performing any more auditing services for Oklahoma-based clients.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires firms that seek to provide certain professional services in Oklahoma—including auditing—to register and obtain permits from the Board, 59 O.S.2011 & Supp.2015, §§ 15.12A(A)(5), 15.15A. The action seeks to enforce the statutory requirement. The Board may believe that a fine will deter future violations in the circumstances of this case.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-195A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency actions that the Oklahoma Accountancy Board intends to take pursuant to consent agreements with respect to certified public accountants (“CPAs”) in Board cases 2068, 2073, 2074, and 2078. The certificate holders failed to complete the required number of continuing professional education hours during the three-year period from 2012 to 2014. The proposed actions are to impose on the certificate holders a fine of \$500 each and costs ranging from \$219.24 to \$239.24 along with orders to complete the remaining number of education hours.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires all certificate holders of the board, including CPA certificate holders, to complete certain continuing professional education requirements over each three-year period, 59 O.S.2011, § 15.35(C). This requirement ensures that those practicing public accounting understand changes in applicable rules and continue to have up-to-date information and skills necessary to properly report financial information. The actions seek to enforce the statutory requirement while allowing registrants who have failed to complete the required hours to continue practicing while coming into compliance. The Board may believe that a fine along with orders to complete remaining hours will effectively deter future lapses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that these actions advance the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-196A**

Randall A. Ross, Executive Director  
Oklahoma Accountancy Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Accountancy Board intends to take pursuant to a consent agreement with respect to a certified public accountant (“CPA”) in Board case 2077. The certificate holder failed to complete the required number of continuing professional education hours during the three-year period from 2011 to 2013 and again from 2012 to 2014. The proposed action is to impose on the certificate holder a fine of \$1,000 and costs of \$239.24 along with an order to complete the remaining number of education hours.

The Oklahoma Accountancy Act, 59 O.S.2011 & Supp.2015, §§ 15.1–15.38, requires all certificate holders of the board, including CPA certificate holders, to complete certain continuing professional education requirements over each three-year period, 59 O.S.2011, § 15.35(C). This requirement ensures that those practicing public accounting understand changes in applicable rules and continue to have up-to-date information and skills necessary to properly report financial information. The action seeks to enforce the statutory requirement while allowing a registrant who has failed to complete the required hours to continue practicing while coming into compliance. The Board may believe that a fine along with orders to complete remaining hours will effectively deter future lapses.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Accountancy Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to promote the reliability of information used in the assessment of enterprises.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-197A**

Kathy Hart, Executive Director  
State Board of Licensure for Professional Engineers  
and Land Surveyors

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take with respect to professional engineer application 25025. The proposed action is to deny the application because the applicant has had five convictions for driving under the influence of an intoxicant, the most recent in 2012. All Board members stated that the application would be accepted if applicant had had no convictions within the last five years.

Oklahoma law requires that, to be qualified for licensure as a professional engineer, an applicant must be “of good character and reputation.” 59 O.S.Supp.2015, § 475.12(A). The statutes also clarify that the Board may deny an application for licensure if an applicant displays “[h]abitual intoxication or addiction to the use of alcohol or to the illegal use of a controlled dangerous substance.” *Id.* § 475.18(A)(13). The Board may reasonably believe that the applicant’s serial criminal convictions involving alcohol do not bespeak professionalism adequate for licensure, and the Board’s position that having no convictions for five years would suffice to reduce the possibility of unprofessional or unsafe conduct is reasonable.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public welfare in the licensure of public engineers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-198A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to suspend the license of licensee 13081CGA for failure to pay an annual fee when due.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to issue certificates to individuals who wish to engage in real estate appraisal, *id.* §§ 858-704(A), 858-706(B)(3). Each of these certificates lasts for three years and automatically expires at the end of the term if the certificate holder takes no action to renew the certificate. 59 O.S.2011, § 858-714. However, during the life of the certificate, the holder must pay annual registry fees. 59 O.S.Supp.2015, § 858-708; OAC 600:10-1-18. The Board allows certificate holders to surrender the certificate prior to its expiration if they no longer wish to pay these annual fees. OAC 600:10-1-12(a). The action seeks to enforce the requirement that certificate holders pay annual fees to continue to enjoy the privileges granted under the certificate. Payment of these fees may allow professional regulation to be funded by regulated professionals rather than out of the public fisc.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to collect annual fees from licensed professionals.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-199A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to, pursuant to a consent order, require that licensee 11071CGA only prepare residential property appraisals until completion of four courses—one course each on the sales comparison, site valuation and cost, and income approach to valuation along with one course on market analysis and the highest and best use of property. The appraiser prepared two commercial property appraisals that, among other things, used comparison sales with no adjustment when applying valuations to subject properties; relied on clearly incorrect math with respect to weighted comparisons; and had no supporting data on information used for various cost estimates or lease comparisons.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to discipline licensees who violate “any of the standards for the development . . . of real estate appraisals as provided” in the Act, those who “violat[e] any of the provisions of the” Act, and those who violate “any of the provisions in the code of ethics set forth in” the Act, 59 O.S.Supp.2015, § 858-723(C)(6), (9), (13). The Act requires adherence to “the current edition of the Uniform Standards of Professional Appraisal Practice,” 59 O.S.2011, § 858-726, which is 2014-2015 edition of the Uniform Standards of Professional Appraisal Practice (“USPAP”).

USPAP contains a COMPETENCY RULE that requires an appraiser to have competence before preparing a report. USPAP U-11. USPAP also contains standards such as Standard 1, which requires the appraiser to “complete research and analyses necessary to produce a credible appraisal.” USPAP U-16. Components of Standard 1 clarify that this means the appraiser must understand and correctly employ correct appraisal methods; identify characteristics of the property and objectives in the appraisal; and, for market value appraisals, identify all sales and agreements on the property. USPAP U-16–U-18, U-20.

The action seeks to enforce the requirements of professionalism embodied in the Act and in USPAP. The Board may reasonably believe that, by limiting licensee’s practice to residential appraisals and requiring additional education before preparation of any more commercial appraisal reports, future violations will be prevented and this professional can be returned to full practice.

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It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma's policy to uphold standards of professionalism among real estate appraisers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-200A**

Chris Ferguson, Executive Director  
Oklahoma Funeral Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Funeral Board intends to take with respect to complaint 16-05. The complaint involved a situation where a funeral establishment failed to pay a vendor within 90 days on funeral-related merchandise contracted for by families. The proposed action is to issue a letter of concern after the licensee paid the vendor during the investigation.

The Funeral Services Licensing Act, 59 O.S.2011 & Supp.2015, §§ 395.1–396.33, authorizes the Board to “[p]romulgate rules of conduct governing the practice of licensed funeral directors, embalmers, funeral establishments, and commercial embalming establishments and sale of funeral service merchandise,” 59 O.S.2011, § 396.2a(13). The Act authorizes the Board to discipline licensees for violations of such rules, *see* 59 O.S.Supp.2015, § 396.12c(8). Those rules declare it to be a “prohibited act” to “[f]ail[] to pay any vendor or third party obligation, within 90 days, that arises” out of an authorized transaction, OAC 235:10-7-2(9); *see also* OAC 235:10-11-1(d)(1). The action seeks to recognize the possibility that a violation occurred in this case while recognizing that it was remedied upon being brought to the licensee’s attention. The Board may reasonably believe that, in the circumstances of this case, a letter of concern will adequately deter future violations.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Funeral Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to protect the public health and welfare.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-201A**

Christine McEntire, Director  
Oklahoma Real Estate Appraiser Board

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the Oklahoma Real Estate Appraiser Board intends to take. The proposed action is to, pursuant to a consent order, require that licensee 11411CRA complete three courses in residential appraisal report preparation by June 2, 2016. The action would then impose probation terms including reports on appraisal activities for three months after completion of those courses. The action is a response to three complaints filed after the Board reviewed reports on appraisal activities generated during a prior probationary period.

The first complaint involved an appraisal report with numerical errors and a lack of adequate analysis in several places, particularly in adjustment of values from comparable properties. The second complaint involved an appraisal report with numerical errors, a lack of analysis on the best use of the property, and a confusion of two comparable properties. The third complaint involved almost no analysis of a 400 square foot basement, numerical errors, and inadequate analysis of comparable properties.

The Oklahoma Certified Real Estate Appraisers Act, 59 O.S.2011 & Supp.2015, §§ 858-700–858-732, authorizes the Oklahoma Real Estate Appraiser Board to discipline licensees who violate “any of the standards for the development . . . of real estate appraisals as provided” in the Act, those who “[f]ail[] or refus[] without good cause to exercise reasonable diligence in developing an appraisal,” and those who display “[n]egligence or incompetence in developing an appraisal,” 59 O.S.Supp.2015, § 858-723(C)(6), (7), (8).

The action seeks to ensure that real estate appraisers maintain standards of diligence and professionalism, which is particularly important when appraisals will be relied upon by financial institutions extending credit. The Board may reasonably believe that, by offering licensee the opportunity to obtain additional education and then filing reports on appraisals after that education, the weaknesses in licensee’s appraisals may be corrected.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Real Estate Appraiser Board has adequate support for the conclusion that this action advances the State of Oklahoma’s policy to uphold standards of professionalism among real estate appraisers.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-202A**

Kim Glazier, Executive Director  
Oklahoma Board of Nursing

December 9, 2015

This office has received your request for a written Attorney General Opinion regarding agency action to be taken under the auspices of the Oklahoma Board of Nursing with respect to T.E., a licensed practical nurse. The licensee submitted a \$75 fee with a renewal application on July 30, 2015, but afterwards the Board received a notification from the State Treasurer that the licensee's financial institution did not honor the transaction. Given that the payment was due several months ago, that the payment was ultimately not honored by the financial institution, and that Board staff have attempted to contact licensee several times, the proposed action is to now suspend the license.

The Oklahoma Nursing Practice Act, 59 O.S.2011 & Supp.2015, §§ 567.1–567.20, requires the Executive Director of the Board to “suspend the license or certificate of a person who submits a check, money draft, or similar instrument for payment of a fee which is not honored by the financial institution named,” 59 O.S.2011, § 567.7(E). This action seeks to apply this straightforward requirement with respect to the payment of licensee.

It is, therefore, the official opinion of the Attorney General that the Oklahoma Board of Nursing has adequate support for the conclusion that this action advances the State of Oklahoma's policy of suspending the license of a nurse who submits payment not honored by a financial institution.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

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**OPINION 2015-203A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

December 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take pursuant to a consent agreement in Board case 0215-22. The proposed action is to require the respondent licensee, a licensed osteopathic physician, to complete an eight-hour ethics course and pay a fine of \$1,500 within one year; undergo an assessment with Oklahoma Health Professionals Program, a drug and alcohol treatment program, and submit to a five-year contract if that program determines it necessary; and deliver a copy of the discipline to any employer or potential employer while it remains in effect.

The licensee had failed to disclose prior discipline by a licensing board in the licensee's original application for licensure in 2010; failed to timely renew a license and practiced without a license for several weeks in 2013, including by performing surgeries and prescribing controlled dangerous substances; and was arrested for driving under the influence of alcohol in early 2015 after several prior alcohol-related criminal convictions.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline licensees who “obtain[] a license . . . through fraud, deception, misrepresentation, or bribery,” 59 O.S.2011, § 637(A)(1). The Act also authorizes the Board to discipline those who are “guilty of habitual drunkenness, or habitual addiction to the use of morphine, cocaine or other habit-forming drugs,” *id.* § 637(A)(12), and it declares it unlawful to engage in the practice of osteopathic medicine without a license, 59 O.S.Supp.2015, § 622(A)(1).

The action seeks to enforce these requirements. Requiring full disclosure of prior disciplinary actions and prohibiting misrepresentation through the failure to make such disclosures ensures that the Board has full information about risks of future violations that could impact the health and safety of Oklahomans. Similarly, the ability to discipline physicians with alcohol abuse problems prevents compromised osteopathic medical practice that could harm the public. Finally, requiring that the practice of osteopathic medicine occurs only by licensed individuals ensures that the Board may use its expertise and oversight to ensure such services meet a minimum standard of care. The Board may reasonably believe that educational requirements, a fine, and alcohol abuse treatment will adequately protect the public from compromised medical care and deter future violations.

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continued . . . . .

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public welfare and adequately regulate the practice of osteopathic medicine.

E. SCOTT PRUITT

ATTORNEY GENERAL OF OKLAHOMA

**OPINION 2015-204A**

Deborah J. Bruce, J.D., Executive Director  
State Board of Osteopathic Examiners

December 29, 2015

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Osteopathic Examiners intends to take in Board case 0413-40. The proposed action is to impose a five-year term of probation and fines of \$10,420 on a licensed osteopathic physician. The terms of probation include a restriction on the licensee's ability to administer, prescribe, or dispense controlled dangerous substances; a requirement that licensee complete eight-hour courses in prescribing controlled dangerous substances and medical record keeping; quarterly appearances before the Board for twelve months; close monitoring by Board staff; and delivery of a copy of the disciplinary order to potential employers. Evidence showed that the licensee had overprescribed controlled dangerous substances to several patients over a period of several years.

The Oklahoma Osteopathic Medicine Act, 59 O.S.2011 & Supp.2015, §§ 620–645, authorizes the Board to discipline licensees who “dispens[e], prescrib[e], administer[] or otherwise distribut[e] any drug, controlled substance or other treatment . . . for other than [a] medically accepted therapeutic or experimental or investigational purpose,” 59 O.S.2011, § 637(A)(2)(g). The Board's administrative rules also prohibit the “[i]ndiscriminate or excessive prescribing, dispensing or administering [of] controlled dangerous drugs.” OAC 510:5-7-1(1). The action seeks to enforce these requirements, which ensure that a licensee's osteopathic medical practice serves legitimate therapeutic needs and does not endanger public health. The Board may reasonably believe that probationary terms and a fine will adequately prevent and deter future violations.

It is, therefore, the official opinion of the Attorney General that the State Board of Osteopathic Examiners has adequate support for the conclusion that this action advances the State of Oklahoma's policy to protect the public welfare and adequately regulate controlled substances.

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA



# APPENDICES

# RULEMAKING UNDER THE OKLAHOMA ADMINISTRATIVE PROCEDURES ACT

Updated by Janis W. Preslar, Deputy 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.2015, §§ 250 – 308a, 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 I<sup>1</sup> 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>.

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

<sup>1</sup> 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.2015, § 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 or 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](http://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 <https://www.ok.gov/state/filings/logout.php>. 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 reference . . . .<sup>2</sup>

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<sup>2</sup> 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.2015, § 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.2015, § 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 via the State Online Filing System the regulatory text and the agency rule report to the Governor, the Speaker of the House and the President Pro Tempore of the Senate, as well as to the Office of Administrative Rules. (If the agency cannot file electronically, the agency can submit two copies of the regulatory text of its rules and two copies of the agency rule report to the Governor and 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.

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.2015, § 308(A)(1). If the rules are received after April 1, the Legislature 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.2015, § 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.2015, § 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.2015, § 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 of 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. 75 O.S.Supp.2015, § 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 two paper copies of the Governor's written approval, the emergency rule document and the format approved pages and one compact disc of the emergency rule document.

### **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 2015 OPINIONS**

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# 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, POSTAL, OR HAND DELIVERY:**

**421 NW 13TH STREET, STE 220,**

**OKLAHOMA CITY, OK 73103**

**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](https://www.sos.ok.gov/forms/oar/checklist_per.pdf) and [https://www.sos.ok.gov/forms/oar/checklist\\_eme.pdf](https://www.sos.ok.gov/forms/oar/checklist_eme.pdf).

**ALL FILINGS EXCEPT PERMANENT RULE DOCUMENTS**  
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September 15, 2015 . . . . .	August 25, 2015 . . . . .	September 1, 2015
October 1, 2015 . . . . .	September 8, 2015 . . . . .	September 15, 2015
October 15, 2015 . . . . .	September 25, 2015 . . . . .	October 1, 2015
November 2, 2015 . . . . .	October 8, 2015 . . . . .	October 15, 2015
November 16, 2015 . . . . .	October 23, 2015 . . . . .	October 30, 2015
December 1, 2015 . . . . .	November 6, 2015 . . . . .	November 13, 2015
December 15, 2015 . . . . .	November 25, 2015 . . . . .	December 1, 2015
January 4, 2016 . . . . .	December 8, 2015 . . . . .	December 15, 2015
January 15, 2016 . . . . .	December 23, 2015 . . . . .	December 31, 2015
February 1, 2016 . . . . .	January 8, 2016 . . . . .	January 15, 2016
February 16, 2016 . . . . .	January 25, 2016 . . . . .	February 1, 2016
March 1, 2016 . . . . .	February 8, 2016 . . . . .	February 12, 2016
March 15, 2016 . . . . .	February 25, 2016 . . . . .	March 1, 2016
April 1, 2016 . . . . .	March 8, 2016 . . . . .	March 15, 2016
April 15, 2016 . . . . .	March 25, 2016 . . . . .	April 1, 2016
May 2, 2016 . . . . .	April 8, 2016 . . . . .	April 15, 2016
May 16, 2016 . . . . .	April 25, 2016 . . . . .	April 29, 2016
June 1, 2016 . . . . .	May 6, 2016 . . . . .	May 13, 2016
June 15, 2016 . . . . .	May 25, 2016 . . . . .	June 1, 2016
July 1, 2016 . . . . .	June 8, 2016 . . . . .	June 15, 2016
July 15, 2016 . . . . .	June 24, 2016 . . . . .	July 1, 2016
August 1, 2016 . . . . .	July 8, 2016 . . . . .	July 15, 2016
August 15, 2016 . . . . .	July 25, 2016 . . . . .	August 1, 2016
September 1, 2016 . . . . .	August 8, 2016 . . . . .	August 15, 2016

<sup>1</sup> 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.

<sup>2</sup> 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.

OFFICE OF ADMINISTRATIVE RULES (OAR)  
SECRETARY OF STATE  
IA, POSTAL OR HAND DELIVERY:  
421 NW 13TH STREET, STE 220  
OKLAHOMA CITY, OK 73103  
405-521-4911  
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**REGISTER PUBLICATION DATES AND FILING DEADLINES**

**PERMANENT RULE DOCUMENTS  
(FINALLY ADOPTED RULES)<sup>1</sup>**

***THE OKLAHOMA REGISTER***

**VOLUME 33, NUMBERS 1 THROUGH 24**

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*FILING DEADLINES*

<b><u>PUBLICATION DATE</u></b>	<b><u>Submission by</u><sup>2</sup></b>	<b><u>Acceptance by</u><sup>3</sup></b>
May 16, 2016 . . . . .	April 15, 2016 . . . . .	May 2, 2016
June 1, 2016 . . . . .	April 29, 2016 . . . . .	May 16, 2016
June 15, 2016 . . . . .	May 13, 2016 . . . . .	June 1, 2016
July 1, 2016 . . . . .	May 25, 2016 . . . . .	June 15, 2016
July 15, 2016 . . . . .	June 1, 2016 . . . . .	July 1, 2016
August 1, 2016 . . . . .	June 8, 2016 . . . . .	July 15, 2016
August 15, 2016 . . . . .	June 15, 2016 . . . . .	August 1, 2016
September 1, 2016 . . . . .	August 8, 2016 . . . . .	August 15, 2016

<sup>1</sup> 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 Janis W. Preslar, Deputy 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.

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\* 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 2016, notice must be filed by December 15, 2015). 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;<sup>1</sup>
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,

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<sup>1</sup> 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.<sup>2</sup>

<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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.Supp.2015, § 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.Supp.2015, § 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.Supp.2015, § 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.Supp.2015, § 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 site. *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.2015, § 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.

***A.G. OPIN. 2015-8:***

Provisions of the Open Meeting Act are not applicable to the Workers’ Compensation Commission’s oral deliberations. In acting as an appellate tribunal, the Commissioners are exercising the judicial power of the State and acting in a quasi-judicial capacity; therefore, the Commissioners pre-decisional deliberations considered in the exercise of their judicial power are protected by the deliberative process privilege because confidential deliberations are an essential component of this decision-making process.

# PUBLIC RECORDS IN OKLAHOMA

Updated by Janis W. Preslar, Deputy 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.2015, §§ 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.2015, § 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.

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\* 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 a private 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.2015, § 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.2015, § 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.2015, § 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.2015, § 24A.3(1).

## 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 In-

vestigations 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.2015, §§ 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)). In *Oklahoma Public Employees Ass'n v. State ex rel. Oklahoma Office of Personnel Management*, 267 P.3d 838 (2011), the Oklahoma Supreme Court said disclosure of state employees' birthdates and identification numbers would be an "unwarranted invasion of personal privacy," so as to be exempt from disclosure, because the information sought served no valid public interest in ensuring the government was properly performing its function and disclosure would expose employees to identity theft and could provide access to other exempt information.

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).

### **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.2015, § 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.

Audio and video recordings from recording equipment attached to law enforcement vehicles (dash cams), and some audio and video recordings from recording equipment attached to 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 or a dead body, unless the death was effected by a law enforcement officer; nudity; the identify of a minor under 16 years of age; great bodily injury, unless effected by a law enforcement officer; non-public, personal medical information; certain persons entitled to the assertion of a privilege under Title 43A of the Oklahoma Statutes; or personal information of a person not arrested, cited, charged, or issued a written warning. 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.

#### **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.Supp.2015, § 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, the Oklahoma Film and Music Office, and institutions within the Oklahoma State System of Higher Education, unless the person or entity submitting the information consents to disclosure. *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.2015, § 24A.23. This limited protection does not apply to information voluntarily provided by persons for promotional purposes by the Wildlife Department.

This statute requires the Wildlife Department to disclose an antler description of each deer harvested, by county, 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.2015, § 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 DELIBERATIVE 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*, 343 P.3d 1273 (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, 343 P.3d at 1277.

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, 343 P.3d at 1278. 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, 343 P.3d at 1278.

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, 343 P.3d at 1278.

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, 343 P.3d at 1279.

### 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. 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 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.Supp.2015, § 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.Supp.2015, § 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.2015, § 24A.29. A party may seek a protective order directing the withholding or removal of pleadings and other information from a public record. In granting a protective order for court records, a court must provide a compelling reason for withholding such records from public access. 51 O.S.Supp.2015, § 24A.29; *Ober v. State of Oklahoma ex rel. Department of Public Safety*, \_\_\_ P.3d \_\_\_, 2015 WL 9659627 (April 6, 2015) The party or counsel who has received the protective order is responsible for presenting the order to the appropriate personnel for action. 51 O.S.Supp.2015, § 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). This remedy is not an exclusive one. A party aggrieved by the sealing of a record may file a petition in a district court, setting forth a course of action. *Shadid v. Hammond*, 315 P.3d 1008 (Okla. 2013).

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. 51 O.S.2011, § 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.

***A.G. Opin. 2015-2:***

The State Treasurer has authority to maintain the confidentiality of holder reports and certain claimant information under the Unclaimed Property Act, and, under the Open Records Act, may maintain as confidential litigation files, investigatory reports, and any other information where confidentiality would be allowed or required by law.

***A.G. Opin. 2015-3:***

Written requests for the issuance of a formal written Attorney General Opinion made by a member of the Legislature or another public official is a record under the Open Records Act and available for public inspection, copying, or mechanical reproduction.



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# Cumulative Opinions Construed 1968 – 2015

## 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 – 2015

Opinion	Construed	Cited In
14-15	(O)	<i>Edwards v. Bd. of County Comm'rs</i> , 2015 OK 58
13-21	(W)	2015-5
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 &amp; 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 &amp; 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

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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
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)

<b>Opinion</b>	<b>Construed</b>	<b>Cited In</b>
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)
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

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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
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)

<b>Opinion</b>	<b>Construed</b>	<b>Cited In</b>
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
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74-149	(OI)	<i>Musgrove Mill, LLC v. Capitol-Med. Ctr. Improvement</i> , 2009 OK 19 (Okla. 2009)
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74-190	(W)	81-148
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74-229	(W)	81-7
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73-143	*	75-291
73-158	(W)	84-126
73-177	(M)	76-324
73-289	*	See 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 see 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

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71-403	*	<i>See</i> 83-120
71-422	(W)	80-223
71-425	(W)	99-66
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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)
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
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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
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67-200	(M)	77-151
67-295	(W)	68-329
67-331	(PW)	71-170
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67-348	(M)	83-236
67-377	(W)	68-102
67-392	(W)	69-203
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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
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</i> 75-291
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8/4/58	(W)	71-244
5/11/57 to R.F. Barry	(W)	70-161
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2/16/56	(M)	76-182
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