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TO: All School Boards, City and Town Boards and County Boards and Assistant District Attorneys

FROM: Robert E. Christian, District Attorney

RE: "Open Meeting Act"

Many questions continue to be asked about the "Open Meeting Act" as it involves public entities. Daily, I am asked to interpret the validity of various activities pursuant to the "Open Meeting Act".

Any discussions involving the Open Meeting Act of the State of Oklahoma must begin with the purpose of the legislation.

When the Act was first passed it was popularly known as the "Sunshine Law." Specific language was included in **25 O.S. §302** which reads as follows:

> "It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems."

The Oklahoma Court of Criminal Appeals in the case of **Order Declaring Annexation Dated June 28, 1978, Issued by Fraizer, 637 P.2d 1270 (Okl.Cr.1981)** reviewed a case involving what the Appellees described as "insignificant" or "immaterial" technical violations in, in such, they held, in-part, as follows:

> "Essentially, appellees ask us to wink at these Open Meeting Act violations. This we will not do, for to wink at violations in one case is to invite them in another. The Oklahoma Legislature, elected voice of the people of this state, mandated open meetings, including observance of the notice

> and agenda provisions. We in the judiciary are bound to honor that mandate. As appellant's counsel points out, without vigorous enforcement in the courts, laudable legislation is reduced to "mere words". Well, not this laudable legislation, not in this Court, not in this case. The Legislature has said, "Let the sun shine on government." So say we today. **637 P.2d 1270 (Okl.Cr.1981)**

I discuss the purpose of the Legislation first so that it is very plain that violating actions are not dismissed solely because they are technical violations. The principle is very simply: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State **(Town of Palm Beach v. Gradison, 294 So.2d 473 (Fla. 1974)**

With this said, I searched the opinions and treatises of this state concerning the "Open Meeting Act" and found the attached paper prepared by Assistant Attorney General Rabindranath Ramana in 1992. This paper provides an excellent discussion on the "Open Meeting Act."

I have also enclosed a paper by Assistant Attorney General Victor Bird concerning the "Open Records Act."

Both documents should be mandatory reading for all public officials, boards and commissions.

Also, one should update their copies of the "Open Meeting Act" and the "Open Records Act" each year.

After reading these papers and the legislation itself, you have any specific questions then please let me know and I will address them.

If I may be of further assistance in this matter then please let me know.

Sincerely,

Robert E. Christian

Appendices

OKLAHOMA'S OPEN MEETING ACT

Rabindranath Ramana

"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."[1] That critique of invisible government underlies Oklahoma's Open Meeting Act, 25 O.S.1991, §§ 301 et seq., as amended; a series of statutes enacted "to encourage and facilitate an informed citizenry's understanding of governmental processes and governmental problems."[2]

In pursuit of this democratic aim, the Open Meeting Act 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) to refrain from holding informal gatherings of a majority of board members in which public business is conducted or discussed.

The Act also provides that the 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 paper 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 contrasting approaches to interpreting and applying the Act will be briefly discussed.

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[1] Lippman, *A Preface to Politics*, (1914).
[2] 25 O.S.1991, § 302

I. TWO VIEWS OF THE ACT: BROAD AND TECHNICAL

The Act's provisions, case law, and Attorney General Opinions suggest two contrasting but 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. 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 void.

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 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, 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;
   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.[3] Similarly, student government associations may fit the statutory definition of a public body.[4]

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.[5] 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.[6]

This "decision-making" test for committees and subcommittees has been applied by courts and Attorneys 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.[7] 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.[8]

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.[9]

A case-by-case approach is required in order 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

[3] Okla. A.G. Opin. 80-215

[4] Okla. A.G. Opin. 79-134

[5] *Andrews v. Independent School Dist. No. 29*, 737 P.2d 929 (Okla. 1987); *International Association of Firefighters v. Thorpe*, 632 P.2d 408 (Okla. 1981); *Sanders v. Benton*, 579 P.2d 815 (Okla. 1978)

[6] *Andrews*, 737 P.2d at 931.

[7] *Andrews*, 737 P.2d at 931.

[8] *Sanders*, 579 P.2d at 819-21.

[9] Okla. A.G. Opin. 84-53.

several statutory exceptions to the definition of public body under the Act. These statutory exceptions include:

1. The state legislature;
2. The state judiciary;
3. Administrative staffs of public bodies;
4. Administrative agencies headed by a single officer, for example, the State Insurance Commission, the State Auditor and Inspector's Office, and the Attorney General's Office.

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."[10]

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 any gathering where a majority of the body's members are personally present and conducting business. Moreover, the "conduct of business" includes not only the taking of official action, but the entire decision-making process in which the public body is engaged, including mere discussion and deliberation when no final action is taken.[11] As a result, informal gatherings of a majority of members of a public body trigger the requirements of the Act whenever public business is discussed.

This expansive 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 kind of authority that it has. That conclusion follows from the Act's definition of the term "meeting," for if a majority of board members come together as part of a committee, they will, in all likelihood, discuss public business when they are personally present together. By so coming together, the majority of members on the committee will have held a meeting, and as a result, all of 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

[10] 25 O.S.1991, § 304(2).
[11] Okla. A.G. Opin. 82-212.

Meeting Act should not give that committee-decision making authority and should not appoint a majority of its members to that committee.

III. BEFORE THE MEETING—NOTICE AND AGENDA REQUIREMENTS

The Open Meeting Act imposes two general requirements upon public bodies prior to the holding of public meetings. First, the public body must provide to specific public record keepers notice of the time, place, and date that the meetings will be held. This notice must be provided with 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; (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, 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;
6. *Public bodies under the auspices of an institution of higher learning but which 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.[12]

The second factor, the kind of meeting, determines when notice must be given. In this context, the Act creates four 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:

[12] 25 O.S.1991, § 311.

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 15th of the preceding year. (e.g., for all regularly scheduled meetings planned for 1992, notice must be filed by December 15, 1991). The Act allows the date, place, or time of a regularly scheduled meeting to be changed after December 15th. 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. *Special meetings*—Under the Act, a special meeting is "any meeting of a public body other than a regularly scheduled meeting or an emergency meeting." 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 48 hours prior to the meeting.

3. *Emergency meetings*—Under the Act, an emergency meeting is defined as any meeting called for the purpose of dealing 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 notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss." For these kinds of meetings, a public body must give only what advance public notice is reasonable under the circumstances. However, although there is no absolute requirement of any kind of notice for an emergency meeting, the giving of some sort of notice should be attempted if at all possible.

4. *Continued or Reconvened Meetings*—these are meetings conducted for the purpose of finishing business appearing on an agenda of a previous meeting. 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.[13]

B. Notice to the Public and Agendas

The Open Meeting Act also requires that, for all kinds of meetings except emergency meetings, the date, time and place of the meeting and the agenda for the meeting must be posted at least 24 hours prior to 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 the meeting if no office exists."[14] The 24 hour time

[13] 25 O.S.1991, § 304 and 25 O.S.Supp.1992, § 311.
[14] 25 O.S.1991, § 304 and 25 O.S.Supp.1992, § 311(9).

limit excludes Saturdays, Sundays and legal holidays. As a result, notice and agenda for a meeting at 10:00 a.m. on Monday must be posted by 10:00 a.m. on the preceding Friday.

No provision of the Act, judicial decision, or Attorney General Opinion sets forth precisely what information must be contained in an agenda. However, 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." In addition, "the language used should be simple, direct and comprehensible to a person of ordinary education and intelligence."[15]

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 on whether to approve employment contract for Teacher X;" "Discussion and vote on whether to approve warrants 1–10," "discussion and vote on 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. App. 1981), a local school board posted an agenda describing the matters to be considered at a meeting as follows:

1. Appoint new board member
2. Interview new administrator
3. Hire principal

At the subject meeting, the board hired a new school superintendent. The *Haworth* Court found that the board's hiring of the superinten-

[15] *Andrews v. Independent School Dist.* No. 29, 737 P.2d 929, 931 (Okla. 1987); *Haworth Board of Education v. Havens*, 637 P.2d 902, 904 (Okla. App. 1981).

dent was invalid under the Open Meeting Act. It reasoned that the distinction between "interviewing" and "hiring" in agenda items 2 and 3 could have reasonably led a citizen to conclude that, at the subject meeting, the board would only interview administrators and only hire principals. By failing to follow its posted agenda, the board rendered its action invalid.

Haworth illustrates the problems that may occur if agendas are prepared carelessly. Close attention is needed to insure 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.

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 reported 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.[16]

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 "in all meetings of public bodies, the vote of each member must be publicly cast and recorded." The following section, 306, provides that "no informal gatherings or any electronic or telephonic communications among the majority of 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 the taking of board action by means other than a publicly cast and recorded vote. Thus, members of a public body may not submit votes by mail.[17] Similarly, one member of a public body may not delegate his or her vote to another member by proxy.[18] One board member may also not meet individually with other members in order to obtain their signatures on a docu-

[16] *Rogers v. Excise Board of Greer County*, 701 P.2d 754, 760-61 (Okla. 1984).
[17] Okla. A.G. Opin. 80-144.
[18] Okla. A.G. Opin. 82-7.

ment that could be used to take board action that would otherwise require the vote of a majority of members.[19] In the words of a 1981 Attorney General Opinion, "Permitting a single member of the governing body to obtain a consensus or vote of that body by privately meeting alone with each member would condone decision-making by public bodies in secret, which is the very evil against which the Open Meeting Act is directed."[20]

The Supreme Court of Oklahoma has held that the Act's requirement regarding the public casting and recording of votes applies to the initiation of legal actions by public bodies. In *Berry v. Board of Governors of Registered Dentists*, 611 P.2d 629 (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 has opined:

> 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. . . . For example, executive sessions between public bodies and their attorneys are allowed in order to further the public's interest in protecting public property and public rights involved in litigation.[21]

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[19] Okla. A.G. Opin. 81-315.
[20] Okla. A.G. Opin. 81-315.
[21] Okla. A.G. Opin. 82-114.

Section 307 of the Act expressly states that "no public body shall hold executive sessions unless otherwise specifically provided for herein." Section 307 proceeds to set forth seven reasons justifying the use of executive sessions:

1. For the purpose of discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee;
2. For the purpose of discussing negotiations concerning employees and representatives of employee groups;
3. For the purpose of discussing the purchase or appraisal of real property;
4. For the purpose of 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 the 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 his 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.[22]

Certain other statutes concerning particular public bodies set forth additional reasons justifying executive sessions for those public bodies.[23]

In light of the Act's presumption against executive sessions, these statutory justifications must be read narrowly. Thus, the first reason set forth above authorizes executive sessions not for all employment

[22] *See*, 25 O.S.Supp.1992, § 307.

[23] *See* 10 O.S.1991, § 1116.2 (executive sessions for Deprived Child Review Board); 59 O.S.1991, § 1609 (executive sessions for Board of Examiners for Speech Pathology and Audiology); 63 O.S.Supp.1991, § 2-104.1 (executive sessions for Oklahoma State Bureau of Narcotics & Dangerous Drug Control Commission); 70 O.S.1991, § 5-118 (executive sessions for boards of education); 74 O.S.1991, § 150.4 (executive sessions for Board of Directors of the Oklahoma Center for Advancement of Science & Technology), 74 O.S.1991, § 4207 (executive sessions for Oklahoma Council on Campaign Compliance & Ethical Standards) 74 O.S.1991, § 5061.6 (executive sessions for Board of Directors of Oklahoma Development & Finance Authority).

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 seven 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 also provides that no executive session may be held unless a majority of a quorum of members present at an open meeting vote to do so. 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, "until a motion is made and a vote taken in a public meeting, there can be nothing but a proposal to have an executive session."[24] 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 such that a citizen may ascertain from the agenda what matters will be discussed at the proposed executive session.

Moreover, in 1992, the Legislature amended the Open Meeting Act such that agenda items announcing that an executive session will be proposed must "state specifically the provision of Section 307 . . . authorizing the executive session."[25] The Legislature also provided that a willful violation of the Act's executive session provisions will: (a) subject such member of the public body to criminal sanctions; and (b) "cause the minutes and all other records of the executive session including tape recordings to be immediately made public."[26]

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

1. Posting an agenda item referring to a "proposed executive session to discuss the possible demotion of Laura Palmer,"

[24] Okla. A.G. Opin. 82-114.
[25] 25 O.S.Supp.1992, § 311(B)(2)(c).
[26] 25 O.S.Supp.1992, § 307(F).

and citing 25 O.S.1991, § 307(B)(1) as the statutory authority for the executive session.

2. A vote in open session to hold an executive session (to have an executive session, a majority of a quorum of board members must vote to convene in 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 Laura Palmer's demotion.

D. Minutes

Section 312 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 further states that these minutes shall be "an official summary of the proceedings." Minutes must contain the following information:

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;
4. All actions taken by the public body.[27]

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.

Section 312 leaves public bodies with a great deal of latitude as to the specificity of minutes kept. Verbatim transcripts of discussions at open meetings are neither required nor forbidden. Conversely, nothing in section 312 requires or forbids minutes to contain only a brief summary of board proceedings—as 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?[28]

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[27] 25 O.S.1991, § 312.

[28] *See, Haworth Board of Education v. Havens*, 637 P.2d 902, 904 (Okla. App. 1981).

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 citizen 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 v. Board of Governors of Registered Dentists*, the Supreme Court expressly stated that the Act's allowance for executive sessions "does not abrogate the statutory requirement that minutes be kept and recorded."[29]

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 need not be disclosed to the public.[30]

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 [of an agenda]."[31] All that is necessary to allow the consideration of such matters is the timely posting of an agenda containing an item called "new business."

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[29] *Berry v. Board of Governors of Registered Dentists*, 611 P.2d 628, 632 (Okla. 1980).
[30] 51 O.S.1991, § 24A.5.1b.
[31] 25 O.S.1991, § 311(9).

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 so 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.[32]

G. Recording Meetings

In 1992, the Legislature amended the Act to provide 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 amendment does limit the right to record meetings by providing that "such recording shall not interfere with the conduct of the meeting."[33]

V. PENALTIES

Section 313 of the Act states that "any action taken in willful violation of this Act shall be invalid." In order 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.[34] In deter-

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[32] 25 O.S.1991, § 311(10).

[33] 25 O.S.Supp.1992, § 312(C).

[34] *Rogers v. Excise Board of Greer County*, 701 P.2d 754, 760-61 (Okla. 1989); *Matter of Order Declaring Annexation*, 637 P.2d 1270, 1275 (Okla. App. 1981).

mining what constitutes a willful violation, some Oklahoma courts have dispensed with any consideration of the mental state of the public officials in question. For these courts, 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.[35]

Section 314 establishes a criminal penalty for willful violations of the Act. It states:

> Any person or persons willfully violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment in the county jail for a period not exceeding one year or by both such fine and imprisonment.

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 the filing of notice to the posting of an agenda, the holding of 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.[36]

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.

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[35] *Haworth Board of Education v. Havens*, 637 P.2d 902, 904 (Okla. App. 1981).
[36] Okla. A.G. Opin. 81-214.

Appendices

PUBLIC RECORDS IN OKLAHOMA

VICTOR N. BIRD

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. In 1985 the Oklahoma Legislature enacted a 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.1991, § 24A.2. (The legislation is codified as the Open Records Act, 51 O.S.1991, §§ 24A.1 et seq., as amended, hereinafter referred to as the "ORA" or "Act.")

The result of this Act is to make many a public servant who must apply the law, feel truly naked and uncertain. The intent of this paper 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 to determine whether there exists a duty to disclose information under the ORA is to ask whether the entity is a public body. Under the definition provided by the ORA at § 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 . . .*" § 24A.3(2) (emphasis added). However, merely doing business with the state is not ordinarily considered sufficient to turn a private entity into a public body.

Questions arise as to whether a private physician must disclose a patient's medical record or whether an attorney has a duty to provide a client with a litigation file pursuant to the Open Records Act. Because these are private corporations or individuals who are not supported in whole or in part by public funds, there does not exist a duty 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 members of the Legislature, judges or justices, except, they must disclose financial information pursuant to § 24A.4.

IS THE INFORMATION A RECORD?

If the entity does fit the description of a public body, the second important question to ask is whether the information sought is a public record. Again, a record may take many forms from specific paper documents or photographic materials to video or other types of film or sound recordings. In order 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." § 24A.3. The statute requires all public bodies and officials to keep and maintain all business and financial transactions conducted by a public body. § 24A.4. The issue of custody or control of a record has also been addressed in § 24A.20, where it provides, "access to records which, under the Oklahoma Open Records Act, would otherwise be available for public inspection and copying, shall not be denied because a public body or public official is using or has taken possession of such records for investigatory purposes or has placed the records in litigation or investigation files." So, even if a public body has transferred possession of its records, it is still deemed to be in "control and possession" of the file 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, expenditure of public funds or the administering of public property.*" § 24A.3(1) (emphasis added). In a case construing portions of the ORA, the Oklahoma Supreme Court stated, "the Act includes a definitional section of sufficient breadth to encompass virtually every governmental body and record." *Milton v. Hayes*, 770 P.2d 14 (Okla. 1989).

A record is not, however, non-governmental 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, unless the law otherwise requires disclosure. § 24A.3(1). The language defining what is "not" a record is found in the 1988 amend-

ment to the Act. The Legislature responded to the decision of the Oklahoma Supreme Court in *Tulsa Tribune v. Oklahoma Horse Racing Commission*, 735 P.2d 548 (Okla. 1986), in which the Court sought to infuse privacy rights into the plain text of the ORA. The subject matter of the case was whether personal financial statements are subject to public disclosure when such records are submitted to a public body solely for licensing purposes. Although the Oklahoma Legislature apparently did not agree with the Supreme Court's view of individual privacy interests, (read § 24A.2), it did amend the Act to provide that when personal financial information is provided to an agency solely for licensure purposes, it is not deemed a "record" under the Act.

WHAT RECORDS MUST BE DISCLOSED?

Having determined that the entity is a public body and the information sought is a public record, it is best to continue the analysis with the presumption that the information must be disclosed. After all, the introductory sentences of the Act provide, "As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government." § 24A.2.

Indeed, the burden is upon the person, agency or political subdivision that seeks to establish that such records are protected by a confidential privilege. § 24A.2. So, the determination of whether a record is subject to release only begins by review of the Open Records Act itself. The ORA protects from disclosure only those records which are exempt under the terms of the ORA, or those which must be kept confidential pursuant to specific state or federal law. If the ORA does not specifically address whether the information is exempt from release, other state and federal statutes must be reviewed to discover whether a privilege does exist.

EXCEPTIONS TO DISCLOSURE UNDER THE ACT

1. Privileged information.

Section 24A.5 lists, in part, records that are 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, §§ 301 et seq. of Title 25 of the Oklahoma Statutes.

The evidentiary privileges can be found at 12 O.S.1991, §§ 2501 and 2502. It is important to note that the evidentiary privilege for government attorneys is greatly limited. Section 2502(D)(6) provides that communication between a public agency and its attorney is *not* subject to the privilege unless the communication concerns a pending investigation, claim or action *and* the court determines that disclosure would greatly impair the ability of the agency to proceed in the matter.

2. Personnel Records

There are certain personnel records which may be kept confidential. Section 24A.7(A)(1) and (2) provides that records may be kept confidential which relate to:

1. 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, or employment applications submitted by persons not hired by the public body. (Emphasis added.)

For example, under these provisions a potential employer could not obtain records regarding a public employee's evaluation, disciplining, promotion or resignation. If a citizen applied for a job with a state agency but was *not* hired, the employment application submitted, although in the public body's possession, could not be released. What is considered to be a "clearly unwarranted invasion of personal privacy" is yet unknown and untested by the Oklahoma Court. A federal court has construed an "unwarranted invasion" to be when disclosure would cause more harm to the individual than benefit to the public. *U.S. Department of Air Force, Scott Air Force Base v. FLRA*, 838 F.2d 229 (7th Cir. 1988).

Other personnel records not specifically listed in § 24A.7(A)(1) and (2), must be made available for public inspection. The type of personnel records which must be disclosed are the employment applications of those who become public officials or employees, their gross receipt of public funds, their dates of employment, their title and position and any final disciplinary action which results in their loss of pay, suspension or final termination. § 24A.7(B).

In 1992, the Oklahoma Legislature amended the Oklahoma Personnel Act to provide that state employee home addresses, telephone numbers and social security numbers shall not be open to public inspection or disclosure. 74 O.S.Supp.1992, § 841.6A.

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." § 24A.3(5). In this area the Act provides a specific laundry list of law enforcement information which must be provided to the public. The public may access arrestee descriptions, facts concerning arrests, conviction information, disposition of all warrants, a chronological list of prior offenses, departmental crime summaries, radio logs and jail registers. Law enforcement information not specifically listed in subsection A of 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. § 24A.8(B). However, § 24A.8 specifically limits this privilege to "Law Enforcement records." Other records would be subject to inspection and disclosure pursuant to the ORA.

4. Personal Notes and Materials

Materials that are predecisional or precede an action or adoption of a policy, including intraagency memorandums or letters, personal notes, personally created materials, or research leading to the adoption of a public policy or the implementation of a public project may be kept confidential by a public official or body. Postdecisional records, usually designed to explain or interpret the decision, action or policy, are subject to inspection and disclosure under the ORA. However, records prepared in the process of formulating a public official's or body's budget request are subject to inspection and dissemination pursuant to the ORA.

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. § 24A.10(B). Also, a public body may refrain from disclosing real estate appraisals prior to the award of a contract as well as the prospective location of a private business or industry prior to public disclosure. § 24A.10(B)(4) and (5). Further, subsection C protects from disclosure information submitted by persons or entities seeking economic advice from the Department of Commerce. Similarly, the Department of Agriculture may not individually identify the providers of confidential crop and livestock reports. § 24A.15. The Oklahoma Medical Center may keep confidential its market research data. § 24A.10a.

6. Donor Privacy

A public body may keep confidential the identity of the donor of materials to a library, archive or museum if anonymity is a condition of the donation and the donation is tax deductible. The public body may release the date of the donation, its appraised value and a general description of the gift. § 24A.11.

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 that it is needed to protect the identity of the person making the original communication. § 24A.14. (See A.G. Opins. No. 88-79 and 88-87).

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. If kept, statistical information not identified with a particular student and directory information shall be released, "Directory information," may include a student's name, address, telephone listing, date and place of birth, major field of study, participation in school activities and dates of attendance. The students and parents must be provided a reasonable opportunity to object to disclosure of directory information before it may be released. § 24A.16 (*See also* A.G. Opins. No. 85-167, 86-152 and 88-33).

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. § 24A.12. *Unfortunately, the Act does not address the investigation files of agencies* not authorized to have an attorney. (Remember that personnel investigation files may be kept confidential pursuant to § 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 available for release by another public body. § 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. § 24A.20. Although this section was obviously drafted to try to stop the circumvention of the Act by placing records in an investigation

file, practically speaking, it may be quite difficult to obtain access to such records. It is important to keep in mind that the agency has the burden of establishing that the record must remain confidential. § 24A.2.

Practical Application and Procedures for Implementing 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. § 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.

If a portion of the record is exempt *and* it is easily segregable from the disclosable portions, the confidential section may be deleted. § 24A.5(2).

It is important to note that the public body may set up its own procedures to protect and prevent record requests from causing "excessive disruption of the public body's essential functions." § 24A.5(5). A public body may require a request form to be filled out before it is processed, but it cannot use its procedures as obstacles to disclosure.

The Act does not impose any additional record keeping duties on a public body. § 24A.18. For example, if a citizen requests the names and addresses of all agency employees who have children in child care facilities, must the agency compile such information for the requestor? Under § 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 is replete with the presumption that the government information has been reduced to some form.

A major area of controversy in the Act involves the charging of "copy fees" and "search fees." A public body may never charge more than twenty-five cents per page for documents having the dimension of 8 1/2 by 14 inches or smaller. It may charge up to one dollar ($1.00) for certified copies. § 24A.5(3). Although the ORA includes video and sound recordings as public records, it gives no guidance as to what may be charged for duplication of these records.

SEARCH FEES

A public body may charge a "search fee" only when the information sought is solely for "commercial purposes" or when the information requested would clearly cause an "excessive disruption of the public body's essential function." § 24A.5(3)(a)(b). This is an area in which

an agency should proceed carefully. 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.

§ 24A.5(3). This language makes it clear that search fees will be tolerated in very few circumstances. (*See*, A.G. Opin. No. 88-35).

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. § 24A.2. We know that the Legislature considers the release of documents regarding employee evaluations or demotions to be an invasion of personal privacy. Yet, the ORA states, "Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access[.]" § 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 up to $500.00 or imprisonment in the county jail for a period not to exceed one year, or both. § 24A.17. 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.

Finally, in keeping with the theme that when approaching the ORA it is best to assume that all records 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. § 24A.17(c).

CASE LAW AND ATTORNEY GENERAL OPINIONS REGARDING THE ORA

Milton v. Hayes, 770 P.2d 14 (Okla. 1989).

This case is informative because it reveals how the Oklahoma Supreme Court approaches the analysis of the Open Records Act. In the *Milton* case the Court found that the Oklahoma Election Code, 26 O.S.1981, §§ 1-101 et seq., as amended, provided the exclusive means of access to election materials. The Court applied basic common law rules of statutory construction, those being, specific statutes control

over more general statutes and more recent enactments of legislation control over prior enactments. This case should help provide some guidance in choosing between a specific Oklahoma statute which requires confidentiality and the ORA which requires disclosure.

The Attorney General has also had several occasions to construe the Open Records Act.

A.G. Opin. No. 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. (Note: At the time of this printing House Bills 1271 and 1780 have been introduced to the First Regular Session of the 44th Legislature to clarify a number of problems that have arisen with regard to accessing machine readable records.)

A.G. Opin. No. 85-167:

In this Opinion, the Attorney General harmonized the state law regarding "directory information," as defined by § 24A.16(B), 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. This problem was corrected by the Oklahoma Legislature in 1986 when it cast § 24A.16(B) in its present form.

A.G. Opin. No. 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 invoked.

A.G. Opin. No. 86-152:

This is another Opinion dealing with access to student directory information. The Attorney General opined that existing lists of *former* college students came 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 applicable federal law is not permitted; and, that the

rights of individuals who have made known their objection to such disclosure be protected.

A.G. Opin. No. 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 and 24A.7(A)(1)(2). 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.1991, §§ 1750.1 et seq., as amended, requires that application information pertaining to those licensed by CLEET remain confidential unless otherwise ordered by a court.

A.G. Opin. No. 88-35:

This Opinion addresses whether a public body may charge a search fee to a member of the news media. Under the clear reading of § 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. No. 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 § 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. No. 88-87:

This Opinion responded to the issue of whether letters written to the Pardon and Parole board regarding clemency considerations of inmates were confidential personal communications pursuant to § 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.