

OKLAHOMA'S OPEN MEETING ACT

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“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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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). 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. 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 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:

1. The State Legislature,
2. The State Judiciary,¹ or
3. 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 any informal gathering where a majority of the body’s members are personally present and conduct official business. Moreover, the “conduct of business” includes not only taking 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. A.G. Opin. 82-212. 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 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

¹ The Council on Judicial Complaints is similarly exempt when conducting, discussing, or deliberating any matter related to a complaint. *See* A.G. Opin. 00-15 (citing 25 O.S.Supp.2000, § 304(1)).

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 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 2012, notice must be filed by December 15, 2011). 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. However, 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.

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 AND AGENDAS

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.

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.

Finally, 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.

These three 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;²
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

² 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).

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,
 - 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.³

In light of the Act's presumption against executive sessions, these statutory justifications must be read narrowly.⁴ 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

³ See, e.g., 10 O.S.2011, § 1116.2(E) (executive sessions for Oklahoma Commission on Children and Youth - Review Boards); 59 O.S.2001, § 1609(B) (executive sessions for Board of Examiners for Speech-Language Pathology and Audiology); 62 O.S.2011, § 52(E) (executive sessions for EDGE Fund Policy Board); 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).

⁴ 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.

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

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

1. The posting of an agenda referring to a "proposed executive session to discuss the possible demotion of Jane Doe," and citing 25 O.S.2011, § 307(B)(1) as the statutory authority for this executive session;
2. A majority vote in an open meeting by a quorum of board members to hold the proposed executive session;

3. An executive session that conforms to the description set forth in the agenda (*i.e.*, a discussion regarding the matter referred to in the agenda);
4. A vote in an open meeting regarding Jane Doe's demotion.

Courts have also spoken to who may attend executive sessions. In *Lafalier v. the Lead-Impacted Communities Relocation Assistance Trust*, 237 P.3d 181 (Okla. 2010), the Oklahoma Supreme Court found the trust violated the Open Meeting Act by allowing the Secretary of the Environment and an appraiser's representatives attend its executive sessions held for the purpose of discussing appraisals and purchases of real property pursuant to Section 307(D), which limits attendance in executive session. Under this provision 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. 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 – so long as the minutes record "matters considered" and "actions taken."

Nevertheless, there is some risk in keeping minutes that are too vague. Although there are no reported Oklahoma decisions on the sufficiency of board minutes, a court assessing the sufficiency of particular board minutes might well adopt the same standard that has been applied in assessing agenda items: Would an average citizen have been misled by the minutes in question? *See Haworth*, 637 P.2d at 904.

Under this standard, minutes that, for whatever reason, are likely to mislead a citizen about matters considered and actions taken by a board would not comply with the Act. As a result, a prudent board should err on the side of specificity rather than generality in keeping minutes.

One common deficiency in board minutes concerns the manner in which votes of public bodies are recorded. In light of the Act's requirement that such votes be individually cast and recorded, minute entries stating "Motion carried" and "Motion passed 3-2" are not sufficient to comply with the Act. Instead, the minutes must record the way each member voted. Of course, if a particular motion carries unanimously and if the minutes contain the required information regarding which board members were present at the meeting, an entry stating "Motion passed 5-0" or "Motion passed unanimously" is sufficient. In the latter instance, a person reading the minutes would be able to determine that all board members present voted in favor of the particular motion.

The Act's provisions regarding minutes apply to executive sessions as well as to open meetings. This conclusion is based on the language of Section 312 and an Oklahoma Supreme Court decision. As to the statutory language, Section 312 refers generally to the keeping of minutes of "proceedings"; it does not distinguish between proceedings held in an open meeting and proceedings held in executive session. In addition, in *Berry*, 611 P.2d at 632, the court expressly stated that the Act's allowance for executive sessions "does not abrogate the statutory requirement that minutes be kept and recorded."

Nevertheless, there is one significant difference between minutes of open meetings and minutes of executive sessions: Under the Oklahoma Open Records Act, minutes of executive sessions may be kept confidential. 51 O.S.2011, § 24A.5(1)(b). However, should a court find that a public body has willfully violated Section 307 of the Open Meeting Act regarding executive sessions, the "minutes and all other records of the executive session, including tape recordings," will "be immediately made public." 25 O.S.2011, § 307(F)(2).

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. “‘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 willfully 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.

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. 10-1:

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. 11-22:

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).