OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-4

The Honorable Collin Walke
Oklahoma State Representative, District 87
2300 N. Lincoln Blvd., Room 504
Oklahoma City, OK 73105

March 13, 2020

Dear Representative Walke:

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

1. **Does the Oklahoma Open Meeting Act, 25 O.S.2011 & Supp.2019, §§ 301–314 (the "Act"), prohibit less than a majority of members of a public body from convening to discuss business of the public body if the gathering does not comply with the Act's requirements for a "meeting"?**

2. **Does the Act prohibit a member of a public body from presenting the same information related to the public body's business in separate sequential briefings, each with less than a majority of the body's members?**

3. **If members of a public body convene and are provided with information related to the business of the public body, may the members be prohibited from taking that information with them following the presentation or be sworn to secrecy about the substance of the presentation?**

4. **Does the Act apply equally to (i) a public body convening solely to receive an informational briefing without taking action, and (ii) a public body convening to discuss specific actions that ultimately may be voted upon?**

I.
BACKGROUND

Transparency in government provides citizens with the opportunity to observe their government and understand how its decisions are made. This idea forms the underpinning of Oklahoma's Open Meeting Act, 25 O.S.2011 & Supp.2019, §§ 301–314 (the "Act"). *See, e.g., Wilson v. City of Tecumseh*, 2008 OK CIV APP 84, ¶ 10, 194 P.3d 140, 144. Indeed, the Legislature expressly declared in the Act that "[i]t 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." 25 O.S.2011, § 302. To further this policy, the Act generally requires any "public body" to, among other things, hold its meetings at specified times and places that are convenient to the public and are preceded by advance public notice, cast public votes and have such votes recorded, and keep minutes of its proceedings. *See id.* §§ 303, 305, 312.

In general, the Act's requirements apply only to "meetings" held by a "public body," as those terms are defined in the Act. "Public body" is defined, in relevant part, as:

> the governing bodies of all municipalities located within this state, boards of county commissioners of the counties in this state, boards of public and higher education in this state and all boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts . . . , task forces or study groups in this state supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property, and shall include all committees or subcommittees of any public body.

25 O.S.Supp.2019, § 304(1). A "meeting" means "the conduct of business of a public body by a majority of its members being personally together or . . . [by] videoconference" as permitted by the Act. *Id.* § 304(2). Based on these definitions, a "meeting" occurs when (i) a majority of members of a public body is (ii) together in person or by videoconference,[1] (iii) conducting the public body's business.[2] If a gathering of members lacks one or more of these elements, the gathering is not a meeting and, therefore, not subject to the Act's requirements.

II.
DISCUSSION

A. The Open Meeting Act does not prohibit a minority of members of a public body from convening to discuss business of the public body, unless by doing so the members intend to circumvent the Act's requirements.

As described above, the Act generally does not apply to a gathering of less than a majority of members. *See* 25 O.S.Supp.2019, § 304(2). "Without a majority, there [is] no 'meeting' under the Act[.]" *Monkey Island Dev. Auth. v. Staten*, 2003 OK CIV APP 64, ¶ 13, 76 P.3d 84, 88.

However, your request raises a slightly different issue: separate from the Act's clear requirements for "meetings," is there anything in the Act that would prohibit a ***minority*** of members from convening to receive information or to discuss matters related to the business of the public body, but not take formal action? Generally, the answer is no such prohibition exists, nor can one be

[1] Subject to a single narrow exception applicable only to certain virtual charter school boards, meetings at which members participate by videoconference still must have "[n]o less than a quorum of the public body . . . present in person at the meeting site as posted on the meeting notice and agenda[.]" 25 O.S.Supp.2019, § 307.1(A).

[2] Although the Act does not define "business," this office has stated that the word "must be given a construction in consonance with the ordinary meaning of the term and in harmony with the purposes of the . . . Act." 1982 OK AG 212, ¶ 3. Based on this "liberal interpretation," that opinion concluded that "[b]usiness should be assumed to include the entire decision-making process including deliberation, decision or formal action." *Id.* (citing 1981 OK AG 69, 1979 OK AG 331, and *Times Publ'g Co. v. Williams*, 222 So.2d 470 (Fla. 1969)).

reasonably deduced from the language of the Act.[3] *See, e.g., Wylie v. Chesser*, 2007 OK 81, ¶ 19, 173 P.3d 64, 71 (stating rule that courts may not "insert in a statute omitted words or read it in different words from those found in it" unless such intent is "plainly deducible from other parts of the statute" (citation omitted)). Indeed, a blanket prohibition against members discussing subjects related to the public body—whether one-on-one or in small (non-majority) groups—would risk "los[ing] the public benefit of personal discussion between public officials while gaining little assurance of openness." *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).[4]

This conclusion, however, comes with an important caveat. This office has long cautioned public bodies and their members not to use the Act's exceptions "as a subterfuge or as an excuse to violate the Act." 1982 OK AG 114, ¶ 14; *see also* 1982 OK AG 212, ¶ 13 ("[T]he Act should be interpreted in such a way as to avoid establishing potential evasion loopholes." (citing *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974)). Oklahoma courts have made similar statements. *See Lafalier v. The Lead-Impacted Communities Tr.*, 2010 OK 48, ¶ 42, 237 P.3d 181, 197 (criticizing action taken to avoid provision of the Open Meeting Act, and thereby "gut [the provision] of any real force"); *Matter of Order Declaring Annexation*, 1981 OK CIV APP 57, ¶ 18, 637 P.2d at 1273 ("The principle to be followed is very simple: when in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State." (quoting *Town of Palm Beach*, 296 So.2d at 477)).[5] Accordingly, where a minority of members of a public body gather to discuss business of the public body in a manner intended to skirt the Act's requirements, a court may construe the Act liberally in favor of public access, *see Int'l Ass'n of Firefighters,*

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[3] It is telling that the Act ***does*** expressly prohibit "informal gatherings or any electronic or telephonic communications [not otherwise authorized by the Act] among a ***majority*** of the members of a public body . . . used ***to decide any action*** or ***take any vote*** on any matter." 25 O.S.2011, § 306 (emphasis added); *see also Matter of Order Declaring Annexation Dated June 28, 1978, Issued by Frazier*, 1981 OK CIV APP 57, ¶ 7, 637 P.2d 1270, 1272 ("[Section] 306 prevents the use of 'informal gatherings' to circumvent the Act."). From this provision, it is apparent that the Legislature considered the possibility of members attempting to meet in a venue other than a public meeting, but it chose only to prohibit (i) informal gatherings or electronic/telephonic communications, (ii) among a ***majority*** of the public body's members, (iii) that are used to ***decide an action*** or ***take a vote*** on a matter. There is nothing in the Act to suggest that the Legislature also intended to impose a broad prohibition on members having one-on-one or small group conversations regarding business of the public body outside the context of a public meeting.

[4] *Accord Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 316 P.3d 848, 853 (Mont. 2014) ("Penalizing members and the public bodies they serve by an unwarranted application of the statute creates a difficult labyrinth for public servants and threatens to turn any Saturday night at the county rodeo into a board meeting that must be noticed."); *Schauer v. Grooms*, 786 N.W.2d 909, 925 (Neb. 2010) ("[T]he Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy. 'The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives.'" (citation omitted)); *Dewey v. Redevelopment Agency of City of Reno*, 64 P.3d 1070, 1078 (Nev. 2003) ("Importantly, 'requiring members of a board to consider only information obtained through public comment and staff recommendations presented in formal sessions would cripple the board's ability to conduct business.'" (quoting *Hispanic Educ. Comm. v. Houston Indep. Sch. Dist.*, 886 F.Supp. 606, 610 (S.D. Tex. 1995) *aff'd*, 68 F.3d 467 (5th Cir. 1995))); *Regents of the Univ. of California v. Superior Ct.*, 976 P.2d 808, 828 (Cal. 1999) ("There is a point beyond which open meeting requirements may effectively paralyze informed and efficient decisionmaking.").

[5] Interpreting the Open Records Act—which is similar in purpose to the Open Meeting Act, *see* 51 O.S.2011, § 24A.2—the Court of Civil Appeals stated "a public body may not circumvent the Act by placing material otherwise subject to disclosure solely in the custody of a non-public body or person. To allow such practices to circumvent the Act would also eviscerate the legislative intent." *Ross v. City of Owasso*, 2017 OK CIV APP 4, ¶ 9, 389 P.3d 396, 399. Given the similarities between the statutes, this principle is equally applicable to the Open Meeting Act.

Local 2479 v. Thorpe, 1981 OK 95, ¶ 7, 632 P.2d 408, 411, and find the members' action to be a violation. Any such conclusion, however, would depend on facts specific to each situation.

B. The Open Meeting Act does not prohibit one member of a public body from presenting the same information at sequential briefings, each attended by a minority of the body's members, unless the briefings are intended to circumvent the Act.

The scenario presented in your second question is essentially a subset of the previous question. Specifically, you ask whether it is permissible for a member of a public body to host a series of sequential discussions with other members—either one-on-one or in small groups of less than a majority—to present identical information relevant to the public body's business.

While this specific question has not been addressed in Oklahoma, it is not a novel one. Similar questions have arisen in states with open meeting laws comparable to the Act and, in general, the answers are consistent with our answer to your first question. That is, while not prohibited by the language of open meeting laws, sequential one-on-one or small group discussions or briefings may violate those laws if intended to avoid complying with the laws' requirements.[6] For instance, in *Columbo v. Buford*, the Missouri Court of Appeals held as follows:

> It is the intent of the legislature that the Sunshine Law would apply to meetings of groups of less than a quorum of a 'public governmental body' where a quorum or more of the body was attempting to avoid the purposes of the Sunshine Law by deliberately meeting in groups of less than a quorum in closed sessions to discuss and/or deliberate on public business then ratifying their actions as a quorum in a subsequent public meeting.

935 S.W.2d 690, 699 (Mo. App. 1996).[7] Two examples of conduct held to violate open meeting laws are (i) polling members as to what their vote will be on matters coming before the public body, and (ii) discussions aimed at reaching consensus prior to the public meeting. *See Dewey*, 64 P.3d at 1078 (declining to construe serial informational briefings as a quorum for open meeting

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[6] Admittedly, there are exceptions. Some courts have held their states' open meeting laws to impose transparency measures ***only*** when a majority of members of the public body meets to conduct business; any gathering of ***less*** than a majority falls outside the laws' scope. *See, e.g., Willems v. State*, 325 P.3d 1204, 1209 (Mont. 2014) (holding the "plain and unambiguous" definition of "meeting" not to include serial one-on-one discussions between members of a public body); *Slagle v. Ross*, 125 So.3d 117 (Ala. 2012) (holding that by its plain language, Alabama open meeting statute applied only to gatherings of a quorum of board members, and did not prohibit serial meetings of less than a quorum); *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind. App. 2006) (same).

[7] *Accord State ex rel. Cincinnati Post v. City of Cincinnati*, 668 N.W.2d 903, 906 (Ohio 1996) ("The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body."); *Moberg*, 336 N.W.2d at 518 ("Of course, serial meetings in groups of less than a quorum ***for the purposes of avoiding public hearings or fashioning agreement on an issue*** may also be found to be a violation of the statute depending upon the facts of the individual case." (emphasis added)). *Cf. Grant v. Cty. Council of Prince George's Cty.*, 214 A.3d 1098, 1120 (Md. App. 2019) (declining to find violation "where the record lacks evidence of any actual meeting or . . . communications between members of the District Council which might rise to the level of a 'meeting' ***or any evasive device purposefully designed to avoid the requirements of the Act***" (emphasis added)); *Schauer*, 786 N.W.2d at 925 (declining to hold that small group briefings were "somehow a walking quorum designed to circumvent the requirements of the Open Meetings Act" where no evidence was presented to suggest city council "was attempting to reach a consensus and form public policy in secret").

purposes absent "other action, such as polling or collective discussions designed to reach a decision"); *Harris Cty. Emergency Serv. Dist. No. 1 v. Harris Cty. Emergency Corps*, 999 S.W.2d 163, 170 (Tex. App. 1999) (holding that open meeting law did not limit discussions among less than a quorum of members of a public body where "record contains no evidence of polling or any attempt to circumvent the Act by meeting in groups that were less than a quorum").

Based on the foregoing, we conclude the Act generally does not apply to serial informational briefings or discussions that include only a minority of members of a public body. *See Monkey Island Dev. Auth.*, 2003 OK CIV APP 64, ¶ 13, 76 P.3d at 88 ("[I]t is not a violation of the Open Meeting Act for ***less*** than a majority of a public body to meet." (emphasis in original)). However, where the facts demonstrate that members coordinated these briefings or discussions in order to avoid compliance with the Act, such conduct may be held to violate the Act. If members engage in vote-counting or other attempts to reach consensus in this context, it will likely be deemed a violation. But, any such determination will depend on facts specific to each situation.

C. The Open Meeting Act does not address restrictions on materials provided to the members of a public body.

You ask next whether members of a public body may be (i) prohibited from taking pertinent information with them from gatherings of less than a majority of members or (ii) sworn to secrecy about the content of such gatherings. No such restriction appears in the text of the Act[8] and, as noted above, the Act generally does not apply to gatherings of less than a majority of members. However, other state or federal laws, including the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2019, §§ 24A.1–24A.31, may provide guidance regarding the treatment of sensitive information and documents by a public body to prevent unauthorized disclosure.

D. The Open Meeting Act applies when a majority of members of a public body meets to consider and/or discuss the body's business.

Finally, you ask whether the Act applies equally to (i) a public body convening in a majority solely to receive an informational briefing without taking action, and (ii) a public body convening in a majority to discuss specific actions that may ultimately be voted upon. As discussed above, the Act applies to meetings, defined as the "conduct of business of a public body by a majority of its members being personally together [or together by videoconference]." 25 O.S.Supp.2019, § 304(2). "[B]usiness should be assumed to include the entire decision-making process including deliberation, decision or formal action." 1982 OK AG 212, ¶ 3 (citations omitted).

The latter of the two scenarios you mention is plainly a meeting subject to the Act's requirements. As to the former scenario, this office addressed a similar question in Attorney General Opinion 1982-212, which considered the Act's application to a situation in which a public body simply "meet[s] with experts in order to gain insight into an area[.]" 1982 OK AG 212, ¶ 4. The opinion stated that "the process of decision making as well as the end results must be conducted in full view of the governed." *Id.* The opinion then explained, "when a public body's decision making or deliberation process is influenced by outside sources[,] the requirements of the Open Meeting Act

[8] By contrast, in the context of a properly convened executive session, the Act permits "the minutes and all other records of the executive session" to be kept confidential. 25 O.S.Supp.2019, § 307(F).

must be satisfied. When a public body meets with experts in order to gain insight into a matter, they are involved in the deliberation process." *Id.* at ¶ 6. As a result, when a majority of members of a public body convenes to obtain information about a topic under the body's purview, it is conducting business of the public body, and therefore, holding a meeting that is subject to the Act.

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

1. **Generally, a gathering of a minority of members of a public body is not subject to the Open Meeting Act. *See* 25 O.S.Supp.2019, §§ 304(2), 306; *Monkey Island Dev. Auth. v. Staten*, 2003 OK CIV APP 64, 76 P.3d 84. However, where such a gathering is convened with the intent of circumventing the Act's requirements, it may be held to violate the Act. *See Lafalier v. The Lead-Impacted Communities Tr.*, 2010 OK 48, 237 P.3d 181; 1982 OK AG 114; 1982 OK AG 212. The question of whether members acted with such intent will turn on facts specific to each situation.**

2. **Generally, a gathering of a minority of members of a public body is not subject to the Open Meeting Act. *See* 25 O.S.Supp.2019, §§ 304(2), 306; *Monkey Island Dev. Auth. v. Staten*, 2003 OK CIV APP 64, 76 P.3d 84. Thus, the Act does not prohibit one member of a public body from presenting the same information at sequential briefings, each attended by a minority of the body's members. However, if the briefings are convened with the intent of circumventing the Act's requirements, they may be held to violate the Act. *See Columbo v. Buford,* 935 S.W.2d 690 (Mo. App. 1996); *State ex rel. Cincinnati Post v. City of Cincinnati*, 668 N.W.2d 903 (Ohio 1996); *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510 (Minn. 1983). The question of whether members acted with such intent will turn on facts specific to each situation.**

3. **The Open Meeting Act does not prohibit members of a public body from taking materials provided to them during a regular meeting or a gathering of less than a majority of the body's members. However, other state and federal laws may require certain information or records to be kept confidential, while other laws may require such information or records to be made public.**

4. **The Open Meeting Act applies when a majority of members of a public body meet to consider and/or discuss the public body's business, including when a public body conducts informational briefings. *See* 1982 OK AG 212.**

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