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## Question Submitted by: The Honorable Robert H. Macy, District Attorney, Oklahoma County

1982 OK AG 114

Decided: 04/12/1982

Oklahoma Attorney General

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Cite as: 1982 OK AG 114, \_\_ \_\_

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¶0 The Attorney General has received your request for an official opinion wherein you ask the following questions:

1. "Excluding 'new business' as defined in 25 O.S. 311(9) (1977), must all matters to be considered by a public body at a meeting of said body be listed on the agenda for said meeting even though some or all of the matters to be discussed may be discussed in executive session?"
2. "In the event that a public body is engaged in ongoing litigation over some matter or matters, may said body go into executive session to discuss said matter with their attorney under the 'new business' provisions of 25 O.S. 311(9) (1977) and avoid the notice and agenda requirements of the Open Meeting Act?"

I.

¶1 In *International Association of Firefighters Local No. 2479 v. Thorpe*, Okl., 632 P.2d 408 (1981), the Oklahoma Supreme Court observed:

"The Open Meeting Law, because it is enacted for the public's benefit, is to be construed liberally in favor of the public."

¶2 The Open Meeting Act is found at 25 O.S. 301 (1977) et seq. Section 25 O.S. 302 proclaims the public policy behind the Open Meeting Act:

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

¶3 This policy was alluded to in *Oklahoma Association of Municipal Attorneys v. Derryberry*, Okl., 577 P.2d 1310, 1313-14 (1978):

". . . If an informed citizenry is to meaningfully participate in government or at least understand why government acts affecting their daily lives are taken, the process of decision making as well as the end results must be conducted in full view of the governed...."

¶4 These legislative and judicial expressions of the important public policy goals of the Open Meeting Act serve as general guidelines for interpretation of the Act. This particular Opinion deals with the notice and agenda requirements of the Open Meeting Act (25 O.S. 311). In *In the Matter of the Appeal of the Order Declaring Annexation Dated June 28, 1978* Okl.,

App.,637 P.2d 1270 (1981), the Oklahoma Court of Appeals, Division 1, said:

". . . To our minds the notice and agenda requirements are at the very heart of the Sunshine law...."

¶5 It is, therefore, particularly important that we observe the rule of liberal construction of the notice and agenda provisions of the Open Meeting Act and construe them in such a way as to further the public policy goals of the Act.

## II.

¶6 Your first question asks whether all matters to be considered at a meeting of a public body must be listed on the agenda for the meeting, even though some or all of the matters are to be discussed in executive session. Executive sessions are permitted under 307 of the Act:

". . . only for the purpose of discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee; or by district boards of education for the purpose of hearing evidence and discussing the expulsion or suspension of a student when requested by the student involved or his parent, attorney or legal guardian and for the purpose of discussing negotiations concerning employees and representatives of employee groups. Provided, however, that any vote or action thereon must be taken in public meeting with the vote of each member publicly cast and recorded."

¶7 Under *Oklahoma Association of Municipal Attorneys v. Derryberry*, supra:

". . . executive sessions may be held for confidential communications between a public body and its attorney, but only if the communications concern a pending investigation, claim or action, and disclosure of the matters discussed would seriously impair the ability of the public body to process the claim or conduct the pending investigation, litigation or proceeding in the public interest. *The public body with the advice of its attorney, would determine whether it would be proper to hold executive sessions for the purposes above set forth.*" (Emphasis added)

¶8 *Berry v. Bd. of Governors of Reg. Dentists*, Okl., 611 P.2d 628 (1980), further explained the Supreme Court's view of executive sessions for the purpose of discussing litigation:

". . . 1) Although the municipal attorneys' case permits executive sessions on the advice of counsel in certain specified instances, it does not abrogate the statutory requirement that minutes be kept and recorded; 2) An executive session of a public body is not permitted unless a majority of a quorum of members present vote to hold an executive session; 3) Even if an executive session is properly held and minutes are recorded which might be determined to qualify under the attorney-client privilege of confidentiality, the statute requires that any vote or action taken in an executive session must be in a public meeting with the vote of each member publicly cast and recorded; 4) Informal gatherings among a majority of the members to decide on any course of action or to vote on any matter is prohibited by the Act."

¶9 *Berry* makes it abundantly clear that the determination of whether it would be proper to hold an executive session, which the Court in *Derryberry* said was to be made by the public body, is a determination which must be made in open meeting by a majority of the members, pursuant to a recorded vote with minutes taken. Such a decision or determination may not be made

in an informal gathering of the members. *Berry*, supra. Nothing in the Open Meeting Act suggests that such an item of business is exempt from the agenda requirements of 25 O.S. 311(9). Speaking to the agenda requirements of 311(9), in *Hillary v. State*, Okl.Cr., 630 P.2d 791, 793 (1981), the Court said:

". . . The Open Meeting Act does not specify that notice be given *only when certain business is transacted* or that the State needs to prove that a particular type of business was, in fact, transacted in order to prove a violation. Posting is required even for the most typical meeting." (Emphasis added)

¶10 Convictions and fines against the members of a town board were upheld in this case for violating the notice and agenda provisions of the Open Meeting Act. Under *Berry*, the determination to hold an executive session must be handled like any other item of business. As said in *Hillary*, the Open Meeting Act's notice and agenda requirements cover all business transacted by a public body. Therefore, all matters to be discussed by a public body at a meeting must be listed on the agenda for the meeting, including matters which may be brought up for discussion in an executive session.

¶11 Before moving on from this point, it is necessary to point out several other matters. First, the phrasing of your question suggests that "new business" need not be listed on the agenda. If a public body intends to provide an opportunity for "new business" to be brought forward at a meeting, that should be mentioned on the agenda, even though the particular items of "new business" need not or cannot be identified. A public body should not take up "new business" unless it has indicated that it would do so on the agenda for the meeting.

¶12 Finally a point of clarification on executive sessions. 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, as observed by the Court in *Derryberry*, supra, at 577 P.2d 1313. 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. *Id.* It is, however, never supposed to be a foregone conclusion before a meeting of a public body that an executive session *will* occur for any purpose. Until a motion is made and a vote taken in public meeting, there can be nothing but a proposal to have an executive session. The agenda should contain enough factual information for the public to ascertain that an executive session will be proposed, and there should also be sufficient information disclosed on the agenda to indicate what items of business are proposed for an executive session.

### III.

¶13 Your second question asks whether a public body may go into executive session to discuss ongoing litigation under the "new business" provisions of 25 O.S. 311(9) of the Open Meeting Act and thus avoid the notice and agenda requirements. "New business" is defined in 25 O.S. 311(9) as:

". . . any matter not known about or which could not have been reasonably foreseen prior to the time of posting (of the agenda)."

¶14 The preceding sentence provides that the posting of the agenda does not preclude a public body from taking up "new business." Obviously, whether any particular item is a "matter not known about or which could not have been reasonably foreseen prior to the time of posting" of the agenda is a fact question. Certainly, something might arise in ongoing litigation on less than twenty-four hours notice that a public body may need to discuss in executive session with its attorney; yet, caution

should be exercised to be certain that it could not have been known about or foreseen prior to the time of posting the agenda. The "new business" exceptions of the Open Meeting Act are not to be used either as a subterfuge or as an excuse to violate the Act.

¶15 If "new business" arises within the statutory time limitations discussed above, and the business otherwise qualifies for an executive session, it may be taken up in executive session. Nothing in the Open Meeting Act suggests that "new business" may not be taken up in executive session.

¶16 It is, therefore, the official opinion of the Attorney General that:

1. All matters to be discussed by a public body at a meeting of the public body must be listed on the agenda for the meeting, including a proposal for an executive session.
2. A proposal for an executive session carried on the agenda for a meeting of a public body must contain sufficient information to advise the public that an executive session will be proposed, what matters are proposed to be discussed in the executive session and what action, if any, is contemplated to be taken on matters proposed for discussion in an executive session.
3. A public body may go into executive session with its attorney to discuss ongoing litigation under the "new business" provisions of 25 O.S. 311(9) (1977), provided the matters to be discussed could not have been known about or reasonably foreseen prior to the time of posting the agenda. Whether or not matters involved in ongoing litigation qualify as "new business" is a question of fact.

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ATTORNEY GENERAL OF OKLAHOMA  
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FIRST ASSISTANT ATTORNEY GENERAL

### ***Citationizer<sup>®</sup> Summary of Documents Citing This Document***

<b>Cite Name</b>	<b>Level</b>	
<b>Oklahoma Attorney General's Opinions</b>		
Cite	Name	Level
<u>2020 OK AG 4,</u>	<u>Question Submitted by: The Honorable Collin Walke, Oklahoma State Representative, District 87</u>	Discussed

### ***Citationizer: Table of Authority***

<b>Cite Name</b>	<b>Level</b>	
<b>Title 25. Definitions and General Provisions</b>		
Cite	Name	Level
<u>25 O.S. 301,</u>	<u>Short Title</u>	Cited
<u>25 O.S. 302,</u>	<u>Public Policy</u>	Cited
<u>25 O.S. 311,</u>	<u>Public Bodies - Notice</u>	Discussed at Length

