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Question Submitted by: The Honorable Mike Ritze, State Representative, District 80

2015 OK AG 3

Decided: 06/11/2015

Oklahoma Attorney General Opinions

Cite as: 2015 OK AG 3, __ __

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

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

I.

Written Requests for the Issuance of a Formal Written Attorney General Opinion Made by a Legislator or Other Public Official Are "Records" as Defined in the Oklahoma Open Records Act, 51 O.S. Sections 24A.1 Through Section 24A.30.

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

"Record" means **all documents**, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, **received by**, under the authority of, or **coming into the custody**, control or possession of **public officials**, public bodies, or their representatives **in connection with the transaction of public business**, the expenditure of public funds or the administering of public property.

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

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

A written request for a formal Attorney General Opinion is **a document**;

A written request for a formal Attorney General Opinion is **received by and comes into the custody of the Attorney General or his representatives**;

A written request for a formal Attorney General Opinion is **received by a public official**, and

A written request for a formal Attorney General Opinion is **received in connection with the transaction of public business**.

¶3 All of your inquiries deal with written requests for a formal Opinion. Under the *Statement of Policy of the Attorney General Regarding Furnishing Formal Opinions* [hereinafter *Policy*]--printed in the front of each volume of annually published formal written Attorney General Opinions--all requests for a formal Attorney General Opinion must "be written" and, among other things, "contain a complete statement of the issues together with a concise question of law, and a clear, concise statement of the question based upon the information in the request." *Opinions of the Attorney General of Okla.*, V. 44, at viii, ¶ 4 (2014).

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

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

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

"Public body" shall include, but not be limited to, any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust or any entity created by a trust, county, city, village, town, township, district, school district, fair board, court, **executive office**, advisory group, task force, study group, or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public

funds or administering or operating public property, and all committees, or subcommittees thereof. Except for the records required by Section 24A.4 of this title, "public body" does not mean judges, justices, the Council on Judicial Complaints, the Legislature, or legislators[.]

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

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

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

Id. (emphasis added).

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

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

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

II.

A Document That is a Record Under the Oklahoma Open Records Act is a Document Which Must be Made Available for Inspection, Copying or Mechanical Reproduction, Regardless of Whether an Open Records Act Request to Inspect the Document is to Inspect a Specific Single Document, or is a Request to Inspect a Group of Documents Dealing With the Same Subject or Written by the Same Official.

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

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

III.

There is no Legal Basis Upon Which a Written Request for a Formal Attorney General Opinion Would be a Confidential or Privileged Communication, as:

- 1) the Oklahoma Open Records Act's Broad Definition of "Record" Encompasses a Written Request for a Formal Attorney General Opinion,**
- 2) the Law Requires That Formal Written Attorney General Opinions Be Annually Published, and**
- 3) the Published Formal Written Attorney General Opinions Contain Both the name of the Requestor and the Questions Asked.**

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

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

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

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

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

- 1. A written request for the issuance of a formal written Attorney General Opinion made by a member of the Legislature or another public official is a "record" under the Oklahoma Open Records Act, 51 O.S.2011 and Supp.2014, §§ 24A.1 through 24A.30, which must be made available for public inspection,**

copying or mechanical reproduction.

2. A written request for the issuance of a formal written Attorney General Opinion is a record under the Oklahoma Open Records Act, 51 O.S.2001 and Supp.2014, §§ 24A.1 through 24A.30, regardless of whether an Open Records request to inspect it is a request to inspect a specific document or is an Open Records request to inspect a group of documents based on their subject or the name of the official requesting the issuance of a formal written Attorney General Opinion.

3. Given: 1) the Oklahoma Open Record Act's broad definition of "record" at 51 O.S.Supp.2014, § 24A.3(1)--a definition which encompasses a written request for a formal written Attorney General Opinion; 2) the law's requirement, at 74 O.S.Supp.2014, § 20(A), that the Attorney General annually publish all written opinions, and 3) the fact that for over forty years the published formal written Attorney General Opinions have included both the name of the official requesting an opinion and the question(s) asked, there is no legal basis upon which a written request for the issuance of a formal written Attorney General Opinion would be a confidential or privileged communication.²

E. SCOTT PRUITT
Oklahoma Attorney General

NEAL LEADER
Senior Assistant Attorney General

FOOTNOTES

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

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

Citationizer[®] Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name Level

Title 51. Officers

Cite	Name	Level
51 O.S. 24A.3,	Definitions	Discussed at Length

<u>51 O.S. 24A.1,</u>	<u>Short Title</u>	Discussed at Length
<u>51 O.S. 24A.5,</u>	<u>Open and Confidential Records</u>	Discussed

Title 74. State Government

Cite	Name	Level
<u>74 O.S. 18b,</u>	<u>Duties of Attorney General - Counsel of Corporation Commission as Representative on Appeal From Commission</u>	Discussed
<u>74 O.S. 20,</u>	<u>Opinions of Attorney General - Publication and Distribution - Surplus Publication - Attorney General's Revolving Fund</u>	Cited