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## Question Submitted by: The Honorable Ron Sharp, Oklahoma State Senator, District 17

2020 OK AG 2

Decided: 02/27/2020

### Oklahoma Attorney General Opinions

Cite as: 2020 OK AG 2, \_\_ \_\_

¶0 This office has received your letter requesting an official Attorney General Opinion in which you ask, in effect, the following questions:

1. Is the Oklahoma Secondary School Activities Association a non-appropriated state agency?
2. Is the Oklahoma Secondary School Activities Association a "public body" that is subject to the Oklahoma Open Meeting Act, 25 O.S.2011 & Supp.2019, §§ 301--314?
3. Is the Oklahoma Secondary School Activities Association a "public body" that is subject to the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2019, §§ 24A.1--24A.31?

#### I.

#### BACKGROUND

¶1 The Oklahoma Secondary School Activities Association ("OSSAA") is a voluntary membership association of Oklahoma secondary schools that was "formed to conduct and supervise numerous competitive extracurricular student activities." *Wright City Pub. Sch. v. Okla. Secondary Sch. Activities Ass'n*, 2013 OK 35, ¶ 18, 303 P.3d 884, 888; *see also Scott v. Okla. Secondary Sch. Activities Ass'n*, 2013 OK 84, ¶ 2, 313 P.3d 891, 893 ("[The OSSAA] identifies itself as a voluntary association of Oklahoma secondary schools that regulates the interscholastic activities of member schools which serves to ensure that desired educational goals are not shortchanged by an overemphasis on athletics.").<sup>1</sup> Nearly 500 of the State's public and private schools are OSSAA members. *Wright City*, 2013 OK 35, ¶ 18, 303 P.3d 884.<sup>2</sup> The OSSAA's affairs are managed by a 15-member board of directors made up of representatives elected or appointed from its member schools. *See* OSSAA CONSTITUTION, art. IV, §§ 1, 2 (2019-2020).<sup>3</sup> The board's powers and duties are set forth in the OSSAA constitution and include, for instance, the adoption of policies and procedures necessary to "plan, organize, supervise, finance, and administer the interschool activities of the member schools[.]" *Id.*, art. IV, § 5. Per the OSSAA constitution, member schools are required to pay annual fees. *Id.*, art. III; *but see* OSSAA HISTORY (stating that "[f]unding [of the OSSAA] for the most part is provided by gate admissions charged to the public at the playoff tournaments").

#### II.

#### DISCUSSION

##### A. The OSSAA is not a non-appropriated state agency.

¶2 You first ask whether the OSSAA is a non-appropriated state agency. Title 74, Sections 3301 through 3305 of the Oklahoma Statutes "provide[] the manner in which state agencies are created." 2011 OK AG 2, ¶ 5. Under these provisions, "[a] state agency which has not been created by Oklahoma's Constitution can only be established by an act of the Legislature, when it is in session, or if the Legislature is not in session, a Governor's Executive Order." 2008 OK AG 2, ¶ 3 (citing 74 O.S.2001, §§ 3302--3304). Thus, by statute the Legislature has the sole authority to create a state agency when it is in session, 74 O.S.2011, § 3302, while the Governor may, by Executive Order, create state agencies in the interim between legislative sessions, *id.* § 3303.<sup>4</sup>

¶3 The OSSAA was not established by the Oklahoma Constitution, nor was it created by the Legislature or the Governor. Instead, the OSSAA was founded in 1911 as a private association of both private and public Oklahoma member schools. See OSSAA HISTORY. To be sure, the OSSAA is briefly mentioned in Title 70 of the Oklahoma Statutes as (i) being a sanctioning body for certain interscholastic athletic contests, see 70 O.S.2011, § 24-131.1(4), and (ii) having authority to determine, in limited situations, the eligibility of non-resident transfer students to participate in such events, see *id.* § 8-103.2. But those mentions alone do not convert an otherwise private entity into a state agency.

¶4 Notwithstanding this conclusion, it is important to note that the Oklahoma Supreme Court concluded in *Scott*, 2013 OK 84, 313 P.3d 891, that while the OSSAA is not a state agency, it should nevertheless be treated like one for certain purposes. In that case, the Court considered whether the OSSAA's decisions regarding student eligibility, when challenged in court, should be subject to the standard of review applied to state agency decisions under the Administrative Procedures Act ("APA"). Historically, the OSSAA had been treated as a voluntary association, "free to adopt rules that govern their interaction and . . . to enforce those rules without undue interference by the courts." *Id.* ¶ 18, 313 P.2d at 896 (quoting *Morgan v. Okla. Secondary Sch. Activities Ass'n*, 2009 OK 21, ¶ 17, 207 P.3d 362, 365). In *Scott*, however, the Court held that for the State's public schools, membership in the OSSAA was not truly voluntary. *Id.* ¶¶ 22, 27, 313 P.2d at 897-99. Indeed, the OSSAA constitution prevented member schools from competing against non-member schools, with limited exception,<sup>5</sup> leading the Court to find the OSSAA to be "effectively in almost complete control of secondary school athletic competition between public school students in the state of Oklahoma." *Id.* ¶ 27, 313 P.3d at 899.<sup>6</sup> This finding--coupled with the fact that the OSSAA "[i]n many respects . . . already behaves like a state agency and adheres to requirements provided by statute," *id.* ¶ 28, 313 P.3d at 900--led the Court to conclude that the OSSAA "is similar enough in character and in reach that courts should apply the [APA] standard of review" to its actions. *Id.* ¶ 32, 313 P.3d at 902.<sup>7</sup>

¶5 Based on the foregoing, it is clear that because the OSSAA is neither a constitutional agency nor created by statute or Executive Order, it is not a non-appropriated state agency. At the same time, courts may apply APA-level scrutiny in reviewing actions taken by the OSSAA. If the Legislature wishes to exercise a greater measure of control over the OSSAA's actions or failure to act, it has the option of enacting legislation to effect broader oversight of OSSAA operations.

**B. While the OSSAA is not a "public body" subject to the Oklahoma Open Meeting Act, both the OSSAA constitution and statutory restrictions on public school membership effectively require the OSSAA to comply with the Act.**

¶6 You next ask whether the OSSAA must comply with the Oklahoma Open Meeting Act, 25 O.S.2011 & Supp.2019, §§ 301-314 (the "OMA"). The OMA's requirements apply to a "public body," as that term is defined therein. See 25 O.S.2011, § 303 ("All meetings of **public bodies**, as defined hereinafter, shall be held at specified times and places which are convenient to the public and shall be open to the public[.]" (emphasis added)). The OMA definition of "public body" is lengthy, but the relevant language for the purposes of this opinion is as follows: "'Public body' means . . . all boards . . . in this state supported

in whole or in part by public funds or entrusted with the expending of public funds, or administering public property[.]” *Id.* § 304(1). Thus, the question of whether the OSSAA—or more precisely, its board of directors<sup>8</sup>—is subject to the OMA depends on whether the OSSAA is supported in whole or in part by public funds.<sup>9</sup>

¶7 Because the word “supported” is not defined in the OMA, it must be given its plain and ordinary meaning. See 25 O.S.2011, § 1. In this context, “support” means “to pay the costs of: maintain.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2297 (3d ed. 2002); see also 2017 OK AG 18, ¶ 7, 2002 OK AG 44, ¶ 16 (adopting the same definition). Based on this definition, this office has distinguished between (i) an entity receiving public funds pursuant to legislative enactment or other government authorization for a public purpose, and (ii) an entity simply being paid in exchange for providing identifiable goods and services. See 2002 OK AG 37. While the facts of each case may vary, the former entity is generally found to be supported by public funds, see 2017 OK AG 18, 1980 OK AG 215, while the latter generally is not, see 2002 OK AG 37.<sup>10</sup> Courts in other jurisdictions have adopted similar reasoning. See, e.g., *Greater Houston P’ship v. Paxton*, 468 S.W.3d 51, 63-64 (Tex. 2015) (collecting and describing federal and state cases); *Adams Cty. Record v. Greater North Dakota Ass’n*, 529 N.W.2d 830, 835-36 (N.D. 1995) (“[T]he term support . . . means something other than an exchange of money for identifiable and specific goods and services. When there is a bargained-for exchange of value, a *quid pro quo*, the entity is not supported by public funds.” (emphasis in original)).

¶8 Even assuming that fees paid to the OSSAA by member schools are “public funds,”<sup>11</sup> the OSSAA does not fit neatly on either end of this spectrum. It is not an entity that receives a direct appropriation or other transfer of public funds pursuant to legislative enactment in furtherance of a public purpose. Nor is it a typical contractor or vendor that, pursuant to contractual agreement, provides goods or services to a government entity in return for a specified monetary payment. However, based on the information available to us, we conclude that the OSSAA as it currently operates has more in common with the latter category. Specifically, the OSSAA provides, in return for the payment of annual fees, a variety of explicit and identifiable benefits to its member schools. These include, among other things, the adoption and administration of a set of uniform ethics and standards for interscholastic competition, see OSSAA CONSTITUTION, art. II, § 2 & art. VI, § 1, play-off passes, see OSSAA BOARD POLICIES, § 7, the establishment of divisions for various intermural sports and hosting play-off and championship games, see OSSAA RULES 14 & 15, and telecasting playoff games, contests, and tournaments, see OSSAA BOARD POLICIES, § 24. Cf. 1980 OK AG 78, ¶ 3 (finding that a voluntary association like the OSSAA, in exchange for dues, provides services “in the form of organizing, conducting and administering interscholastic activities”).

¶9 Because member schools pay annual fees to the OSSAA in exchange for identified benefits, the OSSAA is not “supported in whole or in part by public funds” and therefore is not subject to the OMA by its terms.<sup>12</sup> However, while not compelled by statute to follow the OMA, the OSSAA has opted to do so under its constitution. OSSAA CONSTITUTION, art. IV, § 4. Moreover, Oklahoma’s public schools and school districts are statutorily prohibited from becoming members of an interscholastic athletic association, such as the OSSAA, that has not adopted a written policy requiring “[a]ll meetings of the association to be open and conducted in a manner consistent with the provisions of the Oklahoma Open Meeting Act, including specifically the notice and agenda, voting and executive session requirements.” 70 O.S.Supp.2019, § 27-103(2).

### **C. The Oklahoma Secondary School Activities Association is not a “public body” subject to the Open Records Act.**

¶10 Finally, you ask whether the OSSAA must comply with the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2019, §§ 24A.1–24A.31 (the “ORA”). The ORA, like the OMA, applies to “public bodies,” as that term is defined therein. 51 O.S.Supp.2019, § 24A.5 (“All records *of public bodies* and public officials shall be open to any person for inspection,

copying, or mechanical reproduction during regular business hours[.]” (emphasis added)).<sup>13</sup> The ORA’s definition of “public body” is similar to that of the OMA, providing in relevant part that “[p]ublic body’ shall include, but not be limited to, any . . . board . . . supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property[.]” *Id.* § 24A.3(2).<sup>14</sup> Thus, the question of whether the OSSAA is subject to the ORA likewise depends on whether the OSSAA is supported in whole or in part by public funds. And for the same reasons set forth in Section II(B), *supra*, we conclude that the OSSAA is not “supported” by public funds and therefore is not subject to the ORA. As we observed in Section II.A, *supra*, should the Legislature determine that it is appropriate to subject the OSSAA to the provisions of the ORA, it may enact legislation to that effect.

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

**1. The Oklahoma Secondary School Activities Association (“OSSAA”) is not a non-appropriated state agency because it was not created by the Constitution, the Legislature, or an Executive Order. See 74 O.S.2011, §§ 3301-3305; 2011 OK AG 2, 2008 OK AG 2. However, the OSSAA “is similar enough in character and in reach” to a state agency that courts, when reviewing OSSAA actions, may apply a standard of review similar to that applied to actions of state agencies under the Oklahoma Administrative Procedures Act. *Scott v. Okla. Secondary Sch. Activities Ass’n*, 2013 OK 84, 313 P.3d 891.**

**2. The OSSAA is not a “public body” subject to the Oklahoma Open Meeting Act because it is not “supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property.” 25 O.S.2011, § 304(1). Rather, the OSSAA is a private voluntary membership association that provides identifiable services in exchange for the annual fees paid by its member schools. See 2002 OK AG 37. Nevertheless, the OSSAA constitution and statutory restrictions on public school membership effectively require the OSSAA to comply with the Act. See 70 O.S.Supp.2019, § 27-103(2).**

**3. The OSSAA is not a “public body” subject to the Oklahoma Open Records Act because it is not “supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property.” 51 O.S.Supp.2019, § 24A.3(2). Rather, the OSSAA is a private voluntary membership association that provides identifiable services in exchange for the annual fees paid by its member schools. See 2002 OK AG 37.**

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#### FOOTNOTES

<sup>1</sup> According to the OSSAA, it was formed in 1911 “when some of the State’s most prominent educators met and began to draw up rules that would produce a degree of fairness for competition between schools.” See History of the Oklahoma Secondary School Activities Association, *available at* <http://www.ossaa.net/docs/2019->

20/OSSAAInfo/MF\_2019\_20\_History.pdf (last accessed Feb. 3, 2020) (hereafter, "OSSAA History"). This led to the first statewide boys' and girls' basketball playoffs in 1918 and 1919, respectively. *Id.* The OSSAA later expanded to include activities other than athletics, such as music, speech, debate, and drama competitions. *Id.*

<sup>2</sup> A list of member schools for the 2019-2020 school year is available at [http://www.ossaa.net/docs/2019-20/OSSAAInfo/MF\\_2019\\_20\\_MemberSchoolsList.pdf](http://www.ossaa.net/docs/2019-20/OSSAAInfo/MF_2019_20_MemberSchoolsList.pdf) (last accessed Feb. 3, 2020).

<sup>3</sup> Available at [http://www.ossaa.com/Manual\\_Constitution.aspx](http://www.ossaa.com/Manual_Constitution.aspx) (last accessed Feb. 3, 2020).

<sup>4</sup> However, if an agency created by Executive Order is not re-established by legislation in the next legislative session, the agency "shall not continue operation beyond sine die adjournment of the Legislature for that session." 74 O.S.2011, § 3305.

<sup>5</sup> At some point after the *Scott* decision, the OSSAA constitution was amended to permit member schools to compete against schools that are members of "similar associations in this state or other states" and schools that are not members of any association at all. See OSSAA Constitution, art. VI, §§ 1, 2.

<sup>6</sup> While it has been established that students do not have a constitutionally-protected interest in being eligible to participate in OSSAA-sanctioned athletic competition, see, e.g., *Scott*, 2013 OK 84, ¶ 24, 313 P.3d at 898-99, *Morrison v. Roberts*, 1938 OK 458, ¶ 9, 82 P.2d 1023, 1025, the court in *Scott* also recognized that "the college and post-college careers of student athletes often have their genesis at the secondary school level, and for some provide the only path to higher education." *Id.* ¶ 47, 313 P.3d at 909.

<sup>7</sup> See also *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007) (concluding that the OSSAA was a "state actor" for the purposes of the Fourteenth Amendment "because of the [pervasive] entwinement of public institutions and public officials in its composition and workings" (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001))).

<sup>8</sup> See 1986 OK AG 27, ¶ 14 ("Although entities such as Rural Ambulance Service Districts are not specifically mentioned in this section, the board of directors of such districts are 'entrusted with the expending of public funds' and would come within the meaning of a public body for purposes of the Open Meeting Act.").

<sup>9</sup> Based on the facts presented to us, it does not appear that the OSSAA is entrusted with expending public funds or administering public property.

<sup>10</sup> In Attorney General Opinion 2002-37, this office reasoned that because of "the multitude of State contracts issued for both goods and professional services, it cannot be the intent of the Act that every private organization, either for-profit or non-profit, which receives payments for its goods and services from public funds becomes a public body subject to the Act." 2002 OK AG 37, ¶ 17.

<sup>11</sup> From the facts before us, we cannot conclude definitively that these fees are paid from public funds. For instance, if a public school draws on tax revenues to pay its OSSAA fees, the school certainly would be using public funds. See 2002 OK AG 37. However, there are myriad other sources a public school may conceivably draw upon to pay its OSSAA member fees, which may or may not be "public funds."

<sup>12</sup> See also *Breighner v. Michigan High Sch. Athletic Ass'n*, 683 N.W.2d 639, 646 (Mich. 2004) ("[A]n otherwise private organization is not 'funded by or through state or local authority' merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue. Earned fees are simply not a grant, subsidy, or funding in any reasonable, common-sense construction of those synonymous words" (citation omitted)); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988) (holding that the NCAA is not a public body subject to Texas open records law because the dues paid by public universities in Texas were in exchange for identifiable and measurable services).

<sup>13</sup> While the ORA applies to both public bodies **and** public officials, the term "public official" simply "means any official or employee of any public body[.]" 51 O.S.Supp.2019, § 24A.3(4).

<sup>14</sup> While it does not affect the outcome of this opinion, it is worth noting the difference in phrasing between the OMA and ORA definitions of "public body." Specifically, the OMA definition sets forth what "public body" **means**, followed by a list of entities, see 25 O.S.2011, § 304(1), so entities not explicitly included in the definition are excluded. See *Burgess v. United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." (alterations in original) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-93, n. 10 (1979))); see also A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 226 (2012) ("When . . . a definitional section says that a word 'means' something, the clear import is that this is its **only** meaning." (emphasis in original)). By contrast, the ORA definition employs the expansive phrase "shall include, but not be limited to," followed by a list of entities, which indicates that the enumerated list is **not** exclusive. See *JPMorgan Chase Bank, N.A. v. Specialty Restaurants, Inc.*, 2010 OK 65, ¶ 16, 243 P.3d 8, 14 ("Utilization of the word 'including' along with the phrase 'without limitation' denotes an intention of non-exclusivity.").

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