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## Determining Compliance with the Oklahoma Open Records Act

Access to public records is necessary to ensure government accountability. Whether at the federal, state or local level, people have the right to access records pertaining to government affairs. Under the Oklahoma Open Records Act, the state's public colleges and universities are considered public bodies, and, therefore, subject to the statute. An open records audit was conducted to determine whether Oklahoma's colleges and universities comply with the state Open Records Act.

The statute defines a public body as being "supported in whole or in part by public funds..."<sup>1</sup> Because these public institutions of higher education are supported with state funds, they are required to be transparent about how they operate, which includes providing access to open records. Private universities generally are exempt from the Open Records Act but are required by federal law to make publicly available their Form 990s, an Internal Revenue Service form that provides the public with financial information about a nonprofit organization. Private universities that receive certain federal funding also are required by the federal Clery Act to make their annual safety reports and daily crime logs, if applicable, available to the public.

To determine whether the state's public colleges and universities complied with state law, the schools were asked to provide a variety of documents for inspection. The requested records included campus crime logs for Oct. 1, 2016; campus police incident reports for Oct. 1, 2016; criminal citations and summonses issued by campus police on Oct. 1, 2016; lists of people with unpaid parking tickets as of February 7, 2017; campus disciplinary board statistics for 2015-16; employment contract of the university or college president and head coach of football team; presidential discretionary budget and spending 2015-16; and Form 990. Private schools also were asked to provide their annual safety report and, if applicable, daily crime log. After identifying a records custodian at each school, a letter detailing the request was sent electronically to all 44 public and private colleges and universities.

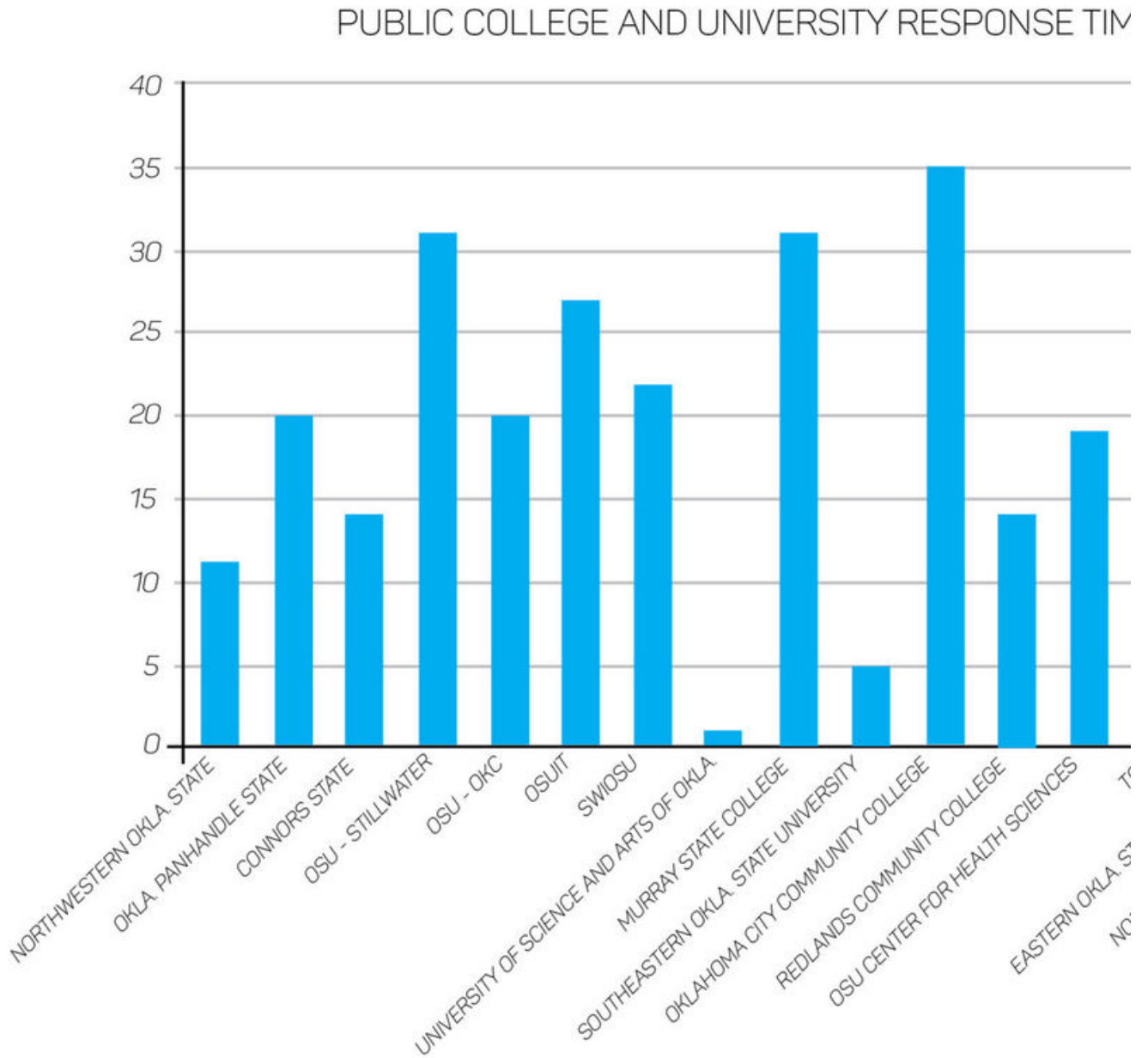
About 40 percent of Oklahoma's public institutions did not comply with the Open Records Act. Seventeen schools provided documents, and two schools said the records were available for inspection in person. The public schools that responded took an average of 18 business days to make records available compared to an average of three business days it took 12 private schools to respond. Twelve of the state's 13 private universities provided access to their Form 990, and all private schools complied with the request for an annual safety report and/or daily crime logs.

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<sup>1</sup> § 24A.3(2).

# Oklahoma colleges, universities not complying with Open Records Act

Kaelynn Knoernschild, Investigative Reporter, @kaelynn\_k Apr 30, 2017 Updated May 1, 2017



Kaelynn Knoernschild/O'Colly

A look at the number of days it took college and university around Oklahoma to respond to the O'Colly's open records requests

Not all state public colleges and universities are following the Oklahoma Open Records Act, according to experts.

In an early February open records audit the *O'Colly* conducted, about 60 percent of the state's 31 public colleges and universities offered documents for inspection. The requested documents included items such as unpaid parking tickets, campus disciplinary board statistics, and contracts for school presidents and coaches. In some cases, schools refused to release documents previously considered to be public while other schools have yet to respond.

Two schools said the requested records could be inspected. Five colleges and 11 universities responded by sending the records electronically. One college sent records by mail.



Eight schools acknowledged receiving the request but hadn't made records available as of Friday. Four schools did not respond to the requests.

The Oklahoma Open Records Act states "all records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours." Public colleges and universities are considered public bodies and are required to comply with the law.

Frank LoMonte, the Student Press Law Center's executive director, said state-funded colleges and universities have a responsibility to be open with the public. Open records audits are one way to gauge schools' level of transparency, LoMonte said.

"I think that when you periodically test people's compliance, it serves a really valuable function both to remind the public that these laws exist and to remind the agencies that they have legal obligations," LoMonte said.

Audit Findings

**'A bunch of bullshit'**

Some schools claimed they don't keep parking ticket databases with student names while others claimed the records were protected under Family Educational Rights and Privacy Act.

Oklahoma State University refused to release the names of students, faculty and staff who haven't paid their parking tickets. It also withheld the names of people unaffiliated with OSU who have more than one unpaid campus parking ticket.

Gary Shutt, OSU's director of communications, cited a state Open Records Act exemption for "personal financial information" as the reason for withholding the names. Shutt said those unpaid tickets are on bursar accounts, the university's billing system.

However, the exemption is for "personal financial information, credit reports or other financial data obtained by or submitted to a public body for the purpose of evaluating credit worthiness, obtaining a license, permit or for the purpose of becoming qualified to contract with a public body."

Shutt said the students' names also are protected under FERPA because their bursar accounts are educational records.

However, LoMonte of SPLC, a nonprofit organization that advocates for open government on campuses across the country, said even if the record appears in the student's educational file, the school still has to produce the record if it is stored elsewhere.

For example, a police report would be kept at the campus police department but might also show up in a student's disciplinary file.

"But the fact that it also shows up in the disciplinary file doesn't also make the police report a FERPA record," LoMonte said. "As long as the piece of paper doesn't actually live in the student's file, then it doesn't matter if the facts on it might also appear in the student's file."

The University of Oklahoma said fulfilling the request for parking tickets would cause "an excessive disruption to the essential functions of the office." The records custodian noted their "several thousand pages" of unpaid parking tickets and asked the *O'Colly* to narrow its search.

In November 2014, OU President David Boren ordered parking citations to be released, negating the university's prior claim that parking tickets were considered student education records protected under FERPA. Following OU's lead, OSU changed its policy and decided to

make the records available to the public.

"In keeping with the Oklahoma Open Records Act, Oklahoma State University has withheld the names of students receiving parking tickets to protect their privacy," Shutt said in an email to the *O'Colly* after OSU President Burns Hargis changed the policy. "However, going forward, the university has decided to make student names available through the open records process."

OU's decision to make parking tickets public was motivated by a lawsuit filed in 2013. After the university administration repeatedly refused to release copies of parking citations issued to students, a student reporter at the *OU Daily* sued the school. *OU Daily* editors joined the lawsuit, and OU President David Boren decided to change the university's policy.

Joey Stipek, the former OU student who sued for the parking ticket records, said issues at another university piqued his interest in the records at OU.

In 2011, a North Carolina judge ruled that parking tickets are not considered education records after the University of North Carolina refused to release the records, citing FERPA.

"FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC," the judge wrote.

Local media requested the documents after suspicions that the university was waiving athletes' parking tickets.

Stipek pursued the records to investigate whether the same practice existed at OU. He said students in particular should be interested in transparency at the collegiate level.

"It's how your money is being spent," Stipek said. "Public access to me is an important right."

Nick Harrison, the attorney who represented Stipek and specializes in open records law, said parking tickets are public record whether they are paid or unpaid.

"Essentially what the (OSU) open records office told you is completely contrary to what OSU's president said the day after OU's president," Harrison said, referring to the policy change in 2014.

Harrison also said OU's lack of response to the request after more than two months violates the "prompt, reasonable access" clause of the state Open Records Act. OU's excuse that providing the parking ticket data would cause "an excessive disruption" is ridiculous, he said.

"Honestly, I think that's a bunch of bullshit," he said. "They process requests like this all the time from major news media outlets. You're asking for very specific records, what you want, and none of that stuff is particularly a time-intensive thing for them to do."

Harrison wrote for the *OU Daily* while attending the OU College of Law and working toward his master's degree in entrepreneurship. He said the school should be prepared to provide the requested documents on a regular basis.

The University of Oklahoma did not immediately respond for comment.

Harrison also referenced a 2005 Oklahoma attorney general opinion in which former attorney general Drew Edmondson said public records should be available in the office "where the records are located in the ordinary course of business."

For example, record requestors seeking a police report should be able to bypass the campus communications office and contact the campus police department directly, eliminating what Harrison referred to as "bureaucracy."

### **Prompt and reasonable?**

Through correspondence with OSU officials, it became apparent the *O'Colly's* records requests regarding the audit and filed at OSU A&M schools, such as OSU-Tulsa and OSU Center for Health Sciences, were being filtered through OSU's general counsel's office in Stillwater.

Open records experts frowned upon the practice of channeling records requests through a legal office, a habit that is becoming more prevalent on college campuses, LoMonte said.

The process is not only inefficient but also potentially causes taxpayer dollars to be spent on unnecessary review, he said.

"Because everything now is being funneled through a single gatekeeper that causes delay, and it also means people end up paying oftentimes for excessive legal review that's not necessary," he said.

In March 2006, Edmondson, the former attorney general, told *The Oklahoman* OSU's policy of sending all requests through a legal office could be in violation of state law by not providing "prompt and reasonable" access.

OSU's policy concerning open records, which was revised July 2006, states "some" requests may be sent to the school's Office of Legal Counsel "for advice on accessibility."

Shutt said if his office is slow to respond to a request, it is usually because of the size of the request.

"The law says we must respond in a reasonable amount of time, and that is our goal," Shutt said.

Shutt said the communications office serves as a central point for records requests and OSU's Office of Legal Counsel serves as a check in the system to ensure the documents released are public.

"Our duty is to make sure anything we turn over is legally something we can turn over," Shutt said.

In most cases, records requests go through the university's legal office unless the requestor is asking for a known public document, he said.

A 1999 Oklahoma attorney general opinion stated "prompt, reasonable access" means "only the time required to locate and compile" the public records.



“There is no provision in the Open Records Act for a public body to ‘withhold’ records for any amount of time, however small,” the opinion states. “The duty to provide prompt and reasonable access is complied with only when a public body properly attends to its duty to provide a record.”

Alan Burton Southeastern Oklahoma State University’s director of communications said unless he needs clarification, open records requests are not sent to legal counsel.

Burton said the school averages about four open records requests per year. The university responded to the *O’Colly’s* request in five days, compared with the 31 days it took OSU.

“We believe it is very important and do our very best to fulfill each request in a timely manner,” Burton said.

#### Open Record responses

Check marks mean the records were available for inspection. The X means the records haven't been made available.

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### Oklahoma part of national problem

A study released in March revealed access to public records has grown worse at state and local levels in the past four years, according to about half of the 228 journalists, scholars, records custodians and others surveyed.

The study, which University of Arizona journalism professor Dave Cuillier performed, also found 38 percent of those surveyed said they noticed an increase in record denials at all levels of government during the past four years.

In Oklahoma, top government officials have prompted court battles in an effort to keep public documents secret in recent years.

The American Civil Liberties Union filed a lawsuit against Gov. Mary Fallin in November 2015, alleging her office was not complying with the Oklahoma Open Records Act after two organizations hadn’t received requested documents for more than a year. The suit is ongoing, and a pretrial conference is scheduled for July 26.



In February, an Oklahoma County judge ruled then-Oklahoma Attorney General Scott Pruitt had violated the state open records act for withholding public records. The court ordered Pruitt's office to turn over more than 2,500 emails it kept from the public for more than two years.

LoMonte said he believes many agencies in Oklahoma and around the country view compliance with open records laws as optional.

"Nobody would treat any other law the way people treat open records laws," he said. "You certainly wouldn't treat the IRS tax deadline like it was a suggestion."

Paul Monies, president of FOI Oklahoma Inc., an organization specializing in Freedom of Information, said it doesn't help the case for open government when top officials such as the governor and state attorney general are fighting to keep documents from the public.

Monies said other state agencies are watching how the highest state offices handle these requests and might even take their cues from them. Monies said government transparency becomes an issue, too, when top officials promote policies such as first-come, first-served, which can cause delays.

The policy is not an effective way to fulfill requests because it can deter people from asking for records because the system is backed up, causing lengthy delays, Monies said.

"If you're making policies where you're basically delaying and pushing (back) returning requests and information, unfortunately that's not a very good way to show that your government is transparent," he said.

One possible solution for better access to public records, Monies said, could be including statutory deadlines in the Oklahoma Open Records Act, forcing agencies to respond within a given amount of time.

However, though the agencies would be given a deadline to respond, there is no guarantee agencies would respond sooner rather than later, potentially causing delay.

Another option would be to employ an ombudsman to ensure open records requests are being fulfilled, he said. But questions linger about which state office would absorb the position and whether the state could afford to pay another salary.

Regardless of the solution, strides need to be made on behalf of open government in Oklahoma, Monies said.

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*To view records provided by Oklahoma's schools, click here or go to <http://bit.ly/2oiWnKN>*



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Private colleges and universities in Oklahoma are more likely to fulfill open records requests than public institutions.

The *O'Colly* recently conducted open records audits of Oklahoma's private and public schools, finding the state's private schools were more prompt and willing to make requested records available than public schools.

Twelve of the state's 13 private colleges and universities made available or were willing to allow the *O'Colly* to access their Form 990, an Internal Revenue Service form that provides the public with financial information about a nonprofit organization. All nine private schools that employ a campus police or security department provided access to their annual safety report and daily crime logs.

In contrast, [the \*O'Colly\* found](#) 40 percent of public colleges and universities were unresponsive to the audit and out of compliance with the Oklahoma Open Records Act.

Although private institutions are generally exempt from the state's open records act, the schools receive federal money and must make certain documents available under federal law.

According to the Tax and Trade Relief Extension Act of 1998, private universities are required to make their three most recent Form 990s available to the public. If a request for an organization's Form 990 is made in person, it must be granted the same day. However, if the request is submitted in writing, an organization has 30 days to provide the record.

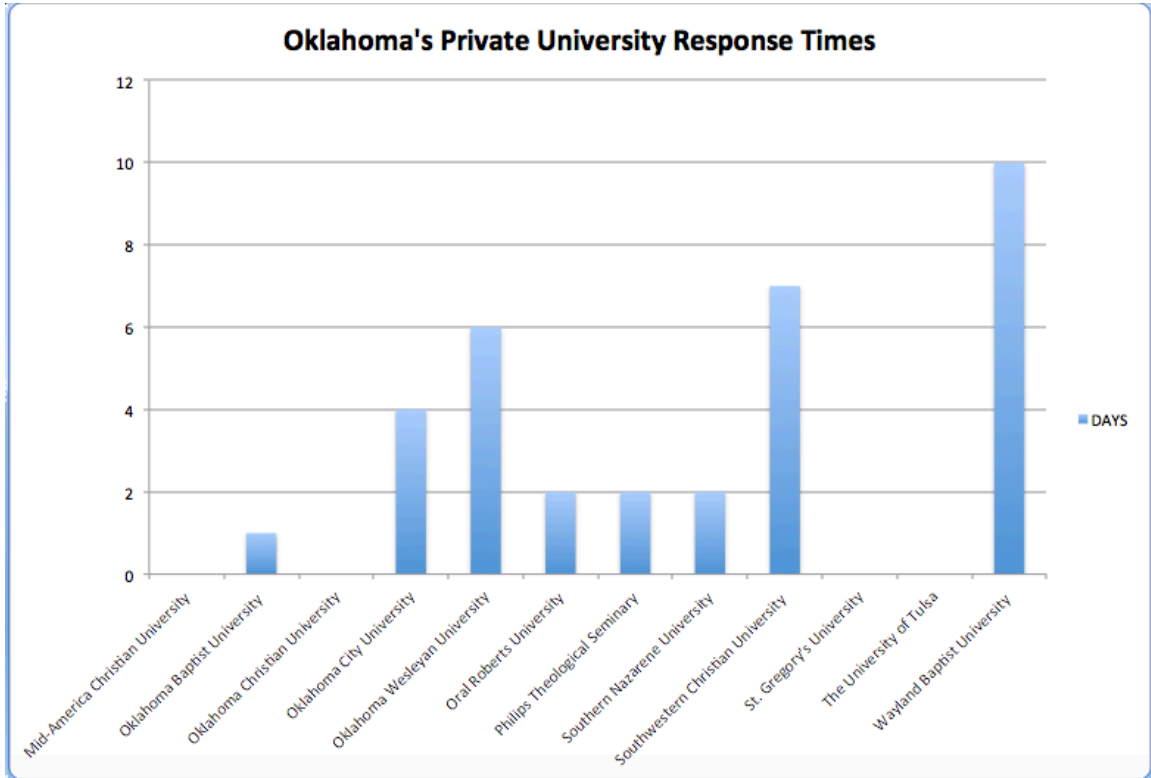
The organization will incur a \$20 penalty each day the request is not fulfilled after the 30-day period. The organization can be dealt a maximum penalty of \$10,000 for each return not disclosed.

Institutions that receive federal money through Title IV programs such as Pell Grants and federal work-study must comply with the Clery Act. Under the law, colleges and universities are required to publish an annual security report and make daily crime logs available for public inspection if they maintain campus police or a security department.

On average, private institutions also responded more quickly than public colleges and universities. It took private schools an average of about three business days

to make the requested documents available, compared to the average 18 business days of public schools.

Bacone College was the only private school that hadn't provided access to its Form 990 by Friday.



Response times indicate the number of days private colleges and universities took to provide access to their Form 990 and campus safety information. Four schools responded to the request the day it was submitted. The chart reflects the schools' promptness, showing a value of "0" for these schools.

Many schools directed the *O'Colly* to Guidestar, a public charity that publishes Form 990s and other nonprofit information online, to inspect the tax form.

Guidestar's editorial director said schools fulfill the public disclosure requirement when they direct requesters to Guidestar's website to view their information.

Suzanne Coffman said colleges and universities tend to have a more sophisticated knowledge than smaller private schools about the federal regulations concerning Form 990s and public disclosure.

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