OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2015-2

The Honorable Mike Ritze
State Representative, District 80
2300 N. Lincoln Blvd., Room 303A
Oklahoma City, Oklahoma 73105

May 4, 2015

Dear Representative Ritze:

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

1. **Does the State Treasurer have legal authority to keep information regarding unclaimed property confidential under the Uniform Unclaimed Property Act or the Oklahoma Open Records Act in response to a disclosure request?**

2. **What information obtained in the course of the State Treasurer's administration of the Uniform Unclaimed Property Act may or must be kept confidential by law?**

3. **Does the State Treasurer have legal authority under the Uniform Unclaimed Property Act to adopt administrative rules that define or limit the scope of confidentiality accorded to information regarding unclaimed property?**

4. **May the State Treasurer share otherwise confidential information with other entities, including States, in the course of administering the Uniform Unclaimed Property Act?**

5. **Does the payment of monies from the Unclaimed Property Fund affect any confidentiality accorded to information related to those payments?**

Because your request involves the Uniform Unclaimed Property Act ("UPA"), 60 O.S.2011 & Supp.2014, §§ 651–688, we briefly review the general purpose of the Act to provide some context. The UPA provides a comprehensive system for handling unclaimed property presumed to be abandoned. Under the statutory framework, individuals or entities holding unclaimed property must file reports on and transfer such property to the State after a defined length of time

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during which the true owner has not claimed the property or had contact with the holder. *Id.* §§ 661(A), 664(A). The periods of time run for several years depending on the exact type of property. *E.g.*, 60 O.S.2011, § 652(A) (setting a period of five years for most types of bank accounts); *id.* § 657.4(A) (setting a period of three years for intangible property such as securities).

Once transferred to the State, the Treasurer—statutorily tasked with administration of the UPA, *e.g.*, *id.* §§ 669, 672, 688(A)—must take steps to safeguard the property (or its value after sale) and make it available for the true owner, *id.* §§ 667(A), 668(A), 674(A). The UPA thus protects property owners by providing an orderly system for them to recover their property. Further, the Act ensures that the State and the general public receive the benefits of such property rather than allowing the holder of such property to reap windfalls from their customers. *See* 1 AM.JUR.2d *Abandoned, Lost, & Unclaimed Property* § 44 (2015) (citing *Douglas Aircraft Co. v. Cranston*, 374 P.2d 819, 821 (Cal. 1962)). Your questions involve the State Treasurer's obligations of confidentiality regarding information obtained as part of the administration of this system. We consider each question in turn below.

I.

THE STATE TREASURER DOES HAVE LEGAL AUTHORITY UNDER THE UNIFORM UNCLAIMED PROPERTY ACT AND UNDER THE OKLAHOMA OPEN RECORDS ACT TO KEEP CERTAIN INFORMATION CONFIDENTIAL, INCLUDING HOLDER REPORTS, CLAIMANT INFORMATION, INVESTIGATORY REPORTS, AND ANY OTHER INFORMATION REQUIRED OR ALLOWED TO BE KEPT CONFIDENTIAL BY LAW.

You first ask whether the State Treasurer has any authority to keep records confidential and, if so, you also ask what information may be kept confidential. Your question implicates the Oklahoma Open Records Act ("Open Records Act"), 51 O.S.2011 & Supp.2014, §§ 24A.1 – 24A.30, which imposes a general requirement that the "records" of "public bodies" and "public officials" must be made available to individuals who request them. 51 O.S.2011, § 24A.5.

The Act's general disclosure requirement applies to the Treasurer. Under the Open Records Act, records include "all documents" whether in the form of a "book, paper, photograph, microfilm, data file[] created by or used with computer software," and more so long as they are "created by, received by, under the authority of, or coming into the custody, control or possession of public officials." 51 O.S.Supp.2014, § 24A.3(1). "Public bod[ies]" include any "office, department, board, bureau, commission, . . . executive office" or other listed entity "supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property," while "public official[s]" include officials or employees of a public body. *Id.* § 24A.3(2), (4). The Treasurer constitutes both a public body, *id.* § 24A.3(2) (defining public body to include an "executive office . . . supported in whole or in part by public funds"), and a public official, *id.* § 24A.3(4) (defining public official to include "any official . . . of any public body").

Therefore, the Treasurer has a basic obligation to make disclosure available for all records received by the Treasurer, all records under his or her authority, and anything else otherwise satisfying the definition of "record" under the Open Records Act.[1] Despite the breadth of this basic disclosure obligation, however, various provisions of the Open Records Act and the UPA create exceptions to this general requirement and thereby authorize or even require confidentiality. Thus, we conclude that the Treasurer does have the authority to keep certain records confidential, and we discuss relevant categories of confidential information below.

A. Several confidentiality and publication rules of the Open Records Act create limitations on the State Treasurer's basic disclosure obligation.

To begin, the Open Records Act contains several exceptions that render its disclosure requirements inapplicable to particular records. 51 O.S.2011, § 24A.5. One set of exceptions includes records required by law to be kept confidential such as those protected by unwaived state evidentiary privileges, the minutes of executive sessions held by public bodies, driving records, and confidential medication information. *See id.* § 24A.5(1) ("The [Act] . . . does not apply to records specifically required by law to be kept confidential[.]"). The Open Records Act also contains numerous provisions allowing public officials to keep otherwise open records confidential. These provisions allow for the confidentiality of some information found in public employee personnel records, 51 O.S.Supp.2014, § 24A.7(A), certain personal notes of public officials, 51 O.S.2011, § 24A.9, and more, 51 O.S.2011 & Supp.2014, §§ 24A.10a, 24A.11, 24A.13–24A.16a, 24A.19, 24A.22–24A.24, 24A.27–24A.28 (creating various exceptions to the Act). The Open Records Act also contains a litigation file and investigatory report provision, which allows authorized agency attorneys and the Oklahoma Attorney General to keep litigation files and investigatory reports confidential. 51 O.S.2011, § 24A.12. To the extent authorized attorneys have such files on behalf of the Treasurer when administering the unclaimed property system, this exception would apply.

B. Several confidentiality and publication rules of the UPA also create limitations on the State Treasurer's basic disclosure obligation.

The UPA has several provisions affecting confidentiality and disclosure. First, the UPA requires that the State Treasurer arrange for publication of a list of the names and last known addresses of persons thought to have a claim to property in the system. 60 O.S.2011, § 662. Because this list must be published, the names and last known addresses of true owners clearly could not be kept confidential. This information generally comes to the Treasurer through reports filed by holders. The provision requiring holders to file reports listing unclaimed property also requires that these

[1] The Open Records Act may not have always so straightforwardly applied to the administration of the UPA. In *Tulsa Tribune Co. v. Okla. Horse Racing Comm'n*, 1986 OK 24, 735 P.2d 548, the Oklahoma Supreme Court interpreted the Open Records Act to require individuals whose information would be subject to release to have an opportunity to object that such a disclosure would invade the individual's privacy or damage the individual's commercial interests. *Id.*, 1986 OK at ¶¶ 12-15, 735 P.2d at 555. The Court subsequently applied the *Tulsa Tribune* holding to the UPA. *Merrill v. Okla. Tax Comm'n*, 1992 OK 53, ¶¶ 1-4, 831 P.2d 634, 640–41. However, the *Tulsa Tribune* interpretation was superseded by statute. *Okla. Pub. Emp. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶ 4 n.5, 267 P.3d 838, 842 n.5 (citing *City of Lawton v. Moore*, 1993 OK 168, 868 P.2d 690). *Tulsa Tribune* thus has no bearing on the UPA today.

reports remain confidential except for the required-to-be-disclosed names and addresses. 60 O.S.Supp.2014, § 661(F). Thus, apart from the information that must be published, the reports themselves must remain confidential.

Second, the UPA also provides for confidentiality of certain information when a person files a claim in the unclaimed property system. The UPA grants the Treasurer the following authority:

> Any information submitted by a claimant . . . may be kept confidential by the State Treasurer if it contains personal financial information of the claimant, social security numbers, birth certificates . . . or any other document which is confidential by statute if in the custody of another public agency or person.

60 O.S.2011, § 674(A). Thus, a disclosure request directed to records containing information about claimants could be rejected by the Treasurer under this statutory provision.

While claimant information must generally be kept confidential, the UPA also allows for the Treasurer to hold a hearing under the Administrative Procedures Act to determine whether a claim should be paid. *Id.* § 675(A). When the Treasurer holds such a hearing, the Treasurer must prepare a written document with findings of fact and a decision as to the validity of all claims filed and considered at the hearing. *See id.* The UPA specifically provides that the written decision becomes a "public record," lifting confidentiality requirements for any information included in the document. *Id.* In other words, claimant information generally remains confidential if it satisfies the statutory requirements, but it becomes public if included in a written decision on the validity of a claim after an Administrative Procedures Act hearing.

The UPA therefore contains several provisions dealing with confidentiality and disclosure that constitute part of the relevant legal framework for information requests. Still other legal provisions external to the Open Records Act and the UPA may also apply.

C. The UPA and the Open Records Act both reference external law as a source of confidentiality, which may further limit the State Treasurer's basic disclosure obligation.

Other provisions of law could require that records be kept confidential. The Open Records Act states that it does not apply to records where those records are "specifically required by law to be kept confidential"; the provision goes on to list examples of those laws requiring confidentiality, including the evidentiary privilege exception mentioned above. 51 O.S.2011, § 24A.5(1). Further, as also noted above, the UPA provides that information submitted by claimants "may be kept confidential" in circumstances involving personal financial information, social security numbers, or "any other document which is ***confidential by statute if in the custody of another public agency or person***." 60 O.S.2011, § 674 (emphasis added). External provisions of law can thus prevent disclosure directly under the Open Records Act or create an obligation of confidentiality under the UPA.

The Financial Privacy Act is one notable example of outside law. 6 O.S.2011, §§ 2201–2208. That Act requires certain financial institutions to maintain the confidentiality of their customers' personal information in the face of disclosure requests from "government authorit[ies]" except upon written consent or a subpoena valid under the Act. *Id.* § 2203. The Oklahoma Supreme Court has interpreted this confidentiality obligation to extend to discovery in litigation between private parties because any judge ordering such discovery would qualify as a "government authority." *Alva State Bank & Trust Co. v. Dayton*, 1988 OK 44, ¶¶ 1, 5, 755 P.2d 635, 635–36. The Court has further determined that this statute applies to financial institutions engaged in the unclaimed property system: financial institutions must share information with the Treasurer under the Act's provisions relating to regulatory oversight and, without those provisions, the Treasurer would be required to obtain a subpoena. *See Lincoln Bank & Trust Co. v. Okla. Tax Comm'n*, 1992 OK 22 ¶¶ 9–14, 827 P.2d 1314, 1319–22. Although information obtained from covered financial institutions about presumably abandoned property would be handled by the Treasurer in the manner described in Part I(B) above, that information would remain confidential if the Act's abandonment requirements were not satisfied. *Id.* ¶¶ 11-14, 13 n.38, 827 P.2d at 1321–22, 1321 n.38. Hence, beyond the publication, disclosure, and confidentiality rules included in the Open Records Act and the UPA, any provision of law like the Financial Privacy Act could potentially trigger the Treasurer's confidentiality obligations.

II.

THE STATE TREASURER HAS LEGAL AUTHORITY UNDER THE UPA TO ADOPT ADMINISTRATIVE RULES CLARIFYING CONFIDENTIALITY REQUIREMENTS UNDER THE ACT, BUT THE STATE TREASURER MAY NOT ADOPT ANY RULES CONTRARY TO LAW. THIS OPINION DOES NOT ADDRESS WHETHER CURRENT REGULATIONS ARE CONSISTENT WITH THE UPA.

Your third question involves the authority of the State Treasurer to create administrative rules that interact with the confidentiality requirements mentioned above. The Treasurer clearly has authority under the UPA to enact administrative rules "necessary . . . to carry out the provisions of the [UPA] . . . in accordance with the Administrative Procedures Act." 60 O.S.2011, § 681. This rulemaking authority allows the Treasurer to clarify confidentiality rules associated with the administration of the unclaimed property system. In fact, the Treasurer has exercised this authority in the context of confidentiality, *see* OAC 735:80-1-5, although this opinion does not address the validity of the regulations currently enacted by the Treasurer.

However, we observe that the Treasurer does not have the authority to enact administrative rules contrary to the Oklahoma statutes. In other words, the Treasurer may adopt rules regarding confidentiality in order to resolve ambiguity, but the Treasurer may not create confidentiality where none otherwise exists. A clarifying interpretation could be entitled to the "highest respect from the courts" if such a rule becomes the subject of litigation, but any interpretation by the Treasurer "must [be] reasonable and not clearly wrong." *Indep. Fin. Inst. v. Clark*, 1999 OK 43, ¶ 13, 990 P.2d 845, 851. One unreasonable interpretation of the UPA's confidentiality provisions would be to contravene a clear, binding provision of law. Hence, the Treasurer can clarify or

define the confidentiality and disclosure rules governing his or her administration of the UPA, but the Treasurer may not contravene clear, binding law. This opinion does not address the validity of the Treasurer's current regulations.

III.

THE STATE TREASURER HAS LEGAL AUTHORITY UNDER THE UPA TO SHARE OTHERWISE CONFIDENTIAL INFORMATION IN VERY LIMITED CIRCUMSTANCES SUCH AS WITH OTHER STATES.

Your fourth question asks whether, notwithstanding an otherwise binding confidentiality obligation, the State Treasurer may share information with other entities, including other States, in order to properly administer the UPA. We first note that the Act must allow disclosure to persons outside the Treasurer's office as a matter of common sense lest the Act be reduced to a dead letter. As the Oklahoma Supreme Court has noted, a "statute will be given a reasonable and sensible construction: one that will reconcile its provisions and avoid inconsistencies and absurdities." *City of Jenks v. Stone*, 2014 OK 11, ¶ 15, 321 P.3d 179, 183. For example, the Treasurer may have to engage with holders concerning otherwise confidential information as part of examinations, *see* 60 O.S.2011, § 678; the Treasurer may need to communicate otherwise confidential information to claimants as part of the process of determining whether to make payments, *see id.* §§ 674, 675; the Treasurer may need to disclose information for the sake of enforcing provisions or rights in court, *see, e.g., id.* § 679(A); and the Treasurer may have to share confidential information with an attorney when receiving services from an attorney not employed within the Treasurer's own office.

Second, the Act also allows the Treasurer to make agreements to exchange information with other States' unclaimed property administrators in order to ensure that the proper government takes custody of unclaimed property. *Id.* § 683.1(A). The UPA itself contains provisions regarding which States should take custody of property, *id.* § 684.1(A). Therefore, sharing information with other States is crucial to the Act's effectiveness. Additionally, according to the United States Supreme Court, federal law preempts state law when a determination of custodial taking of unclaimed property between States must be made–resolving serious past controversies between States and raising the importance of proper channels of communication between States. *See Am. Petrofina Co. v. Nance*, 697 F.Supp. 1183, 1187–88 (W.D. Okla. 1986) (citing *Texas v. New Jersey*, 379 U.S. 674 (1965)) (striking down Oklahoma's provisions governing priority as preempted by federal law). The Legislature thus had important reasons for ensuring that the Treasurer had the authority to share information with other States.

Given the breadth of confidentiality for holder reports and claimant information discussed above, it would also be an untenable reading of the statute if all of the normal rules of confidentiality applied: the Treasurer would essentially only be able to share with other States the name and last known address of an owner. This would not fulfill the objectives of information sharing in ensuring that the appropriate State receives custody of unclaimed property. The Treasurer can, therefore, share otherwise confidential information with other States pursuant to a valid agreement under the Act.

In light of the above considerations, the Treasurer does have the authority to share otherwise confidential information with a very narrow class of other parties. The Treasurer may communicate information to parties necessarily included in a reasonable application of the UPA, including the agency's attorneys and those parties who submit information in the first place. Other persons making requests would not be entitled to information under the Act's confidentiality obligations. Further, the Treasurer has the authority to share otherwise confidential information with other States' unclaimed property administrators.

IV.

THE PAYMENT OF MONIES FROM THE UNCLAIMED PROPERTY FUND DOES NOT AFFECT THE REQUIREMENT OF CONFIDENTIALITY THAT HAS ATTACHED TO INFORMATION RELATED TO THE BASIS FOR SUCH PAYMENTS, BUT A HEARING ON THE VALIDITY OF A CLAIM DOES RESULT IN A DECISION DEEMED A PUBLIC RECORD.

Your fifth and last question asks whether a payment from the Unclaimed Property Fund extinguishes confidentiality requirements attached to information providing the basis for payment. In some circumstances, the decision to pay a claim may coincide with circumstances requiring the extinguishment of confidentiality obligations, but in other circumstances it would not. Specifically, as noted above, the Treasurer ***may*** hold a hearing under the Administrative Procedures Act to determine whether a claim against unclaimed property should be considered valid. 60 O.S.2011, § 675(A). The UPA requires that a written decision be prepared after such hearings, and these decisions must become public records—they are no longer confidential. *Id.* But other information about the claimant not included in the written decision does not become public under the Act. *See id.* Further, no provision of law otherwise requires disclosure of the confidential information obtained from or about a claimant just because that claimant has had his/her property returned to him/her. Thus, if the Treasurer does not hold a hearing on the validity of the claim, nothing extinguishes the confidentiality attaching to a claimant's information even if the Treasurer pays the claim.

V.
CONCLUSION

We have discussed the Uniform Unclaimed Property Act, the Oklahoma Open Records Act, and other provisions of law related to your questions about confidentiality in the administration of the unclaimed property system. These provisions of law create a system that thoroughly protects the confidentiality of personal information while publishing the name and last known address of the true owners of property in order for them to have notice of the existence of their claims.

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

1. **The State Treasurer has legal authority under the Uniform Unclaimed Property Act, 60 O.S.2011 & Supp.2014, §§ 651–688, and**

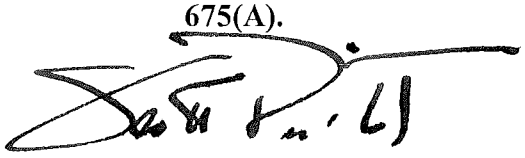
under the Oklahoma Open Records Act, 51 O.S.2011 & Supp.2014, §§ 24A.1–24A.30, to keep certain information confidential.

2. **The State Treasurer has the authority to maintain the confidentiality of holder reports, 60 O.S.Supp.2014, § 661(F), certain claimant information, *id.* § 674(A), litigation files and investigatory reports, 51 O.S.2011, § 24A.12, and any other information where confidentiality would be allowed or required by law, *id.* § 24A.5.**

3. **The State Treasurer has legal authority under the Uniform Unclaimed Property Act to adopt administrative rules clarifying confidentiality requirements under the Act, 60 O.S.2011, § 681, but the State Treasurer may not adopt any rules contrary to law. This Opinion does not address whether current regulations are consistent with the Uniform Unclaimed Property Act.**

4. **The State Treasurer has legal authority under the Uniform Unclaimed Property Act to share otherwise confidential information in very limited circumstances, such as with other States. *E.g.,* 60 O.S.2011, § 683.1.**

5. **The payment of monies from the Unclaimed Property Fund does not affect the requirement of confidentiality that attaches to information related to the basis for such payments, but a hearing on the validity of a claim results in a decision deemed a public record. 60 O.S.2011, § 675(A).**



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