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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Tina Glory-Jordan, Cherokee Nation Tribal Council
Jodie Fishinghawk, Cherokee Nation Tribal Council
Chuck Hoskin, Jr., Cherokee Nation Tribal Council
Chad Smith, Principal Chief

Opinion Number: 2010-CNAG-01

Date Decided: February 5, 2010

To: Tina Glory-Jordan, Cherokee Nation Tribal Council
Jodie Fishinghawk, Cherokee Nation Tribal Council
Chuck Hoskin, Jr., Cherokee Nation Tribal Council
Chad Smith, Principal Chief

From: A. Diane Hammons, Attorney General for the Cherokee Nation

This office has received two requests regarding alleged violations of the Cherokee Nation Freedom of Information Act. The first request, submitted by three members of the Tribal Council, asked for an official Attorney General Opinion addressing the following question:

- 1. Was an informal gathering attended by the Principal Chief and certain members of the Cherokee Nation Tribal Council (among others), and at which the FY 2010 Cherokee Nation Tribal Budget was discussed, a criminal violation of the Cherokee Nation Freedom of Information Act?**

The second question, posed by the Principal Chief, requests an opinion on the following question:

2. Was the action of the Cherokee Nation Tribal Council in voting to intervene in certain Cherokee Nation district court litigation, when such item was not on the agenda, a violation of the Cherokee Nation Freedom of Information Act?

It is interesting to note that over one-third of the official opinions rendered by this office since its inception deal with alleged FOIA violations. See, e.g., 2006-CNAG-1 (re: legislative conferences with no agenda posting), 2007-CNAG-1 (required number of hours for posting an agenda for commission meeting); and 2008-CNAG-2 (re: media recording of public meetings).

ANSWERS AND ANALYSIS

The Cherokee Nation Freedom of Information Act (“FOIA”) was enacted pursuant to Legislative Act 25-01 which was signed into law on July 20, 2001, and requires public bodies to provide certain information to the public and to ensure that the public knows about and is permitted to attend meetings of public bodies. FOIA was amended by Legislative Act 24-04 which was signed into law on June 17, 2004, and by Legislative Act 25-07 which was signed into law on June 15, 2007.

Under FOIA:

All public bodies must give written public notice of their regular meetings and special meetings as required by the Constitution and laws of the Cherokee Nation. Provided that agendas must be posted, in accordance with this Act, ten (10) days prior to any regular meeting of a public body or twenty-four (24) hours in case of a special meeting.

75 CNCA § 10(A)

Legislative committees “must post their meeting agenda at least ten (10) days prior to the meeting.” 75 CNCA § 10(B). FOIA further states that written public notice must include, at a minimum, posting a copy of the notice at the principal office of the public body holding the meeting or at the building in which the meeting is to be held.

FOIA defines “meeting” to mean “the convening of a quorum of the constituent membership of a public body...to *discuss* or act upon a matter over which the public body has supervision, control, *jurisdiction* or advisory power.” (emphasis added) 75 CNCA § 4(E). FOIA further defines “Public Body” to mean any “governmental body or political subdivision of the Nation... including committees, subcommittees, advisory committees, and the like of any such body by whatever name known...” 75 CNCA § 4(B).

The only language in FOIA referencing penalties states, “[a]ny person or group of persons who *willfully and maliciously* violates the provisions of [FOIA] may be found guilty of a crime...” (emphasis added) 75 CNCA § 13. The language in this statute clearly indicates that any alleged FOIA violation must be committed both willfully and maliciously. In addressing whether any alleged behavior is sufficient to trigger the penalty provision of FOIA, one must look to Cherokee Nation law to define the terms “willfully” and “maliciously”.

Under the Criminal Code of the Cherokee Nation, the term “willfully” is defined as follows:

The term “willfully” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

21 CNCA § 92

Under this definition, it is of no consequence whether or not a party intends to violate FOIA; it is enough, for example, that the parties involved intended to have a meeting and that a meeting occurred. As defined by 21 CNCA § 92, “willfully” connotes simply a purposeful act, as opposed to an accidental or an unintended act.

Under the Criminal Code of the Cherokee Nation, the term “maliciously” is defined as follows:

The terms “malice” and “maliciously,” when so employed, import a wish to vex, annoy or injure another person, established either by proof or presumption of law.

21 CNCA § 95

Under this definition, the use of “maliciously” imports a wrongful and unlawful intent required in charging this offense.

Alternatively, under Cherokee Nation law, malice may be established by presumption of law. Guidance on this issue is set forth in the case Bias v. U.S., 3 Ind. T. 27, 53 S.W. 471 (Indian Terr. 1899). In *Bias*, the Court of Appeals of Indian Territory stated that “[m]alice may be implied from any deliberate and unlawful act against another, if the unlawful act be of such character as to show an abandoned and malignant disposition.” Id. at 473.

QUESTION ONE

- 1. Was an informal gathering attended by the Principal Chief and certain members of the Cherokee Nation Tribal Council (among others), and at which the FY 2010 Cherokee Nation Tribal Budget was discussed, a criminal violation of the Cherokee Nation Freedom of Information Act?**

MEETING REQUIREMENTS – COUNCIL/COMMITTEE

As we understand the factual basis for your question, on or about August 15, 2009, an informal gathering was held at the Hard Rock Hotel at which were present members of the Cherokee Nation Tribal Council, Principal Chief Chad Smith and Secretary of State Melanie Knight, as well as some spouses of Tribal Council members, and a Cherokee Nation employee. During the course of this gathering, the FY 2010 Cherokee Nation Tribal Budget was discussed. We have

conducted an investigation into this matter, and have confirmed that the meeting took place, that ten (10) members of the Council were present in the meeting room at one time, and that the then proposed Cherokee Nation governmental budget was discussed. The informal email that was sent to a limited number of Tribal Council members from an Administration employee, gave the date and time for the “next team meeting,” and stated that “the main discussion item will be the FY 2010 budget.”

This office has previously opined that the Principal Chief may hold a “legislative conference” with the Tribal Council “without publication of an agenda so long as the date, time and place of the Legislative Conference is published at least ten (10) days in advance of the Legislative Conference and no formal action occurs at the Legislative Conference.” 2006-CNAG-1, 7/21/2006. All seventeen Tribal Council members are invited to those legislative conferences.

The August 15th “team meeting” was an informal event, at which a limited number of Tribal Council members and their guests were invited, and a meal was served. However, the invitation specifically stated that the 2010 budget would be discussed. The pivotal question for FOIA purposes is whether or not this gathering was a “meeting” as defined by the Act. And, that question in turn depends on whether or not this was an informal business gathering of the members of the *Executive and Finance Committee* or the *Tribal Council* itself.

The Legislative branch of government for the Cherokee Nation consists of one legislative body called the Council of the Cherokee Nation (the Council), composed of seventeen members. See Cherokee Nation Const. art. VI, § 1 (2003). Pursuant to constitutional requirement, the Council has promulgated rules for its credentials, decorum and procedure. See Cherokee Nation Const. art. VI, § 2 (2003). The Council has created six standing committees that address various topics prior to submission to the full Council’s monthly meeting. Most of those committees are comprised of 17 members, or the entire body of the Council itself. The Executive and Finance Committee is a Standing Legislative Committee of the Council created pursuant to the Rules of Procedure Governing the Council. See Rules of Procedure Governing the Cherokee Nation Tribal Council, art. VI, § G (2007). The Executive and Finance Committee has jurisdiction over all financial affairs of the Nation, including necessarily, approval of the annual budget. See Rules of Procedure Governing the Cherokee Nation Tribal Council, art. VI, § G(1)d.

The Executive and Finance Committee is a “public body” under the Act, as would be the Council itself.

The pivotal question here, then, is whether this was a gathering of a portion of the Executive and Finance Committee, or the Tribal Council. Because the two groups are composed of exactly the same members, it is impossible to determinatively decide the matter upon the facts presented. The invitation was sent by email to the “team,” a term used by the Administration to refer to a certain portion of the Tribal Council, generally seen as philosophically aligned with the Principal Chief. The team has met periodically to discuss various issues. There was certainly no reference to the Executive and Finance Committee in the invitation. However, the invitation specifically referenced the annual budget, which was to be voted upon shortly thereafter and is within the jurisdictional purview of that Committee.

Under Cherokee Nation law, a “quorum” for a committee means a simple majority of the constituent membership of said committee. 75 CNCA § 4(F). See also Rules of Procedure Governing the Cherokee Nation Tribal Council, art. VI, § C(6). The Executive and Finance Committee is comprised of all seventeen (17) members of the Tribal Council. See Executive and Finance Committee meeting minutes for July 30, 2009 and August 27, 2009. Accordingly, a simple majority consisting of nine (9) or more of the seventeen (17) Committee members would constitute a quorum of the Executive and Finance Committee. On the other hand, a quorum of the Tribal Council itself is 2/3 or 12 members. See Cherokee Nation Const. art. VI, § 4 (2003).

During the course of the investigation conducted by this office, it was determined that no less than ten (10) different members of the Tribal Council/Executive and Finance Committee attended the informal gathering held at the Hard Rock Hotel on or about August 15, 2009. The attendance of ten (10) or more Executive and Finance Committee members at this gathering was a simple majority of said Committee members, which would constitute a quorum of that body. As set forth above, the FY 2010 Cherokee Nation Tribal Budget was discussed at this gathering; the tribal budget being a subject over which the Executive and Finance Committee has jurisdiction. Accordingly, a quorum of the Executive and Finance Committee attended this informal gathering at which discussion was held upon a matter over which the Committee has jurisdiction (the FY 2010 Tribal Budget). A quorum of the Tribal Council itself, being 12, was not present.

During the course of the investigation conducted by this office, it was determined that no public notice was posted. Specifically, in response to a GRA request dated September 16, 2009 regarding the August 15, 2009 meeting, the Secretary of State asserted that “this meeting was not subject to open meetings laws, and thus no public notice was posted.” The parties in attendance of this meeting apparently believed that said meeting “was not subject to open meeting laws,” and indeed, it is no secret that such informal meetings regularly occur. This stated belief of the participants, taken in conjunction with the other facts, negates the necessary proof of malicious *mens rea* as required under FOIA.

We cannot say, determinedly, whether or not this was a “meeting” within the FOIA definition of that term. We would also point out, however, that FOIA specifically provides that:

No chance meeting, **social meeting**, or electronic communication may be used *in circumvention of the spirit of requirements* of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

75 CNCA § 9(C).

There can be little doubt that the act of conducting the August 15, 2009 meeting was not of such character as to show an abandoned and malignant disposition. Therefore, there is no actual proof of malice or presumption of malice on the parties to the August 15, 2009 meeting at the Hard Rock Hotel.

While it is our conclusion that this meeting did not give rise to a criminal violation of FOIA, the circumstances of this meeting require us to urge that special caution be taken in such matters. In

the discharge of their duties, tribal agencies and employees must comply with the letter of the law and avoid even the *appearance* of impropriety. Westinghouse Electric Corporation v. Grand River Dam Authority, 720 P.2d 713 (Okla.1986). In reviewing state statutes nearly identical to those addressed in this opinion, the Oklahoma Supreme Court said in *Westinghouse*:

"Government agencies are uniquely endowed with the power to implement the public will, and as such, are subject to the highest levels of scrutiny by the people whom they serve. Government officials and employees must exercise great care to avoid even the appearances of impropriety in their duties; for they, like Caesar's wife, must be above reproach." Westinghouse Electric v. Grand River Dam Authority, 720 P.2d 713, 716, 717 (Okla. 1986).

We are therefore of the opinion that the August 15, 2009, meeting of ten members of the Tribal Council/Executive Finance Committee did not constitute a criminal violation of the Freedom of Information Act. We cannot conclusively state on the facts present that the gathering was an Executive and Finance Committee "meeting" for purposes of FOIA, although there were a sufficient number of Councilors present to constitute a quorum of that body. Further, we find no evidence of malicious intent necessary to constitute a FOIA criminal violation. However, we strongly caution elected officials that any such meetings in the future should comply with the notice and agenda requirements of FOIA if a simple majority of Tribal Council members are present. By following the FOIA requirements for such gatherings, there will be no question of illegality, nor appearance of impropriety.

QUESTION TWO

The second question, posed by the Principal Chief, requests an opinion on the following question:

- 1. Was the action of the Cherokee Nation Tribal Council in voting to intervene in certain Cherokee Nation district court litigation, when such item was not on the agenda, a violation of the Cherokee Nation Freedom of Information Act?**

As stated above, FOIA requires that Tribal Council and Committee agendas be posted ten days prior to a meeting. The Principal Chief has asked for our opinion on whether certain actions of the Tribal Council at the Rules Committee meeting of November 20, 2008, were a violation of FOIA. Specifically, he has informed us that the Rules Committee voted on, and approved the entry of appearance by their attorney, Mr. Hembree, in a suit filed by the Principal Chief against the Election Commission, seeking clarification on various election issues even though that item did not appear on the agenda.

Our investigation into this matter verifies the Principal Chief's recitation of the matter to us. On November 20, 2008, at the close of the regularly scheduled Rules Committee, during the "Announcements" portion of the agenda, Mr. Hembree informed the Committee (which is also composed of the entire body of the Tribal Council) about the recently filed (11/19/08) lawsuit. The minutes of that meeting reflect:

He stated the suit is against the Election Commission but felt it necessary for the Council to intervene as a necessary party as it deals with the rights and issues of the Tribal Council. He stated the way the petition was brought is basically directed at the Tribal Council. He asked direction from this committee.

Councilor Hoskin Jr. made a motion for Mr. Hembree to proceed in entering the law suit on the behalf of the Council. Councilor Glory-Jordan seconded the motion. Motion carried unanimously.

Meeting Minutes, Rules Committee, Tuesday, November 20, 2008.

The Agenda for the 11/20/2008 Rules Committee does not mention the lawsuit, any discussion of the issues involved in it, nor any other item connected to the matter. "Announcements" was included at the bottom of the agenda, as is common. Typically public service announcements are made at that time, i.e., announcements of upcoming community events. It is clear that a vote to enter the litigation was made without such item being included on the agenda.

PUBLIC NOTICE REQUIREMENTS/INVALIDITY OF ACTIONS TAKEN

As stated above, our FOIA requires written public notice of meetings, and posting of agendas in advance. The Council recognizes the importance of these requirements in its own Rules of Procedure. In Rule G, "Meeting Agenda," the following have been adopted by the Council:

G(c). The Agenda shall be posted for public inspection at least ten (10) days prior to a regularly scheduled meeting.

- i. At a minimum, this requires written posting outside the Council chambers.
- ii. Agenda publication is encouraged throughout the Cherokee Nation by any and all available means.
- iii. The Secretary of the Council or his/her designee shall post the Agenda. The Agenda shall not be changed or removed after it is posted.

"Rules of Procedure Governing the Cherokee Nation Tribal Council,"
adopted 9/27/07.

Courts in other jurisdictions often have held that FOIA violations, even unintentional ones, even slight ones, render actions taken void or voidable. Polillo v. Deane, 74 N.J. 562, 379 A.2d 211 (1977); Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla.1974); Accardi v. Mayor and Council of City of North Wildwood, 145 N.J.Super. 532, 368 A.2d 416 (1976). For example, Oklahoma's Open Meeting Act provides in 25 O.S.Supp.1977, s 313 that "[a]ny action taken in willful violation of this act shall be invalid."

In interpreting and applying this provision, Oklahoma courts have emphasized the Act's purpose.

In the case of *Order Declaring Annexation Dated June 28, 1978*, 637 P.2d 1270, 1981 OK CIV APP 57 the Court recognized that:

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

Like other legislation enacted for the benefit of the public, open meeting laws are liberally construed to further their goals and favor the public.

637 P.2d at 1273 (citations omitted).

In this instance, the Principal Chief brought up the actions of the Tribal Council in authorizing intervention in the lawsuit itself. Thus, the validity of the action is not a question for us to address, as it has previously been presented to our highest Court.

Again, we find no evidence of malice in this situation, in which the Council voted on an important business item, though it had not been included on the meeting's agenda. We understand that the lawsuit had been filed the day before the Rules Committee met, and it was undoubtedly at the forefront of the Tribal Council attorney's considerations. Undoubtedly the best course of action was to have placed this on the agenda of the next available committee, or meeting of the full Council. If that was not possible due to time constraints, at the least, the agenda should have been formally amended so that the item could be properly added for discussion, with an acknowledgement of why it was not possible to post a public notice.

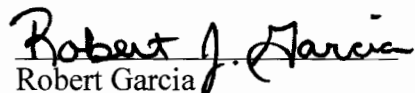
Liberal construction of the open meeting requirement would find this action to be a violation. It has previously been raised before our highest Court, and it is not proper for us to address its effect. However, we will, as in Question 1, strongly advise our elected officials to be ever vigilant and cautious in their dealings in public meetings, and/or situations which could be reasonably construed as meetings. The Cherokee Nation is one of a very few tribes to have an open meeting or Sunshine law, reflecting a commitment to transparent government and a dedication to having an informed and engaged citizenry. We must remain dedicated to not only the wording, but the spirit, of this law.

IT IS, THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:

- 1. The meeting held at the Hard Rock Hotel on or about August 15, 2009 did not give rise to a criminal violation of the Cherokee Nation Freedom of Information Act. Informal meetings of more than eight (8) Tribal Council members are strongly discouraged when items of Council business are the subject of discussion; any such meetings should follow the dictates of our Freedom of Information Act.**
- 2. The actions of the Tribal Council in voting on a business item in its November 20, 2008, Rules Committee, when such item was not on the agenda, has been previously raised before our highest Court, and it is therefore not proper for us to address the validity of the action voted upon. However, we advise the Council to be ever vigilant and cognizant**

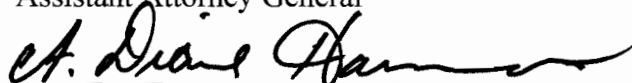
of the dictates of our open meeting requirements, and recognize that any future such actions, if taken in contravention of FOIA, could very well be invalid.

Respectfully Submitted by:

Handwritten signature of Robert J. Garcia in black ink.

Robert Garcia

Assistant Attorney General

Handwritten signature of A. Diane Hammons in black ink.

A. Diane Hammons

Attorney General for the Cherokee Nation