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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Cara Cowan Watt, Tribal Council Member

Opinion Number: 2012-CNAG-04

Date Decided: June 25, 2012

This office has been asked for an opinion answering the following:

Can a Tribal Council Member attend a closed executive session of a Cherokee Nation wholly owned corporation's Board of Directors meeting as a representative of the shareholder of the corporation?

For the reasons below, we believe that a Tribal Council Member does not have an absolute right to attend a closed executive session of a Cherokee Nation wholly owned corporation's board of directors meeting unless the Tribal Council Member is seated on the Advisory Board to the Board of Directors of that corporation.

ANALYSIS

The Freedom of Information and Rights to Privacy Act governs meetings of public bodies. CN LA-25-01 (as codified under 75 CNCA §§1-15). A public body is

any Cherokee Nation board, commission, agency, authority, any public or governmental body or political subdivision of the Nation, including any organization, corporation, or agency supported in whole or in part by public funds under the authority of the Cherokee Nation or expends public funds under the care of the Nation, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi- governmental body of the Nation, the business enterprises of the Nation and its political subdivisions, including, without limitation, bodies such as the Public Service Authority, the Port Authority, and any corporation for profit or non-profit.

75 CNCA §4(B). The Board of Directors of the Cherokee Nation Businesses, L.L.C. is a public body for the purposes of the Freedom of Information and Rights to Privacy Act as it is a board of a Cherokee Nation owned corporation. A meeting is defined as

the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

75 CNCA §4(E). CN LA-35-02 (as amended by LA-15-10, LA-17-10, and LA-15-12) created an Advisory Board of Directors to all corporations in which the Cherokee Nation is a majority shareholder. Under the Operating Agreement of the Cherokee Nation Businesses, L.L.C., the Cherokee Nation is the sole member (shareholder) of the company (see First Amended and Restated Operating Agreement of Cherokee Nation Businesses, L.L.C., Article I, Section 1.6.3). The Advisory Board of Directors is comprised of eight members of the Cherokee Nation Tribal Council. CN LA-15-12. The Advisory Board of Directors has full access to all information of the Board of Directors and can attend all meetings. CN LA-15-12 (also see First Amended and Restated Operating Agreement of Cherokee Nation Businesses, L.L.C., Article IV, Section 4.1). The Advisory Board members do not have the right to vote, though. CN LA-15-12.

Under the Freedom of Information and Rights to Privacy Act, meetings of public bodies are open to anyone, including Tribal Council Members who do not hold an advisory board seat. 75 CNCA §8. Meeting of public bodies can be closed (executive session) for the following reasons:

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of other employees or clients whose records are submitted for use at the hearing.
- (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of

- legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.
- (3) Discussion regarding the development of security personnel or devices.
 - (4) Investigative proceedings regarding allegations of criminal misconduct.
 - (5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

75 CNCA §9. The Board of Directors of CNB can close the meeting of the Board and proceed in Executive Session so long as the discussion item meets one of the above reasons. Once in Executive Session, the meeting is closed to the public. 75 CNCA §9. The only persons allow to attend a meeting in Executive Session are the Board members and the Advisory Board members. Any Tribal Council member who does not sit on the Advisory Board cannot be present for Executive Sessions unless invited by a majority of the body. Only the Tribal Council members who are present in an official capacity as Advisory Board members can attend an Executive Session of the CNB Board of Directors meeting.

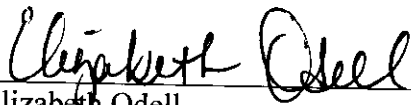
The purpose of the Advisory Board is to act as a conduit of information to other members of the Tribal Council. Advisory Board members have specific statutory rights to access information that in not shared by all Council members. CN LA-35-02. The recently passed "Ownership for the People Act", CN LA-27-11, states that both the Principal Chief and the Tribal Council shall be the entities to represent the "shareholder" for corporations owned by the Cherokee Nation. This act does not convey any special privilege to either the Principal Chief or Tribal Council to attend Executive Session of business boards. Additionally, any action taken by the Tribal Council under this act shall require a two-thirds majority. A meeting of the Board of Directors is not a meeting of the Member. The Chief and the Tribal Council together represent the sole Member of CNB. The Tribal Council as a whole has certain rights that are reserved for the Member. Those rights include obtaining information regarding the company, inspecting records, obtaining copies of the corporate documents of the company, and appointing and removing Directors. (see First Amended and Restated Operating Agreement of Cherokee

Nation Businesses, L.L.C., Article VII, Section 7.2). These rights do not include the right to attend closed meetings of the Board of Directors. The Board of Directors is tasked with directing, managing, and controlling the business of CNB. (see First Amended and Restated Operating Agreement of Cherokee Nation Businesses, L.L.C., Article III, Section 3.1). This includes the duty to conduct regular meetings. (see First Amended and Restated Operating Agreement of Cherokee Nation Businesses, L.L.C., Article III, Section 3.12). That is a duty for the Board of Directors not the Member. Only the Advisory Board members, who were appointed by the Tribal Council as a whole, can officially attend the Board of Directors meetings and the Executive Sessions. All other Tribal Council members who attend the Board of Directors meetings are attending as a member of the public and not as a representative of the Member as the Member has no reserved right to attend the meetings. However, the body or committee can invite any individual to attend an executive session upon the concurrence of the majority of the body.

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

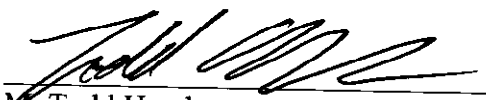
A Cherokee Nation Tribal Council Member does not have an absolute right to attend a closed executive session of a Cherokee Nation wholly owned corporation's Board of Directors Meeting unless the Tribal Council Member is seated on the Advisory Board to the Board of Directors of that corporation.

Respectfully submitted by:



Elizabeth Odell

Assistant Attorney General



M. Todd Hembree

Attorney General of the Cherokee Nation