9305-9855

ALAN WILSON
ATTORNEY GENERAL

February 25, 2015

Simpsonville City Council
Attn: Phyllis Long, City Clerk
118 NE Main Street
Simpsonville, SC 29681

Dear Simpsonville City Council Members:

You have asked for an opinion of this Office as to whether a "walk through" of the "Old Simpsonville School Building" / "Arts Center" attended by two of the three members of the Council's Recreation and Events Committee would be subject to the open meeting requirements of the Freedom of Information Act ("the FOIA" or "the Act"). Central to your question is whether the walk through would classify as a "meeting" as defined by the FOIA. While our office is not a fact finding entity, based on the information you have provided, we believe a court would likely find that the walk through would classify as a meeting subject to the requirements of the FOIA.

Your correspondence references the composition of the Simpsonville City Council, which includes a total of six members functioning by way of a committee system. Each of the four committees is comprised of three members and operate "for the purpose of gathering and studying information and making recommendations to the city council." Simpsonville, S.C., Code of Ordinance § 2-70(a) (2014). The Recreation and Events committee is tasked with studying and making recommendations on "[m]atters related to city parks, amphitheaters, arts center, and sports." Id. at § 2-70(b). You note that council members Graham, Lockaby, and Groom currently sit on this committee.

Your letter also indicates that the Recreation and Events Committee was asked to provide a recommendation of the use of the Arts Center due to the expiration of a former use agreement. Public input for use of the building was heard during a regularly scheduled Recreation and Event Committee meetings on July 22, 2014 and on August 26, 2014 and public proposals were subsequently made during a September 23, 2014 meeting. At the September 23, 2014 meeting, a motion was made and passed to approve the presented proposals involving partnership between the Simpsonville Arts Foundation (SAFi) and the Simpsonville Chamber of Commerce for use of the building, recommend its adoption, and move the matter to full council for review and vote.

Also provided with your letter is an email from the City Administrator as well as newspaper articles indicating that on September 24, 2014, Councilwoman Lockaby requested access to the Art Center building for herself and Simpsonville's assistant Municipal Judge for the purpose of considering whether the classrooms in the building could be a suitable location for the municipal court operations and staff. Following the tour, an email from the City Administrator

states that an additional walk-through was scheduled "immediately after the police department substation grand opening on September 26." The City Administrator noted that "[t]he following attended the September 26 walk-through: Council member Lockaby, Council member Lawrence, Council member Graham, the chief judge, the assistant judge, the clerk of court, the assistant clerk of court, the public works director, the police chief, and myself (the city administrator)." Furthermore, the City Administrator noted that "the public works director, the police chief, and Council member Graham each arrived at different times later than the others" and described the site-visit as follows:

> [t]he best way that I can describe the actual setting of the walk-through on September 26 is that it was informal and splintered. There were lots of separate conversations all going on at the same time. Small groups and pairings splintered off into different parts of the building. There was a lot of interest in the comments and opinions of the individual court staff members and the public works director as to whether they saw any potential for court occupying some of the classroom space.

Your letter also contains an excerpt from an article in the *Tribune-Times* quoting Councilwoman Lockaby as stating:

> "[w]e've been tasked with finding out what to do with the school. ... It's really been up in the air," said Lockaby, who's the chairwoman of the Public Safety Committee. "I thought about putting the court in there because I know that the current courtroom isn't big enough. ... They've been shut down twice by the fire marshal for having too many people."
>
> . . . .
>
> Lockaby said she, Dyrhaug [City Administrator] and Sharff [Assistant Municipal Judge] had previously discussed possibly moving the court to the school building. "We were trying to explain what Judge Sharff's ideas were about the building and five classrooms," Lockaby said. . . .
>
> "I think it was a very productive meeting. Now we've just got to present it to council."

You also indicate that comments regarding the September 26 tour of the building were made during the City Council's regularly scheduled meeting on October 14, 2014 by citizens and members of council. Specifically, the minutes of the October 14, 2014 meeting reflect the following:

> Councilmember Lockaby advised that some time back she had contacted Judge Sharff to ask if he would consider using the school building for court due to overcrowding. Mr. Sharff was not aware of the school building but agreed to look at the space with Ms. Lockaby. On Wednesday, September 24, 2014, David Dyrhaug, Sylvia Lockaby and Leslie Sharff visited the school building to look at the space. It was decided that the group would return on Friday, September 26, 2014 with John Laux to get his opinion on renovations that would be needed if court were to occupy the space. The group did go back on September 26, 2014

> after the ribbon-cutting at Advanced American for the Police Department Substation.
> . . . . [Councilmember Graham] shared that although he and Councilmember Lockaby serve on the same committees together[1], they did not speak to each other during the visit on September 26, 2014. Mr. Graham stated that he spoke with David Dyrhaug, the three Judges, John Laux and the guy from the Revolutionary Museum and that he was discussing the logistics of what would and would not work in the space if court were to be considered.
> . . . .
> . . . . Ms. Lawrence stated she had drifted by after the ribbon-cutting at Advanced America and that is why she was there on September 26, 2014.

Finally, we note that the minutes reflect the following vote resulted on use of the Art Center building during the October 14, 2014 meeting:

> Motion by Recreation Committee Chairperson Gooch to accept the Chamber/SAFi proposal to occupy the Simpsonville Old School Building and to enter into contractual negotiations. Motion to Table by Councilmember Graham to study the issue further. There was no 2nd to the motion to table therefore the motion failed. After discussion roll call vote taken on original motion, motion failed Yes = 2, No = 4. Councilmembers Graham, Braswell, Lockaby and Lawrence voting No.

Law/Analysis

We begin by noting this Office's longstanding policy that "investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court." Op. S.C. Att'y Gen., 2006 WL 2849809 (Sept. 14, 2006). As your question requires factual determinations, we note that this opinion is written solely based upon the information provided and referenced in your correspondence. Only a court of law can make a conclusive determination – as a fact finding entity – of the issues raised. Nonetheless, we have provided the legal framework that a court would likely follow to guide its factual analysis as well as authority addressing open meeting law issues similar to the one you have raised to help clarify your inquiry and provide our opinion of how a court may rule.

I. The FOIA's Open Meeting Provisions

The FOIA is codified at S.C. Code Ann. §§ 30-4-10 et seq. We have recognized in numerous prior opinions of this office that "[a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent." Op. S.C. Att'y Gen., 1988 WL 383514 (April 11, 1998) (citation omitted); see also Op. S.C. Att'y Gen., 2010 WL 928443 (February 24, 2010); Op. S.C. Att'y Gen., 2002

[1] Councilmembers Lockaby and Graham also serve on the Public Safety Standing Committee together. The Public Safety Standing Committee's assigned area of responsibility includes "matters related to fire, police, and municipal court." Simpsonville, S.C., Code of Ordinance § 2-70(b) (2014).

WL 1925746 (June 13, 2002). Accordingly, S.C. Code Ann. § 30-4-15, provides significant guidance as it sets forth the legislature's intent in its enactment of the FOIA as follows:

> [t]he General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007 & Supp. 2014). In other words, "[t]he essential purpose of FOIA is to protect the public from secret government activity." Lambries v. Saluda County Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014) (citing Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998)). The Supreme Court has also instructed that the "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001) (citations omitted).

"In South Carolina, FOIA governs the public disclosure of the activities of public bodies, and it has provisions pertaining to public meetings we well as documents." Lambries, 409 S.C. at 8, 760 S.E.2d at 789 (citing S.C. Code Ann. § 30-4-10 to –165 (2007 & Supp. 2013)). The FOIA's open meeting provision, S.C. Code Ann. § 30-4-60, states that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." The term "meeting" is statutorily defined within the Act 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." S.C. Code Ann. § 30-4-20(d) (emphasis added). Both "public body" and "quorum" are also statutorily defined by the FOIA. See S.C. Code Ann. § 30-4-20(a), (e).

First addressing the term "public body," its definition includes "any department of the State . . . any public or governmental body or political subdivision of the State, including counties, municipalities . . . including committees, subcommittees, advisory committees and the like of any such body. . . ." S.C. Code Ann. § 30-4-20(a) (2007 & Supp. 2014). The inclusion of "committees, subcommittees, advisory committees, and the like of any such body by whatever name known" was added to the public body definition by our legislature in 1987. Act No. 118, 1987 S.C. Acts 301-02. Clearly the legislature intended for standing committees of a city council, such as those formed by the Simpsonville City Council, to be covered by this definition. We have advised the same for numerous years, even prior the FOIA's 1987 amendment. See Op. S.C. Att'y Gen., 2002 WL 31341811 (Aug. 19, 2002) (agreeing with Mt. Pleasant town attorney that "Mount Pleasant Town Council and all [of its] committees are considered public bodies which are subject to the freedom of information act and requirements thereof" and noting "[t]his Office has so advised for many years, long before the FOIA was amended expressly to reflect such requirement").

Turning to the term "quorum," it is defined as a simple majority of the constituent membership of a public body unless otherwise defined by applicable law. S.C. Code Ann. § 30-4-20(e) (2007 & Supp. 2014). In a recent opinion of this Office we were asked to apply the definition of a quorum specifically to a question involving the Simpsonville City Council's standing committees. See Op. S.C. Att'y Gen., 2014 WL 3965780 (Aug. 5, 2014). In that opinion we noted our Office's agreement that:

> 1) A committee is a public body (S.C. Code § 30-4-20(a));
> 2) Two members on the same committee could constitute a quorum (S.C. Code Ann. § 30-4-20(e));
> 3) A meeting of the quorum would trigger the meeting of the committee (S.C. Code § 30-4-20(d)); [and]
> 4) A meeting of a public body must be open unless it is an exception (S.C. Code § 30-4-60).

Id. at *2. Consistent with the above referenced opinions, we believe that the gathering of two of three members of a Simpsonville City Council standing committee, *i.e.* a quorum, could classify as a meeting of a public body subject to our FOIA's open meeting requirements.

S.C. Code Ann. § 30-4-80(a) (2007 & Supp. 2014) provides the manner in which notice of meetings of public bodies must be given, distinguishing between notice requirements for regular, special, and emergency meetings of public bodies. For special meetings, which appears to be applicable to this opinion, the Act requires that public bodies must post notice as early as is practicable but not later than twenty-four hours before the meeting, and that notice include the agenda, date, time, and place of the meeting. Id.

Based on the subject matter the Recreation and Events Committee was asked to gather information on in regards to the Art Center, we point out that S.C. Code Ann. § 30-4-70(a) enumerates six topics that a public body can discuss during executive sessions, which are closed to the public. Such topics include, but are not limited to, "proposed contractual agreements and the proposed sale of purchased property; the receipts of legal advice related to a pending, threatened, or potential claim; and the discussion of the proposed location, expansion, or provision of services." Lambries, 409 S.C. at 9, 760 S.E.2d at 789 (listing some of the topics closed to the public pursuant to S.C. Code Ann. § 30-4-70(a)). However, prior to convening an executive session, an announcement of the specific purpose for the executive session must be made. S.C. Code Ann. § 30-4-70(b)(2007) ("Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, 'specific purpose' means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section"). Furthermore, "[n]o action may be taken in executive session except (a) to adjourn or (b) return to public session." Id.

Also of importance, we note that our state's FOIA cautions that "[n]o 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." S.C. Code Ann. 30-4-70(c) (2007 & Supp. 2014). We

discussed these so-called "chance meetings" in an August 8, 1983 opinion of this office, stating that "regardless of whether a gathering be simply for discussion or action upon public business, or whether the gathering be designated informal or formal in nature, if the definition of 'meeting' is met, then the requisite notice of the meeting must be given." Op. S.C. Att'y Gen., 1983 WL 142726 (Aug. 8, 1983). This opinion also noted that "when interpreting the word meeting as used in the FOIA, the term must be broadly construed in light of the foregoing remedial purpose." Id. at * 3(footnote omitted).

II. Authority Applying Open Meeting Laws

a. South Carolina Case Law and Prior Attorney General Opinions

While each case applying the FOIA must be analyzed on its own set of facts, we will look to case law and Attorney General opinions for guidance on what constitutes a meeting for purposes of the FOIA thereby necessitating notice to the public. First, we point out recent authority from our Supreme Court in which the term meeting was elaborated on for purposes of determining the FOIA's requirements for posting a regularly scheduled meeting's agenda. See Lambries v. Saluda County Council, 409 S.C. 1, 760 S.E.2d 785 (2014). In its analysis, the Court stated that "FOIA makes it clear that meetings are not limited to instances where action is taken, as evidenced in section 30-4-20(d), which defines a "meeting" as "the convening of a quorum . . . *to discuss or act* upon a matter over which the public body has supervision, control, jurisdiction or advisory power." Id. at 14, 760 S.E.2d at 792 (emphasis in original). Of particular importance, we note that in addition to citing S.C. Code Ann. § 30-4-20(d) following the previous quotation for the FOIA's definition of meeting, the Court cited and quoted 62 C.J.S. Municipal Corporations § 308 (2011), which expounds upon the definition of "meeting" as follows:

> [u]nder an open meetings law, a meeting is a gathering of a quorum or more members of a governing body at which members discuss, decide, *or receive information* as a group on issues relating to the official business of the body . . . . A meeting is not limited to gatherings at which action is taken by a governing body. Deliberative gatherings are included as well, and deliberation in this context connotes not only collective decision-making but also the collective acquisition and exchange of facts in preparation for the final decision.

Id. (quoting 62 C.J.S. Municipal Corporations § 308 (2011)) (emphasis added).

We also point out the case of Braswell v. Roche, 299 S.C. 181, 183, 383 S.E.2d 243, 244 (1989), where our Supreme Court held that the Newberry County Board of Education violated the FOIA when it did not disclose a meeting it held with its administrative staff at the school district office. The board argued that it met "only to receive information from its administrative staff regarding matters over which it had 'supervision, control, jurisdiction, or advisory power." Id. at 182, 383 S.E.2d at 244. The Court held that the meeting, where the agenda included topics such as "(1) points of agreement and disagreement between the Board and the Committee; (2) a summary of research regarding school size; (3) operational costs at Bush River School as compared to other similar schools; and (4) rezoning and transporting students from the Bush

River area" and a statement providing that "we [the Board and staff] will go over each piece of information," "necessarily entailed Board discussion of matters over which it had supervision, control, jurisdiction, or advisory power." Id. at 183, 383 S.E.2d at 244.

The question of what constitutes a meeting for purposes of the FOIA's open meeting laws has also been addressed by several opinions of this Office. An opinion issued on August 19, 2002 addressed whether attendance of non-committee council members at a committee meeting would constitute as a full meeting of council requiring public notice if a quorum of council members were present. Op. S.C. Att'y Gen., 2002 WL 31341811 (Aug. 19, 2002). After analyzing three different lines of authority, we concluded that, while "each situation would have to be judged on its own facts,"

> [i]f there is interaction or discussion or participation by non-members, clearly there is a "meeting." If there is no participation, but merely physical presence, then a court will look behind the situation to real underlying facts. The presumption – which is rebuttable – is that the physical presence of a quorum of council would constitute a "meeting" of that body.

Id. at * 8. We have since reaffirmed the conclusion reached in our August 19, 2002. See Op. S.C. Att'y Gen., 2008 WL 2324810 (May 6, 2008) ("Following our 2002 opinion, we presume that if a quorum of the District 2 Board is present, then a meeting is established under FOIA" but ultimately concluding discussions were not related to subjects the board had supervision, control, jurisdiction, or advisory power over); Op. S.C. Att'y Gen., 2004 WL 2451475 (Oct. 7, 2004) ("We reaffirm our opinion of August 19, 2002. In our opinion, a court would most probably conclude that the attendance and participation by noncommittee members at a committee meeting of Mount Pleasant Town Council – where there is present a quorum of full Council – constitutes a 'meeting' of the full Council"). Although somewhat factually different, we believe the same analysis contained in these opinions would be applied to the situation we have been asked to consider.

b. Case Law and Attorney General Opinions of Other States

Heavily relied on in our August 19, 2002 opinion, the case of State ex. rel. Badke v. Village Board of the Village of Greendale, 173 Wis.2d 553, 494 N.W.2d 408 (Wis. 1993) is informative and worthy of discussion. In Badke, the Wisconsin Supreme Court addressed whether having a quorum of the Village Board present at its Plan Commission meeting constituted a Village Board meeting. Id. at 560-61, 494 N.W.2d at 410. Of particular importance, the Court noted that "interaction between members of a governmental body is not necessary for convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties, or responsibilities." Id. at 572, 494 N.W. 2d at 415. It supported its conclusion by emphasizing that:

> [l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking. We recognized the importance of exposure to information in *Lynch v. Conta, 71 Wis.2d at 686, 239*

N.W.2d 313, and again in *Showers, 135 Wis.2d at 90, 398 N.W.2d 154* (quoting Conta):

> Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirely to the public. Yet, that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met.

Id. at 572-73, 494 N.W.2d at 415.

Furthermore, the Court provided that "even if the Village Board members did not interact at the Plan Commission meetings, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decision making authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law." Id. at 573-74, 494 N.W.2d at 415. Finding that the appropriate legal standard in this instance was that if a quorum of a public body is present, a rebuttable presumption exists that such gatherings are meetings that require public notification, the Court concluded that the Village Board failed to rebut the presumption. Id. at 571, 494 N.W.2d at 414.

The Office of the North Dakota Attorney General applied Badke in an April 4, 1996 opinion addressing whether the presence of city council members at a meeting between the mayor and city department heads constituted a meeting of the city council under the open meetings law even if the mayor and other city council members merely listened and did not interact or participate in the discussion. Op. N.D. Att'y Gen., 1996 WL 162446 (April 4, 1996). It opined that because the other city council members were invited to attend the mayor's meeting, their attendance would not be a chance meeting, particularly if the council members had a history of attending. Id. at *5. It also noted that "[e]ven if it was a chance gathering, the member's presence during the discussion would allow them to gather information regarding city council business and therefore convert the gathering into a 'meeting' under the open meetings law." Id. The opinion also agreed with Badke's finding that to constitute a meeting "[i]nteraction or discussion is not required." Id. But, it noted its skepticism, stating that "it is difficult to imagine that no discussion would occur between city council members and department heads, or among the city council members themselves, at such a meeting." Id.

Other courts have spoken directly to "site visits" or "tours" of a particular location and whether such a gathering would constitute a meeting for purposes of their state's open meeting laws. In Gold Country Estates Preservation Group, Inv. v. Fairbanks North Star Borough, 270 P.3d 787, 790 (Alaska 2012), the Alaska Supreme Court held that a Platting Board's site visit to

property pertaining to a variance application and subdivision application it was asked to consider was a meeting for purposes of its open meeting laws. Although finding the meeting was properly noticed, the court nonetheless

> conclude[d] that the information-gathering and discussion at the site visit constituted collective consideration of "a matter upon which the governmental body [was] empowered to act" and a key step in the "deliberative and decision-making process" . . . . The Platting Board members received "evidence" in the sense that they made observations of the site and had an opportunity to assess the merits of the safety concerns voiced at the November 17 meeting. Thus we hold that the site visit was a meeting for purposes of the Open Meetings Act.

Id. at 796.

The Maryland Court of Appeals held that the County Board of Appeals violated Maryland's open meeting law when it failed to notice a visit to property that was the subject of an application for special exception to a zoning ordinance to operate a research facility. Bowie v. Board of County Comm'rs of Charles County, 203 Md. App. 153, 36 A.3d 1038 (Md. 2012). After concluding that the site visit was a meeting, despite being held at an unconventional venue, it highlighted that: "we do not mean to suggest that the Board acted in bad faith or engaged in intentional wrongdoing. However, . . . open meeting requirements can be violated even by unintentional acts." Id. at 171, 36 A.3d at 1048.

Attorney General opinions of other states are also in accord with the conclusions reached in the above cases. The Office of the California Attorney General opined that a majority of city council members who attended a private tour of water facilities owned and operated by the water district that provide services to the city was a meeting for purposes of its state's open meetings law. Op. Cal. Att'y Gen., 2011 WL 3863022 (Aug. 26, 2011). Presuming that the "tour would include the acquisition of information relevant to the water services the district provides, or may provide," the opinion concluded that "the gathering of such information amounts to public business within the council's jurisdiction" and "the tour would be a 'meeting' if a majority of the council were to participate." Id. at *3.

In regards to whether voluntary school board tours of school facilities on each date a regular meeting was to be held would be subject to Arkansas' open meeting law, the Arkansas Attorney General opined that "[c]ertainly, it would be unreasonable to suggest that a 'meeting' will necessarily occur each time school board members visit the school. On the other hand, the regular monthly gathering envisioned under the above motion may come much closer to constituting a meeting for purposes of the FOIA, particularly given the likelihood that there will be some discussion of school-related matters during the tour." Op. Ark. Att'y Gen., 1999 WL 182167 (March 16, 1999).

It is important to point out that not all jurisdictions have applied the definition of "meeting" as liberally as the courts and opinions above. In Harris v. Nordquist, 96 Or.App. 19, 25, 771 P.2d 637, 641 (Or. Ct. App. 1989) it was held that occasional discussions of "what was going on at the schools" by members of a school board at restaurants before and after official

meetings was not a meeting for purposes of its state's open meetings law. Looking to the definition of meeting, summarized as " 'the convening' of the body 'for which a quorum is required in order to make a decision or deliberate towards a decision' " the court noted that "information gathering is distinct from deliberating." Id. (citations omitted). Thus, because "[t]he prohibition [pursuant to Oregon's open meeting law] is against a quorum of a governing body meeting in private for the purpose of deciding on or deliberating toward a decision" the Court found no violation. Id.

In Gavin v. City of Cascade, 500 N.W.2d 729 (Iowa Ct. App. 1993), the Court found no violation of Iowa's open meeting law when members of city council went together to view a rock the city superintendent was considering purchasing. In its analysis, the Court stated that "it is necessary to determine if deliberation or action upon any matter within the scope of the governmental body's policy-making duties took place at this gathering and whether there was an intent to avoid the purposes of chapter 21." Id. at 732 (citations omitted). The Court found no evidence that any deliberation or action took place because the men did not discuss the proposed purchase together, rather they reported their opinions to the city superintendent individually. Id. The Court also found "no evidence of any intent to avoid the purposes of chapter 21." Id.

Attorneys General opinions have also reached similar conclusions to the cases above. The Office of the Rhode Island Attorney General addressed its opinion of whether a town council violated its state's open meeting law when it met to inspect a parcel of land without notice to the public. Op. R.I. Att'y Gen., 2014 WL 2772363 (Jan. 23, 2014). Finding that the town council members did not collectively discuss matters over which it had supervision, control, jurisdiction, or advisory power, it concluded no meeting was held, and therefore the Open Meetings Act was not violated. Id. at *3. Specifically, the opinion noted that: "[y]our reply suggests that the Town Council members' collective presence, as well as the asking and answering of questions, is sufficient to trigger the OMA [Open Meetings Act], but our findings indicate and require more." Id.

Furthermore, a Delaware Attorney General Opinion addressed whether a visit by certain County Council members to a manufactured housing facility was a violation of its state's open meeting law. Op. S.C. Att'y Gen., 1996 WL 517421 (July 25, 1996). Concluding that attendance to the facility was voluntary and a quorum was not present, the opinion determined the open meeting law was not violated. Id. at *2. However, referencing a former opinion of its office, it distinguished that if any report or recommendation was later made to the full board, the analysis would change as the group would likely be interpreted as constituting a committee. Id.

Conclusion

We reiterate that our office is not a fact finding entity and only a court of law can concretely determine the factual issues you have asked us to consider. Nevertheless, we continue to stand by our August 19, 2002 opinion that a court would likely conclude that a rebuttable presumption exists that a "meeting" was conducted by a public body if a quorum of members of the public body are present. As provided above, it is our opinion that two members of the Recreation and Events Committee would constitute a quorum of a public body thereby creating the rebuttable presumption that a meeting was held. Based on the facts contained in your

correspondence, it is also our opinion that a court would likely find that the Recreation and Events Committee would not be able to rebut this presumption. We believe a court would find it particularly relevant that the walk through of the Arts Center specifically related to the proposed use of the building: a matter that was within the Recreation and Events Committee's assigned area of responsibility that it was asked to study, investigate and present its finding and suggestions to City Council. Although it was said no matters were discussed between the committee members in attendance, recent guidance by our Supreme Court indicates that a meeting would likely include a public body's receipt of information and the collective acquisition and exchange of facts. Furthermore, similar to the Court's conclusion in Braswell, it is likely that a gathering to determine if the municipal court could be held in Arts Center likely "necessarily entailed" discussion of matter over which the committee members had advisory power over. Even if the discussions were not to each other, Badke indicates that interaction or discussion is not required as presence alone would allow the committee members to gather information that could influence a decision which they had advisory power over.

While the facts are not clear as to whether the gathering was by chance, as discussed by the North Dakota Attorney General, even if so, the gathering of information regarding city council business could convert a chance or social gathering into a meeting. In addition, although it appears the committee members did not intentionally violate the FOIA, the Maryland Court of Appeals in Bowie found that open meeting requirements can be violated by unintentional acts.

As reflected above, it is likely some courts and Attorneys General Offices would decline to find a meeting was held based on the facts presented in your correspondence. However, we believe our conclusion reflects the legislature's intent in its enactment of the FOIA, being to give the public the opportunity to obtain access to and information concerning the work of public bodies. It is also in line with the adopted maximum by our Office of, when in doubt, disclose. Should you have any questions, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General