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OPINION NO. 85-181

August 8, 1985

The Honorable Jodie Mahony
State Representative
406 Armstrong Building
El Dorado, AR 71730

Dear Representative Mahony:

Under date of July 8, 1985 you have written to seek answers to several questions flowing from recent events at Southern Arkansas University that involved Act 93 of 1967, the Freedom of Information Law.

You has asked the following:

1. Is there any provision for an attorney for a public board or commission to attend an executive session of that board or commission?

The answer is "no". In Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968) the Arkansas Supreme Court ruled that "There exists no provision of the law that specifically exempts meetings between a city council and the city attorney from coverage of the Freedom of Information Act." It is my opinion that this ruling would also apply to the situation at hand regarding the SAU Board.

2. Can an evidentiary hearing for a public employee in a dismissal case be held in executive session under the provisions of the state Freedom of Information Act?

The answer is "no". In Arkansas State Police Commission v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973) the Arkansas Supreme Court ruled that when the State Police Commission conducts a hearing on the application for reinstatement of a discharged state policeman, the Freedom of Information Act requires that the taking of testimony and hearing of arguments be held in public. At the conclusion of the evidentiary hearing the Commission may go into executive session to discuss the decision they should reach. It is my opinion that this same procedure could have been followed by the SAU Board.

3. Can an attorney for a fired public employee be allowed in an executive session of the public board or commission reviewing the firing?

The answer is "no". Section 12-2805 of Act 93 of 1967 states: "Executive sessions will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining or resignation of any public officer or employee. (a) Only the person holding the top administrative position in the public agency department, or office involved: the immediate supervisor of the employee involved; and the employee may be present at the executive session when so requested by the governing body, board, commission or other public body holding the executive session." It is clear from this language, as well as the Supreme Court decision, cited above, that no allowances have been made for attorneys to attend executive sessions of public bodies.

4. Is the constitutional right of due process or any other constitutional right of a fired employee violated if attorneys cannot be present in an executive session of the public board or commission reviewing the firing?

The answer is "no". The avenue of due process is still open to a fired employee through the courts. However, see, generally, Bishop v. Wood, 326 U.S. 341 (1977); Seal v. Pryor, 670 F.2d 96 (8th Cir. 1982); Pollock v. Baxter Manor Nursing Home, 716 F.2d 545 (8th Cir. 1983).

5. Is there any provision under the state law for a public board or commission to appoint a non-member to a board or commission?

The answer is "no". I have found no statute that would allow a public board or commission to take such action.

6. Is there any provision under state law for a public board or commission to appoint a non-member to serve as a temporary chairman for a specific part of a meeting?

The answer is "no". I am unaware of any state law that specifically allows for the procedure described.

I trust this information will be of value to you.

Sincerely,



STEVE CLARK
Attorney General