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August 7, 1979

ATTORNEY GENERAL OPINION NO. 79- 167

Mr. Phillip L. Harris  
City Attorney  
Overland Park City Hall  
8500 Antioch  
Overland Park, Kansas 66212

Re: Public Officers and Employees -- Open Public Meetings --  
Secret Balloting

Synopsis: The Overland Park City Council may not elect a president of the Council by secret ballot, although the election takes place at a public meeting, as such procedures are violative of K.S.A. 1978 Supp. 75-4318.

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Dear Mr. Harris:

You request our opinion regarding whether or not election procedures currently employed by the Overland Park City Council to elect a Council president come within the proscriptions of subsection (a) of K.S.A. 1978 Supp. 75-4318, stating that "no binding action by such bodies shall be by secret ballot." Secondly, you inquire whether the balloting procedures constitute a "secret ballot" within the meaning of that statute.

Overland Park Charter Ordinance No. One-C states in part:

"The Governing Body shall consist of a mayor elected by the City as a whole and ten councilmen elected by districts

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as hereinafter provided. Qualifications, oaths and bonds of the mayor and councilmen shall be as provided in the general laws establishing and relating to the mayor-council form in cities of the first class. On the second Monday after the first Tuesday in the month of April of each year, the Council shall elect, by majority of the votes cast in secret ballot, one of its members as president of the Council who, in the absence or disability of the mayor shall become acting mayor; Provided, that such councilman shall retain all his voting rights and other prerogatives as councilman while acting as mayor." (Emphasis supplied.)

As you have described it, the policy by which the relevant portion of this ordinance is implemented is as follows:

"Although the Charter Ordinance wording specifies a "secret ballot," the manner and method of such elections in the past has been to conduct such election in a regular and open meeting of the Council on the second Monday, following the first Tuesday in April of each year. Nominations are made publicly and slips of paper distributed to all councilpersons present. The vote is then announced by the Chair." (Emphasis supplied.)

The relevant statute in question, K.S.A. 1978 Supp. 75-4318 provides in subsection (a):

"[A]ll meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot ." (Emphasis supplied.)

In our opinion the validity of the Council's position is not enhanced by reliance upon charter ordinance to provide election procedures. Article 12, Section 5 of the Kansas Constitution, granting cities home rule powers, provides in subsection (c) (1):

"Any city may by charter ordinance elect in the manner prescribed . . . that the whole or any part of any enactment of the legislature applying to such city, other

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than enactments of statewide concern applicable uniformly to all cities . . . shall not apply to such city."  
(Emphasis supplied.)

In our judgment, the Kansas Open Meetings Law applies uniformly to all bodies or agencies delineated in 75-4318, including cities. Thus, a city may not by charter ordinance exempt itself therefrom or alter the provisions thereof.

Although the general legislative mandate underlying the Kansas Open Meetings Law is to provide that all "meetings," as defined by K.S.A. 75-4317a, be open to the public, we are guided by the language of Olathe Hospital Foundation, Inc., v. Extencicare 217 Kan. 546, 562 (1975) which states:

"K.S.A. (now 1974) Supp. 75-4318 calls for open meetings of bodies such as the appeals panel, and provides that 'no binding action by such bodies shall be by secret ballot.' One apparent purpose is to make public every official's vote on the public's business. There was no secret ballot here - the vote of the panel was unanimous, and each member's vote is a public record. In addition, the all-day hearing itself was an 'open public meeting' at which the views of all the participants were aired. Under 75-4319 the deliberative session of the panel could have been an entirely lawful 'executive meeting - all that was missing was a formal motion to that effect. Such a brief session, coming at the time it did, was certainly not a 'subterfuge to defeat the purposes of [the] act.' There may have been a technical violation of the act, but there was no violation of its spirit. Knowing violation of the act is a misdemeanor, but there is nothing to indicate that the action taken at a meeting which is in substantial compliance with the act should be void. Neither the law nor good sense requires that this matter be sent back to the appeals panel for another vote." (Emphasis supplied.)

Additionally, although declared moot, similar issues were presented in Burnett v. Doyen, 220 Kan. 400 (1976), which ultimately resulted in voluntary undertakings by Kansas legislators in opening to the public a meeting to nominate a president of the Kansas Senate.

The election of City Council President, in our opinion, is an act constituting "binding action" by the council. Overland Park Charter Ordinance No. One-C imputes definite functions and duties to the President, including installation as acting mayor in case of absence

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or disability of the mayor. Even following a more conservative standard, not found in Kansas law, that limits the coverage of open meeting legislation to meetings at which a vote is taken, the actions of the Council fall under the proscription of K.S.A. 1978 Supp. 75-4318. See e.g. Salkowe v. Dean, 109 N.W. 247, 249 A.2d 35 (1968).

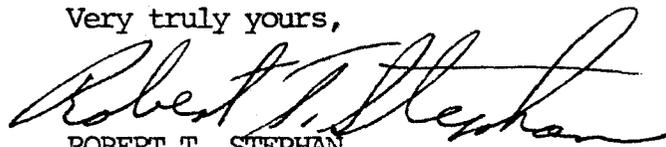
Our research indicates the Kansas Open Meetings Law, although prohibiting certain actions authorized by "secret ballot," does not define this crucial term. Similarly, although discussed by Kansas courts as early as 1895, it is not defined by case law. Taylor v. Leakley, 55 Kan. 1, 8 (1895). Article 4, section 1 of the Kansas Constitution states: "All elections by the people shall be by ballot." This provision implies secrecy of voting, securing to a voter at popular elections absolute secrecy how he voted. State ex rel v. Beggs, 126 Kan. 811, 814 (1928).

Kansas, in recognizing the "Austrialian" or "secret" ballot, K.S.A. 25-601, et seq., subscribes to the general practice, using "[a]n official ballot in which the names are printed. Its use is accompanied by safeguards designed to maintain secrecy in voting." Black's Law Dictionary, 168 (4th Ed. 1951).

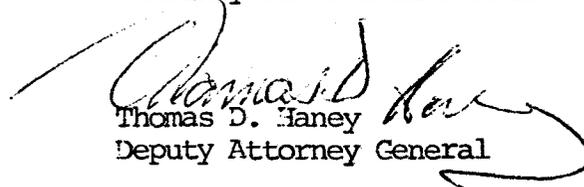
While the classic Australian ballot system is not employed by the Council, the secret voting for publicly nominated candidates, in our opinion constitutes a secret ballot. Although elections may be unanimous, thus giving rise to only a technical violation of the Kansas Open Meetings Law, such procedures contradict both the letter and spirit of the declared policy of this state, as set out in K.S.A. 75-4317:

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public."

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Thomas D. Haney  
Deputy Attorney General

RTS:TDH:may