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ATTORNEY GENERAL OPINION NO. 81-192

The Honorable Jack H. Brier
Secretary of State
2nd Floor - Capitol
BUILDING MAIL

Re: Elections -- Voting Machines and Electronic or
Electromechanical Voting Systems -- Acquisition
by Counties

Synopsis: The provisions of K.S.A. 1980 Supp. 25-4401 et seq. apply exclusively to the acquisition and use of electronic or electromechanical voting systems, whereas K.S.A. 25-1307 et seq. apply to the acquisition and use of voting machines generally. The lever-type, automatic voting machine manufactured by the AVM Corporation is not an electronic or electromechanical voting system, pursuant to the definition thereof in K.S.A. 1980 Supp. 25-4401(f); nor has such machine been certified as such by the office of the secretary of state. Thus, such machines may not be acquired by a county without voter approval pursuant to K.S.A. 1980 Supp. 25-4403, but may be acquired only after voter approval in accordance with K.S.A. 25-1314. Cited herein: K.S.A. 25-1307, 25-1314, K.S.A. 1980 Supp. 25-4401, 25-4403, 25-4404.

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Dear Secretary Brier:

You have inquired whether the lever-type, automatic voting machine manufactured by the AVM Corporation is an electronic or electromechanical voting system, such that a county may acquire these voting machines in accordance with the provisions of Article 44 of Chapter 25 of Kansas Statutes Annotated.

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As you note in your request, there are two statutory sequences which authorize the acquisition of voting machines by counties, K.S.A. 25-1307 et seq. and K.S.A. 1980 Supp. 25-4401 et seq. The former series of statutes was first enacted in 1957 (L. 1957, ch. 233), and all of the counties which have acquired voting machines to date (Johnson, Wyandotte, Sedgwick and Shawnee) have done so pursuant to these statutes. We also note that three of the four counties presently using voting machines utilize the AVM automatic voting machine.

On the other hand, K.S.A. 1980 Supp. 25-4401 et seq. were first enacted in 1977 (L. 1977, ch. 129). These statutes authorize the acquisition and use of electronic or electromechanical voting systems. In your letter of request, you suggest that the enactment of these statutes was in apparent response to technical advances which have resulted in "voting systems . . . which are based on punch card, or optical scan recorders and utilize data processing equipment as tabulators."

While there are substantial similarities between these two acts, there also are important distinctions which have pertinence to your request. First, the provisions of K.S.A. 1980 Supp. 25-4401 et seq. apply exclusively to the acquisition and use of electronic or electromechanical voting systems. Second, there is an important difference in the procedures prescribed by these acts for the acquisition of voting machines or systems. Pursuant to K.S.A. 25-1314, a board of county commissioners must provide voting machines when the county's electors at a primary or general election have approved a proposition to that effect, submitted either on the initiative of the board of county commissioners or as a result of a sufficient petition of the county's electors. Absent such election, no authority exists under 25-1307 et seq. for the acquisition of voting machines.

As originally enacted, nearly identical requirements were prescribed in K.S.A. 1980 Supp. 25-4401 et seq. However, in 1980 the legislature amended these procedures (L. 1980, ch. 115), so that K.S.A. 1980 Supp. 25-4403 now authorizes the acquisition of an electronic or electromechanical voting system without the approval of the county's electors. Subsection (a) of that statute provides:

"The board of county commissioners and the county election officer of any county may provide an electronic or electromechanical voting system to be used at voting places in the county at national, state, county, township, city and school primary and general elections and in question submitted elections."

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A referendum on this matter is required only when there is filed a sufficient petition requesting an election. K.S.A. 1980 Supp. 25-4403(b).

These distinctions are important here, because your request is prompted by the fact that the Board of County Commissioners and the County Election Officer of Riley County are investigating the possibility of acquiring the lever-type, automatic voting machines manufactured by the AVM Corporation without approval of the county's electors pursuant to the provisions of K.S.A. 1980 Supp. 25-4401 et seq. In our judgment, however, Riley County may not proceed under these statutes to acquire such machines.

First, it is to be noted that K.S.A. 1980 Supp. 25-4404 requires the secretary of state to "approve the kinds and makes of electronic or electromechanical voting systems" prior to the use of any such system at any election; and under subsection (d) of K.S.A. 1980 Supp. 25-4403, a board of county commissioners and county election officer may adopt for use in their county only an "electronic or electromechanical voting system herein authorized and approved for use in the state." In this regard, you advise that no electronic or electromechanical voting system has been approved by your office under these statutes.

More importantly, though, we do not believe that the AVM automatic voting machine meets the statutory requirements necessary for such approval. Subsection (f) of K.S.A. 1980 Supp. 25-4401 defines an electronic or electromechanical voting system as "a system of casting votes by use of marking devices and tabulating ballots employing automatic tabulating equipment or data processing equipment." (Emphasis added.) Under subsection (g) of that statute, a marking device is defined, in part, as follows:

"'Marking device' means either an apparatus in which ballots or ballot cards are inserted and used in connection with a punch apparatus for the piercing of ballots by the voter or any approved device for marking a paper ballot with ink or other substance which will enable the ballot to be tabulated by means of automatic tabulating equipment." (Emphasis added.)

By reading these definitions in concert, it is apparent that an electronic or electromechanical voting system requires the use of some type of ballot. For this reason alone, the voting machine in question does not qualify as an electronic or electromechanical voting system. Along with your request you submitted an excerpt from Voting Systems, a multi-volume


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report prepared by the National Scientific Corporation under the authority of the Federal Election Commission Clearinghouse on Election Administration. The excerpt you provided is taken from Volume 1 of this report, "Recommended Procurement Procedures and a Review of Current Equipment." In describing the AVM Automatic Voting Machine, this report states: "No paper ballot in any form is used." (Emphasis added.) Id. at 56. Further, the report describes these machines as "strictly mechanical in nature." Id. at 57.

Based on these descriptions, together with our own understanding of the operation of the AVM automatic voting machine, we do not believe such machine satisfies the statutory definition of an electronic or electromechanical voting system in K.S.A. 1980 Supp. 25-4401(f).

In summary, the provisions of K.S.A. 1980 Supp. 25-4401 et seq. apply exclusively to the acquisition and use of electronic or electromechanical voting systems, whereas K.S.A. 25-1307 et seq. apply to the acquisition and use of voting machines generally. The lever-type automatic voting machine manufactured by the AVM Corporation is not an electronic or electromechanical voting system, pursuant to the definition thereof in K.S.A. 1980 Supp. 25-4401(f); nor has such machine been certified as such by the office of the secretary of state. Thus, in our opinion, such machines may not be acquired by a county without voter approval pursuant to K.S.A. 1980 Supp. 25-4403, but may be acquired only after voter approval in accordance with K.S.A. 25-1314.

Very truly yours,


ROBERT T. STEPHAN
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