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ATTORNEY GENERAL OPINION NO. 81- 268

Marci Francisco
Mayor
City of Lawrence
6 East 6th
Lawrence, Kansas 66044

Re: State Departments; Public Officers, Employees --
Open Meetings Law -- Telephone Conversation;
Public Access

Synopsis: A private telephone conversation between a majority of a quorum of a government body made for the purpose of discussing an item on the agenda of the body or general business of the body may constitute a "meeting" within the meaning of the Kansas Open Meetings Act only where there is evidence that the telephone conversation was "pre-arranged." Such discussions may be lawfully conducted by substantial compliance with the notice and access requirements of the Act. Cited herein: K.S.A. 75-4317, 75-4317a, K.S.A. 1980 Supp. 75-4318, L. 1981, ch. 344.

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Dear Mayor Francisco:

You inquire regarding the application of the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., as amended by L. 1981, ch. 344 (hereinafter "Act"), to telephone conversations between members of the Lawrence City Commission. Specifically, you desire to know whether commissioners may discuss over the telephone "an item upcoming on the agenda" or "general city business."

The Kansas Open Meetings Act applies to all legislative and administrative bodies of the state and its political or taxing subdivisions receiving or expending and supported in whole

or in part by public funds. K.S.A. 1980 Supp. 75-4318. It is undisputed that the Act applies to the Lawrence City Commission, a body composed of five members with a three-member quorum requirement. Certainly, the commission members are free to discuss such matters, the only question is whether such discussions must be held in compliance with the Kansas Open Meetings Act. Hence, we must first determine, whether telephone conversations between members of the governing body such as you describe constitute "meetings" within the meaning of K.S.A. 75-4317a, which states:

"As used in this act, 'meeting' means any pre-arranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."

Notably, the Kansas Open Meetings Act does not specifically address the question of public access to telephone conversations. Attention to this detail is lacking in most other state laws as well, although a few states have specifically included such communications. See Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 W.L.J. 241, 260 n. 137 (1981).

However, in Kansas Attorney General Opinion No. 80-159, this office opined that the Act was applicable to telephone conference calls of a township hospital board of trustees. Therein, we reasoned:

"In view of the purposes of the Kansas Open Meetings Act and the liberal interpretation to which it is entitled, we can find no justification for reaching a conclusion that would restrict the word 'gathering' to include only face to face contacts. Indeed, it is the discussion among members of a governing body which is the real subject of the Act and related case law. It is, likewise, the discussion of public issues that is of interest to the public in general. Since such discussion, as a matter of fact, can be held via the telephone we can only conclude that such discussion is within the ambit of the Open Meetings Act even though the words of such discussions are uttered through an electronic device."
Id. at 5.

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Subsequently, in Kansas Attorney General Opinion No. 80-173, we applied the same reasoning and concurring opinions of Attorneys General from other states to conference calls held by members of the State Finance Council.

Hence, the location of the members of the governmental body or the electronic medium by which they converse about public business does not preclude application of the Act. However, in the question you pose, the factual circumstances add an additional factor in determining whether the telephone call is subject to the open meetings law. Although the gathering of two members of a five person body may constitute a majority of a quorum, it must still be shown that the gathering was "prearranged." In the case of a conference call, the steps necessary to arrange such a call require some prior communication among the parties to establish the time of the call and the location of each member's telephone. Generally, a conference call requires some planning and organizing beyond the simple dialing of the telephone. Because your question is written broadly enough to include a telephone call made by one member of the body to another without a previous plan to do so, we must consider whether the mere act of calling another member to discuss the business of the governmental body constitutes prearrangement. Unfortunately, there are no Kansas judicial decisions interpreting the meaning of the word "prearranged" in K.S.A. 75-4317a.

Kansas authors and Attorneys General have concluded that the term means the opposite of "chance." See e.g., Tacha, The Kansas Open Meetings Act: Sunshine on the Sunflower State, 25 Kan. L. Rev. 169, 181 (1977); Smoot and Clothier, supra at 259; Kan. Att'y Gen. Op. No. 79-200 at 4. Accord, regarding Arkansas open meetings statute, Mayor of El Dorado v. El Dorado Broadcasting, 260 Ark. 821, 544 S.W. 2d 206 (1976). Where one member of a five person government body calls another member for the purpose of discussing business of the body, the verbal encounter and exchange of ideas, views or information hardly could be said to have been accomplished by "chance." The caller's act of dialing the phone is an intentional act, which brings the two conversants together; the "gathering" was arranged by the person dialing the phone. The issue is whether this constitutes prearrangement within contemplation of the Act.

It is a generally accepted rule of statutory construction that, absent some evidence of special usage, words used in a statute are to have their common and ordinary meaning. Webster's Third New International Dictionary (Unabridged 1968) defines "prearrange" as "to arrange beforehand." Id. at 1783. Hence, the definition of "meeting" in the Act simply does not apply to any gathering, in person or over the telephone, which

was not arranged beforehand. Thus, unlike the general rule regarding conference calls, we cannot say, as a matter of law, that the Act prohibits one member of a three or five person government body from telephoning another member to discuss the public's business where there is no evidence that the telephone call was arranged beforehand. In other words, without evidence of prearrangement, private telephone communications between members of a governmental body are not per se violations of the Act.

However, we must extend our discussion of this issue with words of advice and caution. It has long been the view of this office that when public officials, as members of official public bodies, stage a gathering to discuss the public business such discussions are "public" under the Act. We do not believe the legislature intended mere technology to effectively deny public access to the transaction of government business, and in our opinion, the use of a private telephone call to discuss and debate issues between members of a government body is clearly contrary to the spirit and, in some cases, the letter of the Kansas Open Meetings Act. Furthermore, we believe the Kansas courts will not sanction the use of such telephone calls where it effectively subverts the purposes of the Act.

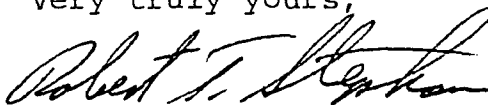
Yet, the facts of each case will be determinative of whether the existence of a "meeting" can be established, and your question lacks the specificity to make categorical conclusions. Certainly, there is a variety of actions by the members of the governmental body which may constitute evidence of a prearranged meeting. To illustrate, where the telephone calls between members of the body for the in depth discussion of public issues have become a matter of custom or habit, establishing that any one of such calls was prearranged becomes easier. On the other hand, an isolated telephone call from one member to another to inquire merely as to the list of topics for an upcoming meeting seems to us beyond the scope of the Act. As a practical matter, demonstrating to a court of law that a telephone call was planned for the purpose of discussing the business or affairs of a government body may be a difficult, if not impossible, burden. Witnesses may be hard to find. However, we note that, with the enactment of 1981 House Bill No. 2103 (L. 1981, ch. 344), the burden of proof has been shifted to the governmental entity, which must now demonstrate "substantial compliance" with the Act. See, Olathe Hospital Foundation Inc. v. Extendicare, Inc., 217 Kan. 546, 539 P.2d 1 (1975).

In summary, it is our opinion that a private telephone conversation between a majority of a quorum of a government body

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made for the purpose of discussing an item on the agenda of the body or general business of the body may constitute a "meeting" within the meaning of the Kansas Open Meetings Act only where there is evidence that the telephone conversation was "prearranged." Such discussions may be lawfully conducted by substantial compliance with the notice and access requirements of the Act.

Very truly yours,



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Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle