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July 22, 1980

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ATTORNEY GENERAL OPINION NO. 80- 159

The Honorable Robert V. Talkington  
P.O. Box 725  
20 North Washington  
Iola, Kansas 66749

Re: State Departments; Public Officers, Employees--Open  
Public Meetings--County Hospital Board of Trustees;  
Telephone Conversations and Voting

Synopsis: It is not a violation of the Kansas Open Meetings Act for a single member of a seven person governing body to converse over the telephone with another member of the body. However, any vote taken by polling of the members of the governing body is ineffective and does not constitute binding action. Prearranged conversations concerning hospital business or affairs between three or more members of a seven member hospital board may not be held in person or through means of a telephone conference call without full compliance with the Kansas Open Meetings Act. Cited herein: K.S.A. 19-1801, K.S.A. 1979 Supp. 19-1803, 19-1804, K.S.A. 75-4317a, K.S.A. 1979 Supp. 75-4318.

\* \* \*

Dear Senator Talkington:

As legal representative of the Allen County Hospital, you request our opinion concerning two situations which involve the open meetings law. You describe those situations as follows:

"The first is a situation where the Board of Trustees has previously discussed an issue and approved specific alternatives in a board meeting and then are polled in accordance

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with the alternatives at a later date. . . .

"The second situation would involve where the board had discussed and approved an issue or specific alternatives at a board meeting and then later there was a change in the specific alternatives or a completely new option brought in to this issue and the board is polled at that time as to the change in alternatives or completely new option."

You ask whether either of these situations would constitute a violation of the open meetings law when the poll is conducted over the telephone, or whether the results of the telephone poll could constitute a legal and binding decision of the board.

As you correctly note, these questions concern more than just the issue of possible open meetings violations. There is also an issue concerning whether binding action may be taken by a governing body other than pursuant to a meeting or session of the members of such governing body where the members are present in person rather than through the use of electronic equipment. We will therefore formulate our response to confront both issues.

You note that the Allen County Hospital is a county hospital organized under K.S.A. 19-1801 et seq. In addition, the Board of Trustees of the hospital is a governing body subject to the Kansas Open Meetings Act. See K.S.A. 1979 Supp. 75-4318.

K.S.A. 1979 Supp. 19-1803 specifies in pertinent part that the board of county commissioners shall appoint a board of trustees for such a hospital and that the board of trustees shall consist of "five (5), seven (7) or nine (9) members." K.S.A. 1979 Supp. 19-1804(c) specifies in pertinent part:

"Said board of hospital trustees shall hold meetings at least once each month, and shall keep and maintain a complete record of all its proceedings and the visitations made by the individual members of the board, and said records shall be available for inspection by the board of county commissioners on request. A simple majority of the members serving on the board shall constitute a quorum for the transaction of business." (Emphasis added.)

The Allen County Hospital Board of Trustees consists of seven (7) members and therefore cannot transact business pursuant to K.S.A. 1979 Supp. 19-1804(c) unless at least four (4) members (a majority in this case) meet for such a purpose. The Kansas Supreme Court has held:

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"[A]ny board, commission or committee should act as a body. That rule is recognized as being well established." School District No. 95 v. Marion County School Reorganization Committee, 167 Kan. 665, 671 (1949).

The Fourth Circuit Court of Appeals, citing P. & F.R. Rly. Co. v. Comm'rs of Anderson Co., 16 Kan. 302, 310 (1876), said:

"The rule is well settled that the governing board of a county can act only as a body and when in legal session as such." Rockingham County v. Luten Bridge Co., 35 F.2d 301, 304 (4th Cir. 1929).

See also, In re Troy, 67 Kan. 186, 187 (1903) (county commission); Mincer v. School District, 27 Kan. 253, 256 (1882) (school board).

The above authorities clearly require that a governing body be in formal session before such body can transact business or take binding action. Therefore, pursuant to K.S.A. 1979 Supp. 19-1804, the Allen County Hospital Board of Trustees cannot transact business or take binding action unless at least four (4) members thereof meet in a formal session. The separate polling of individual members of the board over the telephone for the purpose of effectuating the transaction of business, therefore, would be of no legal effect. The California Court of Appeals, citing the Florida Supreme Court in Turk v. Richard, 47 So.2d 543 (1950), is persuasive authority supporting such a conclusion:

"As stated by one of the text-writers, 'the general legal rule is that, to bind the municipality, the council or legislative body must be duly assembled and act in the mode prescribed by the law of its creation, evidenced by an order entered of record, and such act, if legislative in character, must ordinarily be by ordinance, by law or resolution, or something equivalent thereto.' McQuillin Municipal Corporation, 2dEd., Vol. 2, Sec. 602, p. 529.

.....

"Unless, therefore, the members of the council formally come together, in the manner required by law, for the purpose of joint discussion, decision and action with respect to municipal affairs there can be no 'meeting' of this governing body, within the legally accepted sense of the term, for the individual or separate acts of a member or the unofficial agreements of all or a part of the members of the council are ineffectual and

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without binding force; joint, official deliberation and action as provided by law being essential to give validity to the acts of the council." Adler v. City Council Culver City, 184 Cal.App.2d 763, 7 Cal.Rptr. 805, 810 (1960).

See also, Mayor, Etc., of El Dorado v. El Dorado Broadcasting, 544 S.W.2d 206, 209 (Ark. 1976).

Even though we conclude that the separate polling of individual members of the board is not sufficient for the transaction of business or to effectuate binding action, the issue still exists whether such action constitutes a violation of the Open Meetings Act.

K.S.A. 1979 Supp. 75-4318 states in pertinent part:

"Except as otherwise provided by state or federal law or by rules of the house or senate, and except with respect to any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of such committee to the full house of representatives, all 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, but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving such quasi-judicial functions."

Thus, the Kansas Open Meetings Act requires meetings of governing bodies to be open to the public. The Act does not prohibit discussion by members of a governing body where such discussion occurs in a circumstance that does not constitute a meeting under the Act. A "meeting" is defined as follows:

"As used in this act, 'meeting' means any prearranged 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." K.S.A. 75-4317a.

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So, for example, a gathering of less than a majority of a quorum does not constitute a "meeting" under the act and cannot be prohibited. Likewise, a gathering that is not prearranged or does not involve the discussion of the business or affairs of the governing body, is not a "meeting" regulated by the Act.

In the case of a county hospital board of trustees containing seven (7) members of which a majority of a quorum is three (3), a "gathering" of any number less than three, namely two (2), is not a "meeting" under the Act whether the gathering is by phone or in person. Thus, the Kansas Open Meetings Act does not prohibit one-to-one phone conversations of board members where the governing body in question contains seven members. However, as we have previously stated, such polling [sequential telephone conversations between one member and another] is ineffective as a method for the transaction of hospital business pursuant to K.S.A. 1979 Supp. 19-1804. And such polling, if it were effective, would violate the prohibition of K.S.A. 1979 Supp. 75-4318 against secret ballots. Thus, the only benefit of such polling would be to express or receive the opinions of such members since they would not be legally bound by their expressions or votes. However, at least one Attorney General, having agreed that such "polling" of opinion was not per se unlawful, counseled strongly against the practice. See Op. Atty. Gen. 075-59 (Fla.).

A somewhat different result occurs where the telephone polling is a conference call or a call involving at least three (3) members. Here, there exists an adequate number of persons to be subject to the open meetings statutes if it can be said that such electronic conversations constitute a "gathering." We believe that such telephonic verbal exchanges constitute a "meeting" both for purposes of the open meetings law (when three persons are present) and a meeting under the county hospital statute where a majority is present (in the case of Allen County Hospital, a majority is four). See, Opinions of the Attorney General, Vol. VII, p. 972 (1971). (Copy attached.)

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.

Thus, where three (3) members simultaneously converse over the telephone in a prearranged discussion of public business, the open meetings law must be honored. This includes the providing of the required notice to

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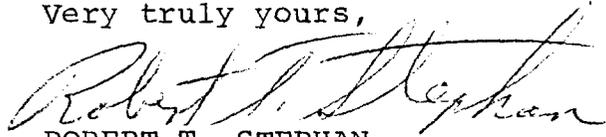
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those persons who have requested it and access for those persons who wish to be present to overhear the conversation. However, no official business may be transacted since a majority of the Board is not party to the conversation. We note in passing that the formal transaction of business (by an actual binding vote) is not a prerequisite to the existence of a meeting under the Act. See Attorney General Opinion No. 80-28. Where four (4) members of the board are present, business may be conducted since the electronic gathering constitutes a meeting sufficient to transact business under the county hospital law.

Therefore, it is our opinion that it is not a violation of the Kansas Open Meetings Act for a single member of a seven person governing body to converse over the telephone with another member of the body. However, any vote taken by polling of the members of the governing body is ineffective and does not constitute binding action. Prearranged conversations concerning hospital business or affairs between three or more members of a seven member hospital board may not be held in person or through means of a telephone conference call without full compliance with the Kansas Open Meetings Act.

Very truly yours,



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Attorney General of Kansas



Bradley J. Smoot  
Deputy Attorney General

RTS:BJS:phf  
Encl.