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ATTORNEY GENERAL OPINION NO. 81-262

The Honorable Marci Francisco
Mayor
City of Lawrence
City Offices
Lawrence, Kansas 66044

Re: State Departments; Public Officers, Employees--
Open Meetings--Informal Gatherings

Synopsis: Informal gatherings of a majority of a quorum of a city commission to discuss city business, held prior to, during or immediately following regularly scheduled meetings, are subject to the requirements of the Kansas Open Meetings Act. Cited herein: K.S.A. 75-4317, 75-4317a, K.S.A. 1980 Supp. 75-4318, L. 1981, Ch. 344, §2.

* * *

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 a variety of distinct factual situations. Due to the number of questions you have asked and the independent factual and legal considerations involved in each we will answer each question in a separately numbered opinion.

You asked: "May two or more Commissioners discuss items of city business a) just before a public (regular) Commission meeting is called to order, b) during a recess of such meeting, or c) upon its adjournment?" This question is posed in regard to the Lawrence City Commission, a municipal governing body composed of five members with three members constituting a quorum.

The Kansas Open Meetings Act applies to legislative and administrative bodies of the state and its political and taxing subdivisions. K.S.A. 1980 Supp. 75-4318. Hence, the Lawrence City Commission is unquestionably subject to the requirements of the Act. The Act defines "meeting" 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."

As noted in Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 W.L.J. 241 (1981),

"[t]he definition of 'meeting' in the Kansas Open Meetings Act contains the following elements:

- "(1) the gathering must have been 'prearranged;'
- "(2) consisting of a majority of a quorum;
- "(3) composed of the members of the body;
- "(4) for the purpose of discussing the business or affairs of the body or agency."
(Footnotes omitted.) Id. at 258.

Your hypothetical statement of facts establishes the last three elements since a gathering of a majority of a quorum of the Lawrence City Commission would consist of two members and the subject for discussion is "city business." Regarding the requirement for application of the Act that the gathering be "prearranged," your facts, as stated, do not specify that the three gatherings about which you ask were planned by the members. However, in this context, we have little difficulty in identifying the facts which would establish the existence of a prearranged gathering and concluding that in all but truly "chance" encounters, these three situations would normally be subject to the mandates of the open meetings law.

In Smoot and Clothier, supra at 259, this issue is discussed as follows:

"The term 'prearranged' in the definitional section of the Act has the effect of excluding 'chance' encounters of members of

a body subject to the Act. The gathering is prearranged if notice is given in writing, personally, via telephone, or is implicitly understood by the membership of the body."
(Footnotes omitted.)

The gathering of two or more city commissioners "just before" a regular Commission meeting is, in our judgment, a prearranged gathering whether the members specifically planned in advance to gather informally before the call to order. Certainly, if the members contacted each other prior to the meeting to arrange the early gathering or if, as a matter of custom or habit, commissioners knew that the members would be available to discuss city business before the meeting, the gathering would be considered prearranged. However, we believe the letter and the spirit of the Act extends beyond these obvious prearranged gatherings to include the types of informal caucuses you describe. It is to be remembered that the Act applies to "all gatherings at all stages of the decision-making process." Coggins v. Public Employee Relations Board, 2 Kan. App.2d 416, 423 (1978).

In State ex rel. Stephan v. City of Galena, No. 80C19 (Dist. Ct. Cherokee County, Kan., 1980), the State established by circumstantial evidence that a gathering of city council members held immediately prior to a scheduled meeting to orchestrate a series of resignations and appointments to avoid the effects of a recall election, was a "meeting" subject to the Act. Not only was the action taken at the subsequent formal meeting voided by the Cherokee County District Court, but also the participating council members were ousted from office pursuant to K.S.A. 60-1205 and 60-1206 in a subsequent action by the county attorney. State, ex rel., Lynch v. Williams, No. 80C246 (Dist. Ct., Cherokee County, Kan. 1980).

It is equally important to note that it was precisely this situation which was condemned by the Kansas Court of Appeals in Coggins, supra. The Court concluded that the "unannounced morning gathering" of the Public Employee Relations Board "prior to the scheduled" meeting was a violation of the open meetings law. As previously noted, the informality of the gathering is not a determinative factor in applying the Act.

In the circumstance you pose, Lawrence City Commissioners are called upon to gather at a particular time and place to discuss city business. Normally, members will arrive a few minutes prior to the call to order. It could hardly be said that such a gathering is a "chance" meeting. Furthermore, there can be little question that those few minutes could be used by members to debate and discuss city business, and, if not open to the

public, deny the citizenry access to a "stage of the decision-making process." It is this debate and discussion which the public is entitled to see as much as formal actions taken after the call to order. To refuse to consider a gathering such as this to be a "meeting" for purposes of applying the Act would be to sanction a subversion of the law.

Your inquiry regarding discussions of city commission members during a recess of a regular city meeting is subject to the same considerations discussed above. Indeed, the declared policy of the Act speaks directly to this issue in the following words:

"It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a)."

Hence, recesses during a scheduled meeting may not be used by commission members to discuss city business without providing the required public notice and access.

Likewise, informal gatherings of commission members to discuss city business following a regularly scheduled meeting are subject to the open meetings law. We opined in this regard concerning a practice of the Emporia City Commission. Kan. Att'y Gen. Op. Letter to Mr. Jay W. Vander Velde, September 24, 1979 (copy enclosed.) There, the city commission rehashed issues of the evening's agenda and discussed other pending city business over coffee and rolls. Again, the discussion was informal and no action was taken. However, commission members were aware of the routine gatherings and, indeed, such discussions following regular meetings had become a custom or habit in their decision-making process. The Attorney General's office advised the commission to comply with the notice and access requirements of K.S.A. 1980 Supp. 75-4318, as such informal post-meeting sessions were within the scope of the Act.

Of course, none of this is to say that Commissioners may not gather in such fashion prior to, during or after regularly scheduled meetings to discuss city business, it is to say only that such gatherings are likely to be subject to the Act and the requirements of notice and public access must be honored.

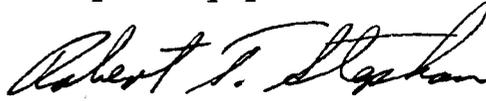
We would make one final note of advice. Pursuant to L. 1981, Ch. 344, §2(b), the burden of proof in actions brought under the Act has shifted to the public body. No longer will

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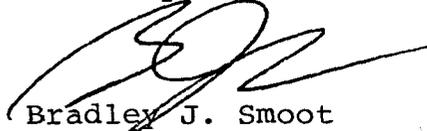
plaintiffs be required to prove beyond a prima facie showing that a particular meeting was prearranged or that public business was discussed. Thus, as a practical matter, we can only advise public bodies to scrupulously follow the Act in all their gatherings involving public business and to avoid the appearance of illegal conduct.

In summary, informal gatherings of a majority of a quorum of a city commission to discuss city business, held prior to, during or immediately following regularly scheduled meetings, are subject to the requirements of the Kansas Open Meetings Act.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:jm