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ATTORNEY GENERAL OPINION NO. 86- 110

Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728, 6th Floor Tower
Olathe, Kansas 66061

Re: State Departments; Public Officers and Employees --
Public Officers and Employees -- Open Public
Meetings; Bodies Subject Thereto; "Membership of a
Body"; Mayor-Council Form of Government

Synopsis: The intent of the Kansas statutes authorizing the
mayor-council form of municipal government is
that the office of mayor is separate and distinct
from the members of the council. Under the Kansas
Open Meetings Act a meeting is defined as a
prearranged gathering of a majority of a quorum for
the purpose of discussing the business of the
governing body. A "majority of a quorum" is the
smallest number of members of the governing body
that can take official action. In accordance with
the intent of the Kansas statutes and the purpose
of the KOMA, we conclude that the "membership of
the body" in a mayor-council form of municipal
government does not include the mayor for purposes
of determining the minimum number of persons that
can constitute a meeting. Cited herein: K.S.A.
15-106; 15-201; K.S.A. 1985 Supp. 15-204; K.S.A.
15-301; 15-310; 75-4317; 75-4317a.

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Dear Mr. Moore:

As district attorney for Johnson County, Kansas, you request our opinion on the interpretation of a provision of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. We are informed that the City of Westwood Hills is a third-class city in Johnson County with a mayor-council form of government. You ask whether the mayor is included with the members of the city council to determine the "membership of a body" for purposes of the KOMA.

The Kansas Open Meetings Act provides that it is "the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public." K.S.A. 75-4317. 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.

The open meetings law is violated if "a majority of a quorum of the membership of a body" hold a private, prearranged meeting to discuss governmental business. You ask if the mayor is a member of the body because you are concerned whether the KOMA is violated if the mayor meets with city council members to discuss city business.

The statutes governing third-class cities with the mayor-council form of government are found at K.S.A. 15-101 et seq. K.S.A. 15-106 states that a majority of councilmen must be present to constitute a quorum to do business. In Attorney General Opinion No. 83-6, we stated that a "[m]ajority" . . . means the number one greater than half the number of members of the governing body" See also Attorney General Opinion No. 83-174. It was also noted in the opinion that since particular quorum requirements are not uniformly applicable to all cities, a city may through its home rule powers change the quorum requirements of its governing body by charter ordinance. We are informed that the city of Westwood Hills has not changed the number required to constitute a quorum specified in K.S.A. 15-106. It should be noted, however, that an ordinance cannot be enacted unless a majority of the entire membership of the city council voted for it. K.S.A. 12-3002.

A third-class city with a mayor-council form of government must elect a mayor and five councilmembers. K.S.A. 15-201. If the mayor is to be counted with the council members for purposes of the KOMA, four persons would constitute a quorum (one-half the total number plus one), and three persons would be a majority of the quorum. If the mayor is not a "member of the body," however, three persons (a majority of five) would constitute a quorum, and a majority of the quorum would be two.

In determining whether a mayor should be considered a member of the governing body of a city to ascertain quorum, the statutes authorizing the mayor-council form of government and the purpose of the KOMA must be examined. K.S.A. 15-201 provides for the election of "a mayor, and five councilmembers." (Emphasis added.) With the consent of the council, the mayor is empowered to appoint city officials and to fill vacancies on the council. If the office of mayor is vacant, the president of the council becomes the mayor until the next regular election. K.S.A. 15-201; K.S.A. 1985 Supp. 15-204. "The city council shall elect one of their own body as 'president of the council'" to serve in the mayor's absence. (Emphasis added.) K.S.A. 15-310. It is the mayor's duty to preside at council meetings, break a tie vote, and enforce the laws and city ordinances. K.S.A. 15-301. The powers of the city council are listed in chapter fifteen, article four, which is entitled "General Powers of Governing Body." The intent of these statutes appears to be that the council is the governing body of the city and that the office of mayor is separate and distinct from the city council. The statutes authorizing the mayor-council form of government for first-class cities, K.S.A. 13-101 et seq., and second-class cities, K.S.A. 14-101 et seq., are very similar in substance to the above statutes. We note that the number of councilmembers of a first or second class city varies according to the number of wards established in the city. See K.S.A. 12-304; K.S.A. 14-301.

Kansas has no case law as to whether a mayor is a member of the governing body of the city. In general, the law has been stated as follows:

"Whether or not the mayor or chief officer of a municipal corporation is regarded as a member of the municipal legislative body depends on the terms of the charter or statute under which the corporation is organized. It has been held that he is not a member of the governing body, or a branch thereof, unless expressly made such by law." 62 C.J.S. Municipal Corporations §388.

See Clark v. Mahan, 594 S.W.2d 7 (Ark. 1980) (Statute provided that the mayor was part of the council.); 4 McQuillin, Municipal Corporation, §13.19, pp. 498-500 (1968). In 56 Am.Jur.2d Municipal Corporations §§163, 165, 176, it is stated that, even if the mayor is authorized to preside at meetings and vote to break a tie, the mayor is not part of the council and cannot be counted in determining the presence of a quorum unless otherwise specified by statute. See Savage v. City of Atlanta, 251 S.E.2d 248 (Ga. 1978) (Power to veto ordinances did not make mayor part of council.)

The intent of the Kansas statutes and the general rule that a mayor is not part of the governing body unless specified by statute must be considered with the purpose of the KOMA. The open meetings law was designed to prevent public meetings from being a "rubber-stamp" of agreements made beforehand in private by members of the public body. Thus, the term "majority of a quorum" was chosen to define the number of persons that could constitute a meeting as it is the "smallest group of the particular governmental body that can take official action." Tacha, "The Kansas Open Meetings Act: Sunshine on the Sunflower State?", 25 U.Kan.L.Rev. 169, 182 (1977).

The business of the City of Westwood Hills is to be carried out by the council. K.S.A. 15-106. The only situation in which the mayor is involved in binding action is when breaking a tie vote. If the mayor is included as a member of the council, a majority of the quorum is three. In that case the mayor could meet privately with only one council member to discuss city business without violating the KOMA. Also, there would be no violation of the open meetings laws if two council members met to discuss city business behind closed doors. On the other hand, if the mayor is not counted as a member of the body, a majority of the quorum is two. The mayor could meet behind closed doors with one council member to discuss city business without violating the open meetings law because the mayor would not be considered in figuring a majority of a quorum. Two councilmen, however, could not meet in private to discuss city business as a majority of a quorum would be present. (We recognize that the result in this scenerio may be different in the case of a first or second class city with a different number of councilmembers than five.)

When a tie vote is broken, three persons, the mayor and two councilmembers, are needed to take binding action. Even if the mayor is not counted as a member of the body in that instance, the purpose of the KOMA is served as the smallest number needed to take binding action is prevented from meeting privately. In addition, two members of the council would be

prohibited from discussing city business in private. In the case of a meeting held with a bare quorum (three councilmembers), the vote of two would constitute binding action. If the mayor was included as a member of the council, these two persons could meet privately and, in effect, make the decisions of the city behind closed doors. In our opinion, this latter situation would violate the intent and purpose of the KOMA.

In summary, the intent of the Kansas statutes authorizing the mayor-council form of municipal government is that the office of mayor is separate and distinct from the members of the council. Under the Kansas Open Meetings Act, a meeting is defined as a prearranged gathering of a majority of a quorum for the purpose of discussing the business of the governing body. A "majority of a quorum" is the smallest number of members of the governing body that can take official action. In accordance with the intent of the Kansas statutes and the purpose of the KOMA, we conclude that the "membership of the body" in a mayor-council form of municipal government does not include the mayor for purposes of determining the minimum number of persons that can constitute a meeting.

Very truly yours,



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Rita L. Noll
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