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ATTORNEY GENERAL OPINION NO. 86- 176

Kenneth M. Wilke, Chief Counsel
State of Kansas State Board of Agriculture
109 SW 9th
Topeka, Kansas 66612-1280

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Secret Ballots; Voting Procedure to Elect
Members of the State Board of Agriculture

State Boards, Commissions and Authorities -- State
Board of Agriculture; Election and Duties of Board
-- Annual Meeting; Election of Board Members

Synopsis: The annual meeting of the State Board of
Agriculture (Board) and the caucus meetings held by
the agricultural districts are public bodies
subject to the provisions of the Kansas Open
Meetings Act (KOMA). Under the open meetings law,
no binding action can be taken by secret ballot.
The purpose of this provision is to make public
every official's vote on the public's business. A
"secret ballot," then, is one in which the voter's
choice or decision is not known. The procedure
which has been followed in electing members of the
Board violates the KOMA as the public has no way to
determine how each delegate voted. Delegates may,
however, vote by paper ballot if each delegate
signs his or her name to the ballot and the ballots
are open for public inspection. Cited herein:
K.S.A. 25-2422; 25-2901; 25-3008; 74-502; 74-503;
75-4317; K.S.A. 1985 Supp. 75-4318.

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Dear Mr. Wilke:

As chief counsel for the State of Kansas State Board of Agriculture, you ask our opinion concerning the applicability of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq., to the selection of members of the Board of Agriculture.

The annual meeting of the State Board of Agriculture (Board) is held in Topeka the second Wednesday of January each year. K.S.A. 74-503. At this meeting members of the Board are elected by delegates chosen by farm organizations across the state. K.S.A. 74-502. This system of selection is unique to Kansas. The Board is composed of two members from each of the six agricultural districts. K.S.A. 74-503. In January 1987 five positions on the Board are up for election.

You describe the procedure followed in electing Board members as follows:

"[E]lection of the board members occurs at the business portion of the annual meeting of the State Board of Agriculture. This portion of the annual meeting is analogous to a congress of delegates. Each delegate in attendance at the business session may vote on the election of each board member regardless of whether or not that prospective board member resides in the delegate's district. Usually, there are 170 or more voting delegates.

"Prior to the business meeting, the delegates from each of the six separate districts meet and caucus for the purpose of selecting a candidate for that particular district, should a board position in that district be vacant, for submission to the delegate body as a whole. Past practice has involved the use of ballots in the following manner: Each delegate is given a slip of paper upon which the delegate may write the name of the nominee which the delegate favors and the ballots are then counted in public view and the person having a plurality from the number of delegates in that particular district is proposed to the delegate body at the business session as a

candidate for that district's board position. Run off elections are use, if needed. Note that this action in the caucus is not binding upon the delegate body as a whole.

"During the business session, the person proposed for nomination from a district is placed before the whole assembly of delegates and the chairperson asks if there are other nominations. If other nominations are forthcoming, then an election from the delegate body of the whole determines who shall fill the vacant board position. In the absence of other nominations, the delegate body will elect the district's caucus nominee in [sic] by unanimous ballot upon proper motion being made." (Emphasis in original.)

The KOMA provides that all meetings of public bodies must be open to the public. K.S.A. 1985 Supp. 75-4318(a). The purpose of the law is stated in K.S.A. 75-4317(a):

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public."

The Act also provides that "no binding action by [public] bodies shall be by secret ballot." K.S.A. 1985 Supp. 75-4318(a). The question presented is whether the election procedure at the annual meeting violates the prohibition in the open meetings law against secret ballots.

An organization is not a "public body" subject to the KOMA unless a two-part test is met: (1) the body is either a legislative or administrative agency of the state or one of its political or taxing subdivisions or is subordinate to such a body; and (2) the body receives or expends and is funded in whole or in part by public funds, or, in the case of subordinate groups, has a parent or controlling body which is so supported. K.S.A. 1985 Supp. 75-4318(a). Clearly, the Board of Agriculture is subject to the KOMA. In order to answer the question whether the election procedure violates the open meetings law, it must first be determined whether the

gatherings of delegates at the annual meeting and district caucuses are public bodies.

Agriculture districts are created by statute. K.S.A. 74-503. District meetings are not groups "subordinate" to the Board because they in effect implement the Board by selecting its members through the caucuses and annual meeting. However, notwithstanding the relationship between the districts and the Board, the annual meeting and the district caucus meetings meet the two-part test and thus are in themselves public bodies which must abide by the KOMA's prohibition against secret ballots. The "public funds" requirement is met as certain expenses of the annual meeting, not to exceed \$10,000 annually, are paid out of the state treasury. K.S.A. 74-503.

The second part of the test is also met. This office has used several factors to aid in determining whether an organization is a legislative or administrative agency of the state:

"1) If the agency has the authority to make governmental decisions and act for the state, it is covered by an open meetings law. If it only collects information, makes recommendations or renders advice, it is not. McLarty v. Bd. of regents, 231 Ga. 22, 220 S.E.2d 117, 119 (1973).

"2) Does the agency have independent authority in the exercise of its functions? Soucie v. David, 440 F.2d 1967 (D.C. Cir. 1971).

"3) Is the agency subject to government audits or otherwise have its business procedures supervised? Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

"4) Finally, one court has defined "governmental agency" to include corporate instrumentalities that accomplish public ends, both government and proprietary. Ratan Public Service Co. v. Hobes, 76 N.M. 536, 417 P.2d 32 (1966).'"
Attorney General Opinion Nos. 84-10; 79-284.

Candidates chosen at district caucuses are virtually guaranteed election at the annual meeting of all the delegates to represent the district that nominated him or her. Members

of the Board are not chosen by popular election. Decisions made by delegates at the annual meeting and district caucuses are made for the public. The selection of persons to serve on the State Board of Agriculture, then, is a governmental function. Therefore, the annual meeting of delegates and agricultural districts caucus meetings are public bodies subject to the open meeting laws.

The KOMA provides that no binding action can be taken by secret ballot. K.S.A. 75-4318(a). It is argued that the caucus elections do not constitute binding action because the delegate body as a whole may elect some other persons placed in nomination during the annual meeting. Historically, however, the person who wins the district caucus is the only person nominated for that position at the annual meeting. In addition, one commentary on the KOMA has suggested that "binding action" is the equivalent of "final action:"

"In other states the phase 'final action' is often used and has been broadly construed 'to connote finality within the scope of the powers delegated' to the bodies subject to those statutes."
Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 270 (1981).

Even if other persons are nominated at the annual meeting in addition to the persons elected at the district caucus, the caucus elections constitute binding action as such elections are the final actions that caucus meetings can take within the scope of their powers.

The argument is made that the balloting procedure used by the caucuses is not "secret" because the pieces of paper used for the election are opened and made available for public inspection. This does not, however, make the casting of such ballots "not secret." The Kansas Supreme Court has said that the purpose of the secret ballot prohibition "is to make public every official's vote on the public's business." Olathe Hospital Foundation, Inc. v. Extendicare, 217 Kan. 546, 562 (1975). We must conclude that the voting procedure currently employed by the district caucuses violates the open meetings law as the public has no way to determine how each delegate voted.

You also ask whether the secret ballot provision of the KOMA would be violated if delegates voted by paper ballot to which each delegate would sign his or her name. As proposed, the ballots would be counted in public view and open for

inspection by any person. You also suggest that the ballots could be retained as part of the record.

In 1893 Kansas adopted the Australian-ballot system for voting in popular elections. This method was designed to protect voters in maintaining secrecy of their ballot. Lambeth v. Levens, 237 Kan. 614, 619 (1985). "Every person has a privilege to refuse to disclose the tenor of his or her vote at a political election" K.S.A. 60-431. See K.S.A. 25-2422; 25-2901; 25-3008. In Taylor v. Bleakley, 55 Kan. 1, 14 (1895), the Kansas Supreme Court defined "ballot" and stated as follows:

"It is conceded that the word 'ballot' means 'a bit of paper having printed or written thereon the designation of an office, and the name of a person to fill it, and that the person casting it has a right to do so in absolute secrecy.' The cardinal features of chapter 78 [L. 1893, Ch. 78; enacting election laws] are two: First, an arrangement for polling by which compulsory secrecy of voting is secured; second, an official ballot containing the names of all candidates, printed and distributed under official authority. The act compels a vote by ballot, and absolute secrecy."

The KOMA mandates that every official's vote on the public's business be made public. As previously noted, members of the Board of Agriculture are elected by a public body, not by popular election. Secret ballots, therefore, cannot be used in selecting Board members as their election is subject to public scrutiny. Ballots are secret when a voter's choice is not disclosed. The fact that a piece of paper is used in voting does not necessarily make an election by "secret ballot." If a delegate's choice is made known, the ballot is not secret. Signing one's name to his or her ballot which is open for public inspection precludes secrecy in voting. It is our opinion that the open meetings law is not violated if delegates to the annual meeting of the State Board of Agriculture vote for board members by writing their choice on a piece of paper and sign their names thereto.

In summary, the annual meeting of delegates and district caucuses are public bodies subject to the open meetings laws. It is our opinion that the voting procedure that has been used to elect members to the state Board violates the provision in the KOMA which prohibits binding action by secret ballot.

Under the Act, a "secret ballot" is one in which each member's vote or decision is not known. The KOMA would not be violated, then, if delegates voted for board members by writing their choice on a paper ballot and signed their names thereto.

Very truly yours,



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