



INTERNAL MEMORANDUM

TO: KHSAA Commissioner Julian Tackett
KHSAA Board of Control President Carrell Boyd

FROM: Chad Collins, General Counsel

DATE: September 1, 2014

RE: Election Procedures

During the April Board of Control meeting, elections were held to select the President-Elect to serve for the 2014-2015 school year. Leading up to this election, questions arose as to the method and procedures to conduct these elections. Specifically, there were questions as to the ability to use a secret ballot as had been the case in past years. In researching this issue, recent changes in administrative law and attorney general opinions indicate that the elections procedure used must be done in open session and cannot be done by secret ballot. Therefore, it seems clear the procedures followed in April were correct under the law. Please allow me to share the legal foundation for this conclusion.

KHSAA and the Kentucky Open Meetings Act ("OMA")

The first legal issue to address is whether the KHSAA is subject to OMA. When the KHSAA was formed in 1917, it was formed as a voluntary not-for-profit association of several school in the Commonwealth. As such, it was not a state agency nor an agent of the Kentucky Board of Education at the time. Therefore there was no legal basis to require activity to be conducted in the open view of the public. That was exclusively the business of the members of the Association.

In subsequent years, many changes occurred including the Kentucky Board of Education officially designating the KHSAA as its agent to administer interscholastic athletics in Kentucky. See 702 KAR 7:065. Soon thereafter, various challenges were proffered seeking interpretations of state law that the KHSAA was subject to Kentucky open meetings and open records law. The KHSAA has always challenged this position and no court has held such. However, the Kentucky Attorney General has issued advisory opinions on several occasions stating that the Association is in fact subject to such law. While such opinions are not binding on the courts, they are persuasive. See *Palmer v. Driggers*, 60 S.W.3d 596 (Ky. App. 2001).

However, 702 KAR 7:065 was amended in 1998 and relevant language amended included adding the provision the KHSAA shall: "conduct all meetings in accordance with KRS 61.805 through 61.850" which is the statute also known as OMA. With this change and the current state of the law, it appears that as it relates exclusively to meetings, the Association is required to comply with OMA. Please note this change did not directly affect open records laws which the Association has long taken the position that it is not subject to, but has generally voluntarily complied in the interest of transparency.

Secret Ballots

Based on the conclusion that the Association is subject to OMA (as it relates to meetings of the Board), the next issue is the manner in which elections are conducted. Specifically, whether secret ballots may be used.

In order to use secret ballots, there must be a basis to go into closed session as this would be the effect of secret ballots. Secret ballots allow the identity of the individual who casts a vote to be shielded from the public and not traced back to that individual. There are few exceptions to OMA and the Kentucky Supreme Court has held that these exceptions must be strictly construed. See Floyd Co. Bd. of Educ. V. Ratliff, 955 S.W.2d 923 (Ky. 1977).

Generally, there are no exceptions to OMA that provide for closed session for the purpose of taking a vote. In fact, KRS 61.835 provides:

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, **shall** be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.

Further, recent attorney general opinions specifically prohibit the use of anonymous paper ballots (secret ballots) in the use of electing a board member. See 12-OMD-06. In this opinion, the Attorney General recognized a previous opinion that would allow a secret straw poll for the purposes of giving an indication of how a member may vote so long as the final vote was done in public. See *Id.*

Based on the foregoing, the use of secret ballots in the election of the Association cannot be supported by law. As to previous cases of the practice of secret ballots, with the recent changes, there is no reason to believe that these elections were conducted in contravention of the law as it was understood at that time.