

UPDATED: City attorney says telephone poll of council was not a violation

By DEBBY WOODIN dwoodin@joplinglobe.com | Posted: Wednesday, September 16, 2015 9:11 pm

Joplin's top legal adviser maintains there was no violation of the state's open meetings/records law on Sunday when he conducted a telephone poll of the City Council without public notice, though an attorney for the Missouri Press Association says that telephone polls are not permitted by public bodies to make binding decisions.

City Attorney Peter Edwards posted a notice at 1:30 p.m. Monday that the City Council had voted 5-3 to accept a settlement agreement absolving Woolston of any alleged ethics violations and that Woolston had agreed to resign his council seat. That canceled a planned disciplinary hearing for Woolston scheduled at 6 p.m. Monday. The posting was made along with city release of a joint statement reciting terms of the settlement.

The city attorney said Monday he contacted council members by telephone and took the vote because there was not time to hold an open meeting on the decision. He also said that a meeting, if one had been held, would have been conducted in a session closed to the public because it involved communication between the council and the city attorney regarding a settlement matter.

"Really, the time and circumstance dictated how this was approached," Edwards said on Monday. "To have the hearing (Monday) requires a lot of preparation both for me and Mike's attorneys. Witnesses were subpoenaed. The court reporter would be here. There would be people traveling in. So, in light of that and in light of the settlement proposal that has been presented to the city, I communicated with the council to get their feelings on the proposal."

Asked if minutes were kept of the telephone discussions, the city attorney said he memorialized that he conveyed the settlement offers and the votes.

He said the council will take a formal vote at its regular meeting next Monday to accept Woolston's resignation.

The Globe filed an open records request on Tuesday asking for the minutes of the telephone conversations with council members and any emails between council members or between Edwards and the council members regarding the Woolston settlement.

Edwards, asked Wednesday for an interview regarding the telephone polling issue, said he was researching some questions before he spoke to the newspaper.

He later called and was asked if he felt he should have asked for a meeting to discuss the settlement proposal or handled the matter some other way. He responded, "It's a tough question. My feeling is

that by calling council members Sunday evening to tell them about the settlement offer, when you look at the Sunshine Law and giving notice of a meeting, it would have been impossible for me to have given notice — impossible and impractical. It was Sunday, City Hall was closed, I have a settlement agreement from Mike's attorney, and I just did what I felt was right, and that was to call them and tell them about it and see what they said about it.

"The intent was not to avoid the Sunshine Law but to deal with the situation at hand.

"When I think about it and try to look back at it and think if it could have been handled differently, an alternative would have been to call council members and see if there was a time to have a meeting before the hearing."

Edwards said even if there had been a meeting, it would have been a closed session.

Asked why it would have had to be closed, he said it was because the council would have been asking questions of him as their legal adviser and there was a threat of litigation. He said that "for council to speak openly and freely" and with potential witnesses involved, "those are conversations that need to be held confidentially in a closed meeting."

He said he did not see any reference in the open meetings law that allows or disallows a telephonic meeting and had not researched any court cases on such issues to determine whether there was case law on the points.

Asked if the mayor could have given permission to delay the hearing to give council an opportunity to first discuss the proposed settlement in a posted meeting that gave the public notice that a matter was to be considered, Edwards said he did not think the mayor could have consented to delaying the hearing. He agreed the hearing officer, Chuck Brown, may have had that authority since Brown had previously granted a request by Woolston's attorneys for a one-week delay.

"I think the alternative was to let the council know there had been a settlement offer and try to organize a meeting for sometime Monday," the city attorney said.

Told that there was a 1985 agreement that set city guidelines on compliance with the Sunshine Law that included requirements for drafting and posting notices of meetings and notice of a possible closed session, Edwards said he was not aware of the agreement.

"I am certainly a proponent of transparency and trying to follow the open records law," Edwards said. He said that when there is an open records request for documents, he opts for disclosure if there is any question of a document being open or closed. "I always try to err on the side of openness. I would rather err on the side of the caution," Edwards said. "It's a lot easier to follow the rules."

Looking back, Edwards said, "I should, as a municipal attorney, have been thinking about the Sunshine Law."

The Missouri attorney general's handbook on the Sunshine Law reads: "Public meetings, including meetings conducted by telephone, Internet or other electronic means, are to be held at reasonably convenient times and must be accessible to the public. Meetings should be held in facilities that are large enough to accommodate anticipated attendance by the public and accessible to persons with disabilities."

Section 610.015 of the Sunshine Law states that in the event of an emergency, with a quorum present, those who could not attend a meeting can vote by telephone or other electronic means but the nature of the emergency has to be stated in the meeting minutes.

"The only time you can have all of them on the telephone is if it is not an elected body," such as an appointed committee, said Jean Maneke, the Missouri Press Association attorney in Kansas City. But there would still have to be public notice, she said, and an accommodation for the public to attend.

Edwards maintains that he can speak to the council, his client, by telephone at any time, particularly when an emergency arises at a time when City Hall is not open.

Any member of the public can file a complaint alleging a violation with the county prosecutor or the attorney general.

If a court rules there is a violation, there can be fines and attorneys fees awarded.

Additionally, courts can void the action taken by the public body if a judge determines that openness outweighs the interest in sustaining the action.

Bill Fleischaker, a Joplin attorney who was the county prosecuting attorney in 1985, filed a lawsuit against the City Council at that time when a meeting was posted without specifying the action to be taken. A majority vote took place to oust then-City Manager Strib Boynton. There was no notice that a closed vote would be taken.

A settlement was reached in which the city adopted an open meetings policy the council pledged to follow and the lawsuit was dismissed by the prosecutor. There was no fine assessed in that action.

A recall effort followed that resulted in the resignations of the council members involved in the vote on the eve of the election.

State audit

The recently disclosed state audit contained findings that the council held closed meetings without always following the Sunshine Law.

The report states that in 10 of 24 closed sessions held after the May 2011 tornado and before Oct. 31, 2013, minutes were not taken. It also stated that some discussions held in closed session were not allowed under the Sunshine Law.

Auditors also reported that the city did not give proper notice for three of 11 special meetings held last year.

City officials responded in the audit that a number of changes had been made to assure minutes were properly kept and accurately maintained.