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State and Local Government

H-3 Kansas Open Meetings Act

Purpose

The Kansas Open Meetings Act (KOMA), KSA 75-4317 *et seq.*, is one of two main laws that guarantee the business of government is conducted in the “sunshine.” The second “sunshine” act is the Kansas Open Records Act (KORA), which is discussed in a separate briefing paper.

The open meetings law recognizes “that a representative government is dependent upon an informed electorate” and declares that the policy of the State of Kansas is one where “meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public” (KSA 75-4317).

The Kansas Supreme Court has recognized the law is to be “interpreted liberally and exceptions narrowly construed” to carry out the purpose of the law. See *Memorial Hospital Association v. Knutson*, 239 Kan. 663, 669 (1986).

State and Local Public Bodies Covered by KOMA

- State agencies;
- Political and taxing subdivisions of the state;
- Legislative bodies of the state or its subdivisions;
- Administrative bodies of the state or its subdivisions;
- Boards, commissions, authorities, councils, committees, and subcommittees of the state or its subdivisions, or of legislative or administrative bodies thereof; and
- Other subordinate groups of any of the above entities that receive or expend and are supported in whole or in part by public funds (KSA 75-4318).

State Bodies Covered by KOMA

- The Legislature, its legislative committees, and subcommittees unless rules provide otherwise;
- State administrative bodies, boards, and commissions;
- State Board of Regents;
- State Board of Education;
- Kansas Turnpike Authority;
- Supreme Court Nominating Commission (added by 2016 SB 128); and
- Other State bodies.

Local Governments Covered by KOMA

- Cities;
- Drainage districts;
- Counties;
- Conservation districts;
- School districts;
- Irrigation districts;
- Townships;
- Groundwater management districts;
- Water districts;
- Watershed districts;
- Fire districts;
- Municipal energy agencies;
- Sewer districts;
- District judicial nominating commissions (Added by 2016 SB 128); and
- Other special district governments.

One of the most difficult problems of interpretation of the open meetings law is to determine which subordinate groups of public entities are covered and which are excluded.

Representative Subordinate Groups	
Covered	Not Covered
Nonprofit Mental Health Services Providers	Nonprofit entity operating county hospital
Area Agencies on Aging	Kansas Venture Capital, Inc.
Economic Opportunity Foundation	Prairie Village Economic Development Commission
Three Rivers, Inc.	Hesston Area Service Center

Public Bodies Excluded from KOMA

Certain state and local bodies or entities are excluded from the requirements of the open meetings law, including the following:

- The Judicial Branch; and
- State or local bodies when exercising quasi-judicial powers (examples include

teacher due process hearings, civil service board hearings for a specific employee, or zoning amendment hearings for a specific property).

Meetings: What are They?

The KOMA covers meetings, defined in KSA 75-4317a, as a gathering or assembly with the following characteristics:

- Occurs in person or through the use of a telephone or any other medium for “interactive” communication (see “Serial Meetings” below);
- Involves a majority of the membership of an agency or body (prior to a change in 2009, a meeting was defined as involving the majority of a quorum of a body); and
- Is for the purpose of discussing the business or affairs of the body.

A Kansas appellate court has held that informal discussions before, after, or during recesses of a public meeting are subject to the requirements of the open meetings law. See *Coggins v. Public Employee Relations Board*, 2 Kan. App.2d 416 (1978). Calling a gathering a “work session” does not exempt the event from the law if the three requirements of a meeting are met.

Serial meetings. The Attorney General has said serial communications among a majority of a quorum of a public body constitute a meeting if the purpose is to discuss a common topic of business or affairs of that body by the members. [Note: The opinions were issued prior to the change in requirements from “majority of a quorum” to “majority.”] Such a meeting may occur through calling trees, e-mail, or the use of an agent (staff member) of the body. (See Atty. Gen. Op. 98-26 and 98-49.) The use of instant messaging also would qualify as a meeting. In 2009, the law was changed to address such communication some have called “serial meetings,” or communications held in a series when, taken together, involve a majority of members. Pursuant to this change, KSA 75-4318(f) now deems interactive communications in a series to be open if the communications:

- Collectively involve a majority of the membership of the body or agency;

- Share a common topic of discussion concerning the business or affairs of the body or agency; and
- Are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency.

Is binding action the trigger? In regard to discussing “the business or affairs of the body,” binding action or voting is not necessary. It is the discussion itself that triggers the requirements of the open meetings law (KSA 75-4317a).

What about social gatherings? Social gatherings are not subject to KOMA as long as there is no discussion of the business of the public body.

Notice of Meetings, Agendas, Minutes, Conduct of Meeting, and Cameras

Notice required only when requested. Contrary to popular belief, KOMA does not require notice of meetings to be published in a newspaper or otherwise widely distributed. According to KSA 75-4318(b), notice must be given to any person or organization requesting it. Notice requests may expire at the end of a fiscal year, but the public body has a duty to notify the person of the pending expiration before terminating notice. The presiding officer has the duty to provide notice, but that duty may be delegated. No time limit is imposed for receipt of notice prior to the meeting.

Notice may be given in writing or orally, but it must be made individually to the person requesting it. Posting or publication in a newspaper is insufficient. A single notice can suffice for regularly scheduled meetings. There also is a duty to notify of any special meetings. No fee for notice may be charged.

Petitions for notice may be submitted by groups of people, but notice need be provided only to one person on the list, that person being designated as required by law. All members of an employee organization or trade association are deemed to have received a notice if one is furnished to the executive officer of the organization.

Agenda not required. KSA 75-4318(d) states: “Prior to any meeting . . . , any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting the agenda.” In *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 290 (1986), the court concluded that, while the law does not require an agenda be created, if a body chooses to create an agenda, the agenda should include topics planned for discussion.

Minimal requirements for minutes. The only KOMA requirement regarding minutes exists in regard to closed or executive sessions. KSA 75-4319(a) requires that any motion to recess for a closed or executive meeting be recorded in the meeting minutes. (See heading “Executive Sessions: Procedure and Subjects Allowed” on the following page for additional information on executive sessions.)

Conduct of meetings. Any person may attend open meetings, but the law does not require that the public be allowed to speak or have an item placed on the agenda. KOMA does not dictate the location of a meeting, the size of the room used (or even that a room must be used), or other accommodation-type considerations. The court has determined a meeting is “open” if it is accessible to the public. See *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 292 (1986).

KSA 75-4318(a) prohibits the use of secret ballots for any binding action. The public must be able to ascertain how each member voted.

Use of cameras. Subject to reasonable rules, cameras and recording devices must be allowed at open meetings (KSA 75-4318(e)).

Subject Matter Justifying Executive Session

Pursuant to KSA 75-4319, only a limited number of subjects may be discussed in executive session. Some of these are listed below.

Personnel matters of non-elected personnel: The purpose of this exception is to protect the privacy interests of individuals. Discussions of consolidation of departments or overall salary structure are not proper topics for executive session. This personnel exemption applies only to employees of the public agency. The Attorney General has opined the personnel exemption does not apply to appointments to boards or committees, or nomination of public officers, nor does it apply to independent contractors (see Atty. Gen. Op. 2016-03).

Consultation with an attorney for the body or agency that would be deemed privileged in the attorney-client relationship. All elements of privilege must be present:

- The body's attorney must be present;
- The communication must be privileged; and
- No other third parties may be present.

Employer-employee negotiations to discuss conduct or status of negotiations, with or without the authorized representative who actually is doing the bargaining.

Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships.

Sensitive financial information contained within personal financial records of a judicial nomination candidate (added by 2016 SB 128).

Official background check of a judicial nomination candidate (added by 2016 SB 128).

Matters affecting an individual student, patient, or resident of a public institution.

Preliminary discussions relating to acquisition (not sale) of real property.

Security of a public body or agency, public building or facility, or the information system of a public body or agency, if open discussion would jeopardize security.

Executive Sessions: Procedure and Subjects Allowed

Requirements and restrictions on closed or executive sessions are contained in KSA 75-4319. Executive sessions are permitted only for the purposes specified. First, however, the public body must convene an open meeting and then recess into an executive session. Binding action may not be taken in executive session. Reaching a consensus in executive session is not in itself a violation of the KOMA. *O'Hair v. USD No. 300*, 15 Kan. App. 2d 52 (1991). A "consensus," however, may constitute binding action and violate the law if a body fails to follow up with a formal open vote on a decision that normally would require a vote. The law does not require an executive session; the decision to hold an executive session is discretionary.

Generally, only the members of a public body may attend an executive session. The Attorney General indicates a public body may designate certain persons with essential information to assist in executive session deliberations. Inclusion of general observers means the meeting should be open to all members of the public.

Procedures for going into executive session include the following:

- Formal motion, seconded, and carried;
- Motion must contain a statement providing:
 - Justification for closure;
 - Subject(s) to be discussed; and
 - Time and place open meeting will resume; and
- Executive session motions must be recorded in minutes. The law does not require other information to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them.

Enforcement of the KOMA

The 2015 Legislative Session enacted significant changes to KOMA and KORA *via* HB 2256. The

law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including coordination with appropriate organizations. Further, the law gives the Attorney General or county or district attorney various subpoena and examination powers in KORA and KOMA investigations.

Among other enforcement provisions, the legislation allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation.

Comparison with Other States' Laws

Recently, concern has arisen over several aspects of Kansas' open meetings law, and how they compare with those of other states. Among the concerns expressed were:

- What actually constitutes a meeting? For example, are social gatherings considered meetings? If so, in what instances? How many members must be present in order for a gathering to constitute a meeting?
- What kind of notice has to be given? Does this apply to all meetings or just specific types?

The following information was derived either from a 2002 states survey by the National Conference of State Legislatures (NCSL) or from direct research of a limited number of states' statutes. States included in the statute comparison were Alabama, Alaska, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Mississippi, Missouri, Nebraska, Oklahoma, and Texas.

Inclusion of legislatures in open meetings laws. In the limited comparison of other states' statutes, the first item noted was that several states' legislative bodies are exempt from their open meetings laws. Of those compared, the states of Alaska, Arkansas, and Oklahoma exempted their legislatures, either specifically or by omission, from the open meetings laws. The statutes of one other state, Nebraska, were

ambiguous as to whether its legislature is included. Indiana's Legislature was deemed not subject in *State ex rel. Masariu v. Marion Superior Court*, in which the court held that any judicial involvement in legislative open meetings and records matters constituted a violation of the separation of powers clause of the *Indiana Constitution*. By comparison, KOMA specifically includes the Legislature (KSA 75-4318).

What constitutes a meeting. Based on the limited comparison of other states' statutes, most states that included their legislatures defined a meeting as the gathering of a majority of the body's members. Only one of the states examined, Illinois, defined it as a "majority of a quorum." As mentioned previously, Kansas changed its law in 2009 from a majority of a quorum to a majority of the body's members.

The meeting definitions among the states examined varied as to whether social gatherings were specifically addressed. When specifically addressed, the mention was in the format of what a meeting does not include. Alabama's law states that a meeting does not include occasions when a quorum attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers, so long as the governing body does not deliberate specific matters expected to come before the governing body at a later date. Similarly, Missouri's law excludes an informal gathering of members of a body for ministerial or social purposes when there is no intent to avoid the purposes of the open meetings law.

Notice details. In its 2002 report, NCSL indicated: "Most legislatures post meeting notices in the capitol or legislative building. Due to increased computer use, legislative assemblies now commonly enter notices into their computer systems and post meeting listings on their Internet or Intranet sites. Only 13 chambers reported that they advertise committee meetings in newspapers, and six use radio or television announcements...."

The NCSL survey also indicated "[t]he items to be discussed usually must be included in the meeting notice as well... [H]owever, committees often have the ability to take up issues not listed."

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