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### Elections and Ethics

#### D-2 Kansas Open Meetings Act

##### Purpose

The Kansas Open Meetings Act (KOMA), KSA 2018 Supp. 75-4317, *et seq.*, recognizes “that a representative government is dependent upon an informed electorate” and declares 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 2018 Supp. 75-4317.]

The Kansas Supreme Court has recognized KOMA is to be “interpreted liberally and exceptions narrowly construed” to carry out the purpose of the law. [*Mem'l Hosp. Ass'n v. Knutson*, 239 Kan. 663, 669 (Kan. 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 2018 Supp. 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

The following local governments are 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.

## Public Bodies Excluded from KOMA

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

- The Judicial Branch (except for judicial nominating commissions);
- 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); and
- Certain state bodies when performing functions that are exempt from KOMA by statute (examples include committee discussion on certain Secretary of Commerce decisions regarding sales tax and revenue (STAR) bonds).

## Meetings: What are They?

KOMA covers meetings, defined in KSA 2018 Supp. 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 the following “Serial Meetings” section);
- Involves a majority of the membership of an agency or body; and
- Is for the purpose of discussing the business or affairs of the body.

The Kansas Court of Appeals has held that informal discussions before, after, or during recesses of a public meeting are subject to the requirements of the open meetings law. [*Coggins v. Pub. Emp. Relations Bd*, 2 Kan. App. 2d 416 (Kan. Ct. App. 1978).] Calling a gathering a “work session” does not exempt the event from the law if the three requirements of a meeting are met.

Social gatherings are not subject to KOMA as long as there is not a majority of the membership present or there is no discussion of business of the public body between a majority of the membership.

**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. Such a meeting may occur through calling trees, e-mail, or the use of an agent (staff member) of the body. [Att’y. Gen. Op. 98-26 and 98-49.] The use of instant messaging also would qualify as a meeting. KSA 2018 Supp. 75-4318(f) now deems interactive communications in a series to be subject to open meetings requirements 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 KOMA (KSA 2018 Supp. 75-4317a).

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

**Notice required only when requested.** KOMA does not require notice of meetings to be published. According to KSA 2018 Supp. 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 is also 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 2018 Supp. 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 (Kan. Ct. App. 1986), the court concluded 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.

**Requirements for minutes.** The only KOMA requirement for minutes pertains to closed or executive sessions. KSA 2018 Supp. 75-4319(a) requires any motion to recess for a closed or executive meeting be recorded in the meeting minutes. (See “Executive Sessions: Procedure and Subjects Allowed” on the following page for additional information.)

**Conduct of meetings.** Any person may attend open meetings, but the law does not require 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 (see *Stevens*) a meeting is “open” if it is accessible to the public.

KSA 2018 Supp. 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 2018 Supp. 75-4318(e)).

### Subject Matter Justifying Executive Session

Pursuant to KSA 2018 Supp. 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. [Att'y. Gen. Op. 2016-03.]

**Consultation with an attorney.** For the body or agency to 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.

**Additional justification for executive session are as follows:**

- 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;
- Official background check of a judicial nomination candidate;
- Case reviews conducted by the Governor's Domestic Violence Fatality Review Board;
- 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;
- Matters relating to information acquired and records of the Child Death Review Board;
- Matters relating to parimutuel racing;
- Matters relating to the care of children;
- Matters relating to patients and providers;
- Matters relating to maternity centers and child care facilities; and
- Matters relating to the Office of Inspector General.

### **Executive Session: Procedure and Subjects Allowed**

Requirements and restrictions on closed or executive sessions are contained in KSA 2018 Supp. 75-4319. Executive sessions are permitted only for the purposes specified. First, 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 KOMA. [*O’Hair v. United Sch. Dist. No. 300*, 15 Kan. App. 2d 52 (Kan. Ct. App. 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:
  - A statement describing the subjects to be discussed;
  - Justification for closure; 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 KOMA**

The law requires the Attorney General to provide and coordinate Kansas Open Records Act (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 law 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.

HB 2290 (2019) provides for repayment by a state agency to the Tort Claims Fund of the cost of defense or indemnification provided for the agency or employee arising out of an alleged violation of KOMA.

For questions regarding application or suspected violations of KOMA, please contact the Office of the Attorney General. Limitations under Kansas law do not allow the Kansas Legislative Research Department to provide legal advice, interpretation of statute, or the legislative intent of a statute.

For more information, please contact:

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