

## **Kansas Open Meetings Act (KOMA)**

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### **I. PURPOSE AND CONSTRUCTION**

- A. It is the public policy of Kansas that meetings be open to the public because "a representative government is dependent upon an informed electorate. . . ." K.S.A. 2007 Supp. 75-4317.
- B. The act is interpreted liberally and exceptions narrowly construed to carry out the purpose of the law. (*Murray v. Palmgren*, 231 Kan. 524, 530 (1982); and *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986)).

### **II. BODIES SUBJECT TO THE KOMA**

- A. Is the group subject to the KOMA?--two concurrent requirements: K.S.A. 2007 Supp. 75-4318.
  - 1. All legislative and administrative bodies, state agencies, and political and taxing subdivisions.
  - 2. Which receive or expend and are supported in whole or in part by public funds.
- B. Specific Bodies Subject to the KOMA:
  - 1. Political and Taxing Subdivisions include: cities, counties, townships (AG Opin. No. 81-288); school districts, community colleges (AG Opin. No. 81-258); watershed districts (AG Opin. No. 85-161); rural water districts (AG Opin. No. 88-97 and 89-92); drainage districts (AG Opin. No. 90-69); local historic preservation committees administering K.S.A. 75-2724 (AG Opin. No. 99-22).
  - 2. State Agencies and Boards, unless otherwise provided by statute. (AG Opin. 86-176).
- C. Subordinate Groups Subject to the KOMA--All subordinate groups, such as boards, commissions, authorities, councils, committees, subcommittees are covered by act if:
  - 1. The subordinate group meets funding test if the parent or controlling body meets funding test, (*State ex rel., Murray v. Palmgren*, 231 Kan. 524 (1982)), and
  - 2. Appointed by parent body to weigh options, discuss options, present recommendations or a plan of action.
    - a. It is the nature of the group, not its designation, which determines if it is subject to the KOMA. (AG Opin. No. 86-92. *See also* AG Opins. No. 80-201; 77-53; 76-140; 76-122; 73-235; 86-38).

3. Examples--School District Advisory Board (AG Opin. No. 84-81); Fire District Advisory Board (AG Opin. No. 86-84); Mayor's commission subject to KOMA as it is subordinate to the city's governing body (AG Opin. No. 88-25); appointed grievance committees, created by a city to hear employee grievances (AG Opin. No. 91-31); DUR Board under SRS (AG Opin. No. 93-41); Parental boards under Rec. Commission (AG Opin. No. 93-73); House and senate conference committees (AG Opin. No. 93-113).
- D. Joint boards subject to the KOMA if boards composed of members of different governmental bodies and:
1. Appointed by official action (AG Opin. No. 86-48); or
  2. A majority of a quorum of one or more governing bodies is present (AG Opin. No. 84-103. *See also* AG Opin. No. 91-150).
- E. Non-profit corporations may be subject to the KOMA if the non-profit:
1. Receives or expends public funds;
  2. Is subject to control of governmental unit(s); and
  3. Acts as a governmental agency in providing services or has independent authority to make governmental decisions
    - a. Nonprofit Corps Subject to KOMA: Area agencies on aging (AG Opin. No. 79-219); Economic Opportunity Foundation, Inc. (AG Opin. No. 84-10); McPherson Co. Diversified Services, Inc. (AG Opin. No. 79-284); Three Rivers, Inc. (AG Opin. No. 87-143); Cowley County Diversified Services (AG Opin. No. 87-188); HELP, Inc. (AG Opin. No. 88-27); Southwest Developmental Services, Inc. (AG Opin. No. 94-111)
    - b. Not subject to KOMA: Private nursing homes (AG Opin. No. 79-221); KU and WSU Endowment Associations (AG Opins. No. 80-239, 82-172); Planned Parenthood (AG Opin. No. 81-253); Hutchinson Cosmosphere (AG Opin. No. 82-256); Electric Cooperative (AG Opin. No. 85-175); *Memorial Hospital v. Knutson*, 239 Kan. 663 (1986); Parsons Chamber of Commerce (AG Opin. No. 89-149); K-10 Corridor Development, Inc. (AG Opin. No. 94-42); Koch Commission (AG Opin. No. 94-55); Kansas Venture Capital, Inc. (AG Opin. No. 94-107); Mid-America Commercialization, Inc. (AG Opin. No. 94-99); Consensus Estimating Group -- with staff from state agencies (AG Opin. No. 94-93); Prairie Village Economic Development Commission (AG Opin. No. 99-64), Hesston Area Senior Center (AG Opin. No. 01-02); Sheltered Living, Inc. (AG Opin. No. 2004-34); KSU Student Senate (AG Opin. 77-174)
- F. Bodies and meetings not subject to KOMA:
1. Staff meetings
  2. Judicial agencies and bodies (AG Opin. No. 82-254)
  3. Bodies exercising quasi-judicial functions -- K.S.A. 75-4318(f)(1).

- a. Quasi-judicial is defined as "a term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." Black's Law Dictionary 1121 (5th ed. 1979).
- b. Example: Zoning boards (AG Opin. No. 78-13 ), city grievance panels (AG Opin. No. 91-31); hearing panels (AG Opin. 97-40).
- c. Only quasi-judicial deliberations may be closed--binding action must be in open meeting. (AG Opins. No. 91-31; 84-50; 79-225).
- 4. Private Organizations. Example: Private/parochial schools (AG Opin. No. 81-94); Nursing homes (AG Opin. No. 79-221).
- 5. Hospital board discussions regarding risk management and peer review laws exempted from open meeting discussion. (AG Opin. No. 89-42).
- 6. Meetings of legislature if house or senate rules so provide. K.S.A. 75-4318(a).
- 7. Precinct committees. (AG Opin. No. 94-157).

III. MEETING--If a body is subject to the KOMA, the KOMA applies only when the body has a meeting as defined by the statutes.

- A. A Meeting is (1) any gathering or assembly, in person or through the use of a telephone or any other medium for interactive communication; (2) by a majority of the membership of an agency or body; (3) for the purpose of discussing the business or affairs of the body or agency. K.S.A. 75-4317a as amended by Senate Substitute for House Bill No. 2947, effective July 1, 2008.
- B. Gathering or Assembly, in Person or Through the Use of a Telephone or other Medium for Interactive Communication
  - 1. This portion of the definition was altered slightly in 2008 as part of a compromise between the Kansas Press Association, the League of Kansas Municipalities and the Kansas Association of Counties. According to testimony offered, the above language clarified interactive communication.
  - 2. Prearrangement was required prior to 1994, and the statute did not mention telephone calls. In *State v. Seward Co.*, 254 Kan. 446 (1994), the Kansas Supreme Court held that phone calls between a majority of a quorum of county commissioners discussing business was not subject to the KOMA because the calls were not prearranged and the members were not in each other's physical presence. The legislature reacted to this case by deleting the requirement of prearrangement and adding to the definition "telephone call or any other means of interactive communication." The 2008 Legislature further amended this phrase as follows: "telephone call or any other ~~means of~~ *medium for* interactive communication."
  - 3. A public body subject to the KOMA may legally conduct meetings by telephone, if it does so in compliance with all of the requirements of the

- KOMA. Regardless whether a meeting is to be conducted telephonically, in person, by video-conference, or even through third parties, the requirements of the KOMA remain applicable; (AG Opin. No. 2005-03).
4. Informal discussions before, after, or during recesses of a public meeting are held to be subject to the act. (*Coggins v. Public Employee Relations Board*, 2 Kan. App. 2d 416, 423, *rev. denied* 225 Kan. 843 (1978)).
  5. Title of the gathering--*e.g.* work sessions-- is irrelevant if the three requirements of a meeting are met. ( AG Opins. No. 80-197; 90-47).
  6. Serial communications is defined as "meetings in a series shall be open if they 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." Added by Senate Substitute for House Bill No. 2947, effective July 1, 2008. (For a discussion of the prior language concerning serial meetings, *see* AG Opins. No. 98-26, 98-49. *See also* AG Opin. No. 95-13).
- C. Majority of the Membership of the Body
1. "A majority" means the next whole number greater than one-half the total number of members. (AG Opin. Nos. 83-174; 86-110; 87-45; 87-132; 87-152; 93-140 and 2002-41).
  2. A county commission may by Home Rule powers raise its quorum to a number greater than a majority of its members. (*State ex rel. Stephan v. Board of Sedgwick County Comm'rs*, 244 Kan. 536 (1989)). Cities also have home rule authority to increase their quorum by charter ordinance. (*See* AG Opins. No. 87-45, 83-74). Bodies without home rule authority cannot alter common law rules determining a quorum and may not alter it without specific authority. (*See also* AG Opins. No. 83-174 (change by Airport Authority not authorized); 93-140 (change by Rec. Comm. not authorized); 96-32 (change by state Dental Board not authorized)).
- D. For the Purpose of Discussing the Business or Affairs of the Body.
1. Binding action or voting is not necessary; discussion is what triggers KOMA. ( AG Opin. No. 79-200).
  2. "Meeting" includes all gatherings at all stages of the decision-making process. (*Coggins v. Public Employees Relations Board*, 2 Kan.App.2d at 423).
  3. Social gatherings are not necessarily subject to the KOMA; if there is no discussion of the business of the body, one element of a meeting is "missing."
  4. Retreats and meetings held in private clubs are probably prohibited, especially if site makes it impossible for public to attend without cost. (AG Opins. No. 82-133; 80-148).
  5. Members attending a conference where items of general interest are discussed (such as convention of League of Municipalities) are not in

violation of the KOMA, as long as the specific business of a body is not discussed. (AG Opin. No. 82-133).

6. Marriage between two members of a five member city council of a third class city does not violate the KOMA, but they should not discuss city business outside open meeting. (Discussing the former definition of a meeting which required majority of a quorum AG Opin. No. 87-45).

#### IV. NOTICE OF MEETINGS--K.S.A. 75-4318

- A. Notice of meetings must be requested before the public body is required to provide it. K.S.A. 2007 Supp. 75-4318
  1. Notice must be given to any person or organization requesting it. (AG Opin. No. 86-133). Residence of the requestor is irrelevant. (AG Opin. No. 81-137).
  2. Notice request expires at the end of fiscal year; request must be renewed. Must first notify of expiration before terminating notice. K.S.A. 2007 Supp. 75-4318(b)(3).
  3. Presiding officer has duty to provide notice, but that duty may be delegated.
- B. Form of Request and Notice
  1. Oral request is valid (but prosecution is difficult if not honored). (AG Opins. No. 81-15; 81-22; 86-133).
  2. Notice given can be written or oral, but must be made individually to the person requesting it. Posting or publication in newspaper is insufficient.
  3. A single notice can suffice for regularly scheduled meetings. Must notify of any special meetings. (AG Opin. No. 83-173).
  4. No fee for notice can be charged. (AG Opins. No. 81-137; 82-141).
  5. Petitions for notice may be submitted by groups of people, but notice need only be provided to one person on the list. K.S.A. 2007 Supp. 75-4318(b)(1). (AG Opin. No. 86-133).
  6. No time limit is imposed for receipt of notice prior to meeting. Notice must be given in a "reasonable time," reasonableness depending on the circumstances. (AG Opin. No. 81-15).
  7. Contrary to popular belief, the KOMA does not require notice of meetings to be published in a paper.
  8. To establish a violation for failure to provide notice of a meeting there must have been a prior request for notice. A pattern of providing courtesy notice does not create a duty to provide it.
  9. A body cannot opt out of KOMA's requirements.
- C. Agendas
  1. The KOMA does not require that an agenda be created.
    - a. If a body chooses to create an agenda, that agenda should include topics planned for discussion. (*Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 293 (1986)).

- b. Agenda may be amended. (*U.S.D. 407 v. Fisk*, 232 Kan. 820 (1983)).
  - 2. If agendas exist, copies must be made available to those who request them. The agenda does not have to be mailed out and can simply be provided by placing the agendas in a public place. K.S.A. 2007 Supp. 75-4318(d); (AG Opins. No. 79-218; 81-15; 86-133).
  - 3. Mandamus was proper remedy for board of county commissioner's alleged violations of Open Meetings Act by failing to include planned discussion topic on agenda for meeting. (*Klein v. Johnson County Bd. of County Comm'rs*, 77 P.3d 1009 (Kan.App. 2003) (unpublished opinion)).
- D. Minutes
  - 1. Except for recording motions for executive session, the KOMA does not require minutes. (Local bylaws, ordinances, or policies may.)

## V. OPEN MEETINGS AND EXECUTIVE SESSIONS

- A. Open Meetings
  - 1. K.S.A. 2007 Supp. 75-4318 requires open meetings when a body is subject to the act.
    - a. Any person may attend open meetings. (AG Opin. No. 80-43).
    - b. The KOMA does not require that the public be allowed to speak or to have an item placed on the agenda (but check local ordinances and policies. K.S.A. 21-4101 prohibits disorderly conduct or disturbing a lawful meeting and provides for criminal prosecution).
  - 2. Secret ballots not allowed, K.S.A. 2007 Supp. 75-4318(a). The public must be able to ascertain how each member voted. (AG Opins. No. 86-176; 79-167; 81-106; 65-167; 93-55).
  - 3. Subject to reasonable rules, cameras and recording devices must be allowed at open meetings. K.S.A. 2007 Supp. 75-4318(e).
  - 4. The KOMA does not dictate the location of the meeting, the size of the room, or other accommodation type considerations. The key to determining whether a meeting is "open" is whether it is accessible to the public. (AG Opin. Nos. 86-153; 79-253; 82-133; 80-148).
  - 5. Telephone conference calls are allowed if the requirements of the act are met (*i.e.* notice and free access). (AG Opins. No. 81-268; 80-173; 80-159).
- B. Executive Session K.S.A. 2007 Supp. 75-4319
  - 1. Executive sessions are permitted for specified purposes, but first the body must convene an open meeting before public body can recess into executive session. K.S.A. 2007 Supp. 75-4319(a); (AG Opin. No. 81-22).
  - 2. Binding action may not be taken in executive session. K.S.A. 2007 Supp. 75-4319(c); (AG Opin. No. 91-31). Reaching a consensus in executive session is permitted. (*O'Hair v. U.S.D. No. 300*, 15 Kan.App.2d 52 (1991)). A "consensus," however, may constitute binding action and

- violate KOMA if a body fails to follow up with a formal open vote on a decision which would normally require a vote. (*City of Topeka v. Watertower Place Development Group*, 265 Kan. 148 (1998)).
3. The decision to hold executive session is discretionary; the KOMA never requires an executive session. (Other laws or policies need to be considered, however.)
  4. Procedure--K.S.A. 2007 Supp. 75-4319(a) requires a specific procedure which must be followed in order to go into executive session:
    - a. Formal motion, seconded, and carried
    - b. Motion must contain statement of (1) Justification for closure; (2) Subject(s) to be discussed; and (3) Time and place open meeting will resume.
    - c. Example: "Madam Chairman, I move we recess into executive session to discuss disciplinary action against a student in order to protect the privacy of the parties involved. We will reconvene the open meeting in the conference room at 8:30 p.m."
    - d. Motion for executive session should contain subject and justification statement, which are not the same thing. (AG Opins. No. 91-78; 86-33. *But see State v. U.S.D.A. 305*, 13 Kan. App.2d 117 (1988)). The subject is one of the topics allowed for executive session listed in K.S.A.2007 Supp. 75-4319(b). The justification is an explanation of what is to be discussed (without revealing confidential information.)
    - e. Executive session motions must be recorded in minutes. K.S.A. 2007 Supp. 75-4319(a) KOMA does not require other information to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them. (AG Opin. No. 90-47).
  5. Some of the subjects which may be discussed in an executive session:
    - a. Personnel matters of non-elected personnel
      1. To discuss an individual, not groups. (AG Opins. No. 81-39; 88-25; 80-102. *But see* 13 Kan.App.2d 117 (1988)). The purpose of this exception is to protect the privacy interests of individuals. Discussions of consolidation of departments or overall salary structure is not a proper topic.
      2. "Personnel" means employees of the public agency. (AG Opin. No. 87-10).
        - a. Personnel does not include appointments to boards or committees. (AG Opin. No. 87-10).
        - b. Personnel does not include independent contractors. (AG Opin. No. 87-169; 2002-28).
        - c. The KOMA does not give the employee a right to be present in the executive session or to force an open session. (Other laws or contracts may,

- however.)
- d. This exception may be used to discuss applicants for employment. (AG Opin. No. 96-61).
- b. Consultation with the body's attorney
    1. This is for attorney/client privilege so all elements of privilege must be present:
      - a. the body's attorney must be present;
      - b. the communication must be privileged, and
      - c. no other third parties may be present. (AG Opins. No. 78-303; 82-130; 82-176; 82-247; 92-56; Privileged communication is defined at K.S.A. 60-426;(Pickering v. Hollabaugh, 194 Kan. 804 (1965)).
    2. Cannot be used to discuss letter received from attorney if the attorney is not present. (AG Opin. No. 86-162).
  - c. Employer-employee negotiation
    1. Public bodies can meet in executive session to discuss conduct or status of negotiations, with or without the authorized representative who is actually doing the bargaining. (AG Opin. No. 79-125).
    2. Public bodies cannot have executive session under this exception when meeting with employees. (AG Opin. No. 80-43).
    3. School Boards--special rules: K.S.A. 72-5423(b). (AG Opin. No. 92-51).
  - d. Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship.
    1. Economic development groups. (AG Opin. No. 88-148).
    2. Must be for data truly confidential in nature. (See K.S.A. 60-3320; *Southwestern Bell Telephone Co. v. KCC*, 6 Kan.App.2d 444, 457 (1980), *rev. den.* 230 Kan. 819 (1981); *All West Pet Supply v. Hill's Pet Products*, 840 F.Supp. 1433, 1437 (Kan. 1993)).
  - e. Matters affecting a student, patient, or resident of public institutions
    1. Must concern a particular person (not students in general).
    2. Hearing must be open if requested by person involved.
    3. Inmates as residents of institutions ( *see* AG Opin. No. 80-102).
  - f. Preliminary discussions relating to acquisition of real property
    1. Acquisition only, not sale of property which must be discussed in open meeting. ( AG Opin. No. 87-91).
    2. This exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is

- insufficient. (AG Opin. No. 89-92).
- g. Security, if open discussion would jeopardize security, K.S.A. 2007 Supp. 75-4319(13); any confidential records concerning security discussed in executive session are exempt from subpoena, discovery or other action.
6. Who can be present in an executive session-- Only the members of a public body have the right to attend executive session. (AG Opin. No. 86-14).
- a. Mere observers may not attend. Inclusion of general observers means the meeting should be open to all members of the public. (AG Opin. Nos. 82-176; 86-143; 92-56).
  - b. Persons who aid the body in its discussions may be discretionarily admitted. (AG Opin. No. 91-31).
  - c. Johnson County school district; members of advisory boards have no right to attend. (AG Opin. No. 86-143).
  - d. County clerk has no right to attend executive sessions. (AG Opin. No. 87-170).
  - e. Non-clients cannot attend executive sessions for attorney-client privileged communication. (AG Opin. No. 82-247).

## VI. ENFORCEMENT OF THE KOMA

- A. K.S.A. 2007 Supp. 75-4320 - civil, not criminal, penalties
- 1. Fines - up to \$500 for each violation as determined by the district court - but only if action brought by attorney general or county or district attorney.
    - a. Statute appears to mean that this is \$500 per body member against the member individually.
    - b. Courts generally do not award significant fines.
    - c. No fine may be imposed for violation for serial communications that occur prior to July 1, 2009. (Senate Substitute for House Bill 2947).
  - 2. Voiding action
    - a. Binding action taken at a meeting not in "substantial compliance" with KOMA may be voided by court.
    - b. Action must be brought by county/district attorney or the attorney general. *Stoldt v. City of Toronto*, 234 Kan. 957 (1984)).
    - c. Action to void must be filed within 21 days of the alleged violation/meeting.
  - 3. Injunction, mandamus, declaratory judgment: Can be brought by any person or by Attorney General or District/County Attorney. ( *Stoldt*, 234 Kan. at 963).
  - 4. Injunctive relief, rather than mandamus, is proper remedy to address board of county commissioners' past violations of Open Meetings Act. K.S.A. 60-8016. (*Klein v. Johnson County Bd. Of County Comm'rs*, 77 P.3d 1009

- (Kan.App. 2003) (unpublished case)).
5. Under the KOMA, a private citizen has the authority to seek injunctive and mandamus relief but no authority to ask the court to void a contract. (*Krider v. Board of Trustees of Coffeyville Community College*, 277 Kan. 244, 83 P.3d 177 (2004) *See also Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*, 106 P.3d 483, 279 Kan. 178 (2005)).
  6. Technical violations. The court will not void any action and will overlook technical violations of the law if the spirit of the law has been met, there has been a good-faith effort to comply, there was substantial compliance with the KOMA, no one was prejudiced, and the public's right to know had not been effectively denied. (*Stevens v. Board of Reno County Comm'rs*, 10 Kan.App.2d at 526).
- B. Procedure
1. County/district attorney and attorney general have concurrent jurisdiction to investigate or bring an action. K.S.A. 2007 Supp. 75-4320
    - a. Policy of attorney general's office to first refer an alleged violation to the county/district attorney, the local law enforcement officer for the state. The decision to investigate or prosecute is discretionary on the part of the prosecutor. K.S.A. 2007 Supp. 75-753 requires county and district attorneys to give the Attorney General a yearly report on KOMA/KORA complaints it received or handled in the past year.
    - b. County/district attorney and attorney general can issue investigative subpoenas. K.S.A. 2007 Supp. 75-4320b.
    - c. If an individual wishes to bring a possible KOMA violation to the Attorney General's attention, the Attorney General's office traditionally asks that a complaint be submitted in writing, with as much supporting documentation (*i.e.* minutes) as possible.
  2. Burden of Proof: Plaintiff has the initial burden to show a prima facie case. Burden then shifts to the defendant to justify its actions. K.S.A. 75-4320a(b)
  3. Plaintiff may receive court costs if violation established. Defendant may receive costs only if action was frivolous. K.S.A. 75-4320a(c) and (d).
  4. No requirement of specific intent to violate the law. "Knowing" violation occurs when there is purposeful commission of the prohibited acts. (*Palmgren*, 231 Kan. at 536-37).
  5. Venue is proper in the county where the action occurred. K.S.A. 75-4320a(a)
  6. Courts are to give KOMA cases precedence. K.S.A. 75-4320a(e)
- C. Other Consequences
1. Violation of the KOMA can be grounds for ouster from office pursuant to K.S.A. 60-1205; (AG Opin. No. 80-168). This is a separate action which must be filed by a public prosecutor.
  2. Alleged violation of the KOMA can be grounds for recall. (*Unger v.*

*Horn*, 240 Kan. 740 (1987); K.S.A. 25-4301 *et seq.* But *see* K.S.A. 25-4302 grounds for recall; 2003 Amendment calls into question whether *Unger Rule* has been legislatively changed).

3. Ouster or recall not automatic - these actions must be pursued separately.