

FRANKLIN COUNTY COMMISSION AGENDA ITEM

TO: Board of Franklin County Commissioners	REVIEWED:
FROM: Lisa J. Johnson	EXT: 3485
DEPARTMENT: Administration	DATE: October 6, 2008

ITEM: Kansas Open Meetings Act

Background: Effective July 1, 2008, there were some revisions to the Kansas Open Meetings Act. Given the changes, a brief summary of the Open Meetings Act is provided for the Commissions review and general information.

The County Commission, as a political subdivision, is a public body subject to the requirements of the Kansas Open Meetings Act. A meeting is any gathering by a majority of the elected body. This is a change from the previous language that held a gathering of a majority of a quorum. For the Franklin County Commission a majority would be three or more members. That includes communication by telephone, email or serial in nature or any type of interactive communication. Social gatherings or conferences for items of general discussion are not meetings so long as there is no discussion of the specific business of the County Commission.

Notice of meetings must be requested before it is required to be provided. The request for notice must be renewed on a yearly basis. The notice may be oral or written and there is no time requirement for notice other than it be reasonable. There is no requirement for an agenda. If there is an agenda it may be amended and items that come up at the last minute may be discussed if they were not planned for discussion.

Any person may attend an open meeting. There is no right to speak or to place items on an agenda at an open meeting. These are deemed to be privileges that may be extended by the Board as a policy decision.

Executive sessions are permitted by statute for specified purposes but no binding action may be taken in an executive session. Matters that may be discussed in executive session include matters of non-elected personnel; consultation with the Board's legal counsel; employer-employee negotiations; confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships; matters affecting a student, patient, or resident of a public institution; preliminary discussions relating to the acquisition of real property; or security matters.

Recommended Action: None.

Attachments: Information from the Kansas Attorney General's Office regarding the Kansas Open Meetings Act.

Kansas Open Meetings Act (KOMA)

Michael J. Smith, Assistant Attorney General

Revision date: July 2008

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.

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1. What Groups are Subject to the KOMA?

- How do you determine if a particular group is subject to the Kansas Open Meeting Act (KOMA)?

It is a factual issue. The KOMA applies to state and local public agencies (those related to the government). It does not apply to private entities. The KOMA also applies to any subordinate group formed by such public agencies (e.g. committees, sub-committees etc.). This means that KOMA applies to state boards, commissions, committees, city councils, county boards of commissioners, township boards, rural water district boards, public library boards, etc. and most groups formed by such entities in order to assist them with public business. The KOMA not apply to private persons or meetings of private groups such as home owner's associations, church groups, private clubs, private businesses, political party caucuses, etc.

- Does the KOMA apply to single individuals who work for the government?

No. The KOMA does not apply to single persons. It applies to "public bodies" which requires there be at least two people.

- Does the KOMA apply to staff meetings of a public agency?

No. Not unless the staff meeting also includes participation by a majority of a quorum of a public body subject to the KOMA

- Does the KOMA apply to judges or judicial bodies?

No.

- Does the KOMA apply to the Kansas Legislature or its committees?

Yes, unless the House or Senate, or one of their committees, adopts a rule exempting a particular body from the KOMA. Thus, in order to determine if the KOMA applies, the Rules of the House or Senate (or committee in question) must be reviewed.

- Does the KOMA apply to a public body acting in a quasi-judicial manner?

Not if the body is deliberating on a case/matter before it. For example, a zoning appeals board may privately discuss a case it is trying to decide.

- Does the title of the gathering make any difference? E.g. "Work Session", "retreat", "Study group", "Executive board meetings" etc.

No. If the group in question is subject to the KOMA, and it holds a meeting as defined by the KOMA, the meeting must comply with the KOMA.

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2. What does being open under the KOMA require, what is a meeting and how should meetings be conducted?

A. WHAT DOES "OPEN" MEAN UNDER THE KOMA?

- If a group is subject to the KOMA, what does the KOMA require them to do?

If the KOMA applies to a body or group, there are two main requirements: (a) Their meetings must be open and (b) Notice of meetings must be (individually) provided to those requesting notice. All meetings subject to the KOMA must be conducted openly - that means that the public must be allowed to listen to the discussion.

- Can I use cameras or tape recorders at a public meeting subject to the KOMA?

Yes. A public body subject to the KOMA cannot prohibit the use of such devices. It can, however, make their use subject to reasonable rules that are designed to prevent disruption of public meetings, safety hazards, or other legitimate concerns.

- Does a group subject to the KOMA have to allow the public to speak at all meetings?

No. The KOMA does not require that the public be allowed to talk at public meetings; unless some other law requires it, whether to allow the public a chance to speak at public meetings is a policy decision.

- Can a public body subject to the KOMA conduct a meeting by telephone?

Yes. As long as it complies with all the requirements of the KOMA.

- Do they have to move to another place if there are too many people in a room or some people can't get into the meeting?

The KOMA does not require that public meetings be moved to larger or better locations. Unless there is evidence that the meeting is deliberately being held in a place in order to prevent public attendance, the size or location of the room is not a KOMA violation.

- Can a public body take a secret binding action?

Binding action must be taken openly. That means any binding vote on a public matter needs to be made in open session. However, some actions taken by a public body (such as spending decisions) may have been previously made by delegating authority to an individual; thus, one

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fact issue may be when and how decisions were originally made.

B. WHEN IS A PUBLIC BODY HOLDING A MEETING?

When does a meeting subject to the KOMA take place?

A meeting of a public body subject to the KOMA has three elements; (a) An interactive discussion (NOTE: *discussion* alone triggers the KOMA, it is not necessary that action or votes be taken); (b) by and between at least a majority of the body; (c) on matters relating to the functions of that body. All three elements must be present to trigger the KOMA.

(a) Majority Rules

- **What is a "Majority"?**

A "majority" means the next whole number greater than one-half of the total number of members. E.g. the "majority" of a five member body is 3; the "majority" of a nine member body is 5.

(b) Interactive Discussion Rules

- **Does a meeting have to be "prearranged" for the KOMA to apply?**

No. All that is required is that the three elements of a meeting occur; (a) An interactive discussion (NOTE: *discussion* alone triggers the KOMA, it is not necessary that action or votes be taken); (b) by and between at least a majority of the body; (c) on matters relating to the functions of that body. All three elements must be present to trigger the KOMA.

- **Can a majority of members of a public body informally discuss public matters outside of an open meeting?**

No. Informal discussions before, after, or during recesses of a public meeting are subject to the KOMA.

- **Is it OK to privately discuss public matters as long as no action is taken?**

Binding action or voting is not necessary; discussion is what triggers KOMA.

- **Can members of a public body subject to the KOMA use other people, the telephone, notes, or email to privately discuss public matters?**

Not if it involves a majority of the public body. If an interactive discussion on the affairs of the body takes place, among the threshold minimum number of members, it is subject to the KOMA. It does not matter what method is used to conduct the discussion.

(c) "Matters relating to the affairs of the body" rules.

- **Can members privately discuss when to hold meetings?**

Yes. It is not encouraged, because of the temptation to discuss other things or the appearance of impropriety, but if the only way to arrange meeting times and places is to directly contact other members of the same body, the topic alone is not considered covered by the KOMA.

- **Can members attend a general interest meeting**

of another group?

Yes, as long as they refrain from any private discussions on the affairs of their body, they may attend conferences where general topics are being presented.

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3. When and how does notice of meetings have to be provided?

- **When does a group subject to the KOMA have to provide notice?**

Notice of meetings must be provided to those requesting notice. There is no KOMA duty to provide notice unless it has been requested.

- **How do I request notice of meetings subject to the KOMA?**

All that has to be done is to make a request for notice of meetings; all regular and/or special meetings. The KOMA does not require that requests for notice be in writing. Oral requests are valid. However, because it often becomes harder to prove that such requests were made, we urge those who want to request such notice to put their requests in writing and keep a copy.

- **If I am interested in meetings on a specific topic, does the KOMA require that the public body notify me when that topic will be discussed?**

Not under the KOMA. The KOMA only requires that public bodies provide the time, place and date when it holds meetings. It does not require that a public body decide, ahead of time, if a specific topic will be discussed and then provide interested persons with notice of that decision.

- **If I have requested notice from a group subject to the KOMA, how and when should that notice be given to me?**

Notice must be made or attempted to be made to each individual person/entity requesting notice. A one time notice of regular meetings times/dates/places is sufficient unless there is a meeting (or meetings) held at another or different time/date/place; then additional notice is required.

- **Does notice of a meeting subject to the KOMA have to be given in writing?**

No. Notice may be legally given verbally. However, we recommend it be in writing for evidentiary purposes.

- **Is the KOMA violated if the public body does not post notice or publish it in the paper?**

No. The KOMA does not require notification through these methods.

- **How long does a public body have to continue giving notice of meetings, once it's been requested?**

Notice requests may be allowed to expire once a year, but prior to discontinuing providing notice, the public body must let those persons know that their request is expiring so that it can be renewed if they'd like to continue getting notice.

- **Does a past practice of providing notice create a duty to continue providing notice?**

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No. Notice is only required under the KOMA if it has been requested.

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4. Executive sessions; when can a meeting be closed and matters privately discussed?

- **When can a group subject to the KOMA close its meetings?**

The body may go into an executive session (after convening an open meeting), in order to privately discuss a matter, if (a) the discussion is on a topic listed in K.S.A. 75-4319 and (b) the correct procedure is followed for going into executive session.

- **Does a public body have a duty to close certain discussions?**

Not under the KOMA. The KOMA allows executives session discussions; it does not require them.

- **Does the KOMA require members of a public body to refrain from publicly revealing matters that were discussed while in executive sessions?**

No. Some other laws, or considerations such as fiduciary duty, personal privacy rights, or contracts, may require or influence such confidentiality. But the KOMA itself does not require that the topics listed in K.S.A. 75-4319 always be kept private.

- **Who can be present during an executive session discussion?**

Only members of the public body holding the discussion have a right to be in executive sessions. The public body may discretionarily include anyone they believe will aid them in that discussion.

- **Can a member of the general public be allowed into executive session discussions in order to simply listen and make sure the KOMA is not being violated?**

No. If the public body allows one "general listener" to attend, the discussion must be open to the rest of the general public.

- **Can a group subject to the KOMA take secret binding action while in executive session?**

No. All binding action must be publicly taken. Executive sessions may only be used to discuss matters. However, a public body can reach a consensus while in executive session.

- **How does a public body properly go into an executive session?**

First the public body must be in an open session, before going into an executive session.

Then, a motion must be made, and seconded.

The motion must contain statement of (1) Justification for closure; (2) Subject(s) to be discussed; and (3) Time and place open meeting will resume.

Example: "Madam Chairman, I move we recess into executive session

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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."

- **When making a motion to go into an executive session, are justification and subject the same thing?**

No. Motions for executive session should contain subject and justification statement, which are not the same thing. The subject is one of the topics listed in K.S.A. 75-4319(b). The justification is an explanation of what is to be discussed (without revealing confidential information.)

- **Must motions to go into executive session be recorded in the minutes of meetings?**

Yes. All executive session motions must be recorded in minutes.

- **What topics can be discussed in an executive session?**

Those topics listed in K.S.A. 75-4319(b) can be privately discussed by a public body subject to the KOMA. A copy of that statute is available on-line at www.kslegislature.org. There are currently 14 topics listed. These include: (1) Personnel matters relating to non-elected personnel; (2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship; (3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency; (4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships; (5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if requested by the person; (6) preliminary discussions relating to the acquisition of real property; . . . And (13) matters relating to security measures, if the discussion of such matters at an open meeting would jeopardize such security measures, that protect specific systems, facilities, or equipment.

(a) Personnel matters

- **Can a public body privately discuss an individual who works for the body?**

Yes. If that person is an employee of that body (or an applicant for employment) K.S.A. 75-4319(b)(1) allows executive session discussions about individuals who are employed by the body holding that executive session discussion.

- **Can an employee who is being discussed by a public body require that they allow him or her into the executive session discussion, or require that the discussion be held openly?**

Not under the KOMA. The public body gets to decide whether to close a discussion on a public employee, or not, and who can be present in executive session discussions.

- **Can a public body subject to the KOMA use an executive session to discuss independent contractors who are doing work for the public body?**

No, not under the "personnel" exception; an independent contractor is not an employee.

- **Can a public body subject to the KOMA use executive sessions to discuss general employee related topics?**

No. The personnel exception in K.S.A. 75-4319(b)(1) is

intended to protect the privacy of individuals. Thus, if no individuals are being discussed, that exception to openness does not apply.

- **Can a public body subject to the KOMA use executive sessions to discuss applicants for employment?**

Yes. The KOMA specifically allows such discussions in order to protect the privacy of a specific individual or individuals who have applied for employment.

- **Does the KOMA allow use of the "personnel exception" to privately discuss other board members or elected officials?**

No. The personnel exception is intended to allow discussion of employees. Officials, whether elected or appointed, are not ordinarily considered employees.

- **Does the KOMA allow use of the "personnel exception" to privately discuss employees of some other public body or entity?**

No. The KOMA allows a public body to privately discuss their own employees, not the employees of some other employer.

(b) Consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship.

- **What constitutes a privileged relationship?**

1. The body's attorney (or attorneys) must be present;
2. The communication must be privileged, and
3. No other third parties may be present.

- **Can a public body discuss a legal matter under this exception, even if their attorney is not with them?**

No. This exception in the KOMA cannot be used to discuss legal matters, such as a letter received from attorney, if the attorney is not present. The attorney for the body must be present somehow (by telephone is allowed) and participating in the discussion (not enough to simply have the attorney present).

- **Does the discussion have to be on litigation or threatened litigation?**

No. The KOMA does not require that the legal matter involve litigation.

- **Can someone who is not a member of the client organization or the attorney(s) for that entity be included in an executive session called under this exception?**

No. The presence of a third-party who is not part of the client organization or an attorney for that body will destroy the privileged nature of the communication.

- **What or who determines if the topic being discussed is privileged?**

Confidentiality can attach to any communication between an attorney and a client wherein legal advice or assistance is sought or given, or information imparted in order to facilitate such advice or assistance. With very limited ethical exceptions, the client alone can decide whether to waive such confidentiality.

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5. What does the KOMA say about agendas and minutes?

- Does a group subject to the KOMA have to create an agenda for its meetings?

No. If it chooses to create an agenda, it should include all matters planned for discussion but agendas can be amended. The public body may discuss matters not on an agenda that come up at the last minute.

- Does a group subject to the KOMA have to put everything that is said at the meeting into the minutes?

Not under the KOMA. The KOMA does not speak to minutes or agendas, except to require that motions to go into executive session be recorded in the minutes.

- Do all votes have to be recorded in minutes?

No, at least not under the KOMA. The KOMA only requires that motions to go into executive session be recorded. Recording anything else in minutes is a discretionary decision.

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6. What happens if I think the KOMA has been violated?

- **Who can enforce the KOMA and go to court on alleged violations?**

The KOMA can be enforced by the Attorney General, by county or district attorneys, or by private citizens.

- **If someone or group violates the KOMA, can they be sent to jail?**

No. Violations of the KOMA are civil in nature, not criminal.

- **What penalties may result from a violation of the KOMA?**

Up to \$500 fine per violation (per member violating it); injunction/mandamus/declaratory order; voiding illegal action (if a public prosecutor files a petition within 21 days after the alleged violation); possible grounds for ouster or recall (separately pursued actions).

- **Are these penalties always imposed for violation of the KOMA?**

No. The courts rarely assess the fine provisions. Plus, in 1986, the Kansas Supreme Court created what are called "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.

- **If I want to make a KOMA complaint, how should I do that?**

You may file a complaint with either the county or the district attorney, or the Attorney General. They have concurrent jurisdiction to investigate or bring an action. It is the policy of the attorney general's office to ask that all complaints be made in writing, together with any supporting documents. The Attorney General will refer an alleged KOMA violation by a local unit of government to the county/district attorney.

- **If I file a KOMA complaint with the Attorney General or a county/district attorney, do they have to bring charges or investigate the way I'd like?**

No. Decisions on how or if to investigate or prosecute are discretionary on the part of the prosecutor. These prosecutors act on behalf of the general public, not as private attorneys for the persons filing the complaint.

- **Can I bring my own KOMA action in court?**

Yes. Any individual can file a KOMA action. If they need legal advice or assistance in doing so, they may want to contact a private attorney.

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- **Who has the burden of proof in KOMA actions that are filed in court?**

The Plaintiff has the initial burden to show a prima facie case. If they meet that burden, it then shifts to the defendant to justify its actions.

- **Does the plaintiff have to prove that the violation was intentional?**

No. There is 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.

- **Who pays court costs in a KOMA action?**

A plaintiff may receive court costs if a violation is established. Defendant may receive costs only if action was frivolous.

- **Where is a KOMA law suit filed?**

In the county where the action occurred. K.S.A. 75-4320a(a)

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