



Kansas Open Meetings Act

R-1

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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 that 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

The open meetings law applies to the following:

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

State Bodies Covered by KOMA

- The State Legislature, its Committees, and Subcommittees unless rules provide otherwise
- State Administrative Bodies, Boards, and Commissions
- State Board of Regents
- State Board of Education
- Kansas Turnpike Authority
- 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
- 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	
<u>Covered</u>	<u>Not Covered</u>
<ul style="list-style-type: none">• Nonprofit Mental Health Services Providers• Area Agencies on Aging• Economic Opportunity Foundation• Three Rivers, Inc.	<ul style="list-style-type: none">• Nonprofit entity operating county hospital• Kansas Venture Capital, Inc.• Prairie Village Economic Development Commission• 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 Kansas Open Meetings Act covers meetings that are defined as:

- A gathering or assembly, in person or through the use of a telephone, or any other medium for interactive communication;
- By a majority of the membership of an agency or body; and
- For the purpose of discussing the business or affairs of the body. KSA 75-4317a.

The definition of “meeting” was changed substantially by 2008 HB 2947. Prior to this, a meeting was defined as involving a majority of a quorum. It is important to note the law was changed in 2009 to address the topic of what some have called “serial meetings,” or communications held in a series when, taken together, they involve a majority of members. The new law deems “interactive communications” in a series to 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 to reach agreement on a matter that would require binding action to be taken by the body or agency.” KSA 75-4318 as amended by 2009 SB 135.

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 K.A.2d 416 (1987). Calling a gathering a work session does not exempt the event from the law if the three requirements of a meeting are met. The Attorney General has said that serial communications among a majority of a quorum of a public body, if the purpose is to discuss a common topic of business or affairs of that body by the members, constitutes a meeting. (Note: The opinions were issued prior to the change in requirements from “majority of a quorum” to “quorum”.) Such a meeting may occur through calling trees, e-mail or through 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.

The term “quorum” means a simple majority of the membership of a public body, *i.e.*, the number greater than one-half of the total (unless otherwise provided by statute). “A majority of a quorum” is the number greater than one-half of a quorum, and is the smallest number that can take action on behalf of a public body. For example, a quorum of a seven-member body is four, and a majority of that quorum is three. A quorum of a five-member body is three, and a majority of that quorum is two. The Kansas Supreme Court has said a county commission may, by home rule, raise its quorum to a number greater than a majority of its members. See *State ex rel. Stephan v. Board of Sedgwick County Commissioners*, 244 Kan. 536 (1989). In mayor-council forms of government, the mayor is not included as a member of the governing body for purposes of counting members for a quorum.

In regard to discussing “the business or affairs of the body,” binding action or voting is not necessary; it is the discussion itself which triggers the requirements of the open meeting law.

Social gatherings are not subject to the open meeting law 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 must be given to any person or organization requesting it. Notice requests 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.

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 can be charged.

Petitions for notice may be submitted by groups of people, but notice need be provided only to one person on the list. No time limit is imposed for receipt of notice prior to the meeting, but notice must be given in a “reasonable time,” and reasonableness depends on the circumstances.

Misconceptions: Newspaper Notice, Agendas, and Minutes

Contrary to popular belief, the open meetings law does not require notice of meetings to be published in a newspaper. Except for recording motions for executive sessions, the law does not require minutes be kept.

The law does not require that an agenda be created. If a body chooses to create an agenda, the agenda should include topics planned for discussion. See *Stevens v. City of Hutchinson*, 11 K.A. 2d 290 (1986). Agenda copies must always be made available to those who request them. The agenda does not have to be mailed out and can be provided simply by placing the agenda in a public place.

What is Allowed

Any person may attend open meetings, but the law does not require that the public be allowed to speak or to have an item placed on the agenda. Secret ballots are not allowed. The public must be able to ascertain how each member voted.

Subject to reasonable rules, cameras and recording devices must be allowed at open meetings. The law 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. Telephone conference calls are allowed if the requirements of the Act are met including notice and free access.

Executive Sessions: Procedure and Subjects Allowed

Executive sessions are permitted for specified purposes. First, however, the public body must convene an open meeting and then recess into an executive session. KSA 75-4319(a). Binding action may not be taken in executive session. KSA 75-4319(c). Reaching a consensus in executive session is permitted. *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 which would normally require a vote. The law does not require an executive session; the decision to hold an executive session is discretionary.

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.
- 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.

Only the members of a public body have the right to attend an executive session. Mere observers may not attend. Inclusion of general observers means the meeting should be open to all members of the public. Persons who aid the body in its discussions may be admitted discretionarily.

Examples of Subject Matter Justifying Executive Session

- Personnel matters of non-elected individual 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. Personnel means employees of the public agency. The personnel exemption does not apply to appointments to boards or committees, nor does it not apply to independent contractors.
- Consultation with the public body's attorney where the attorney/client privilege applies. 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.
- 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.

Enforcement of the KOMA

An action for an injunction, *mandamus*, or declaratory judgment can be brought by any person including the Attorney General, or a county or district attorney.

The plaintiff in a suit has the initial burden to show a *prima facie* case of an open meeting violation. The burden then shifts to the defendant to justify its actions.

A plaintiff may receive court costs if a violation is established. The defendant public body may receive costs only if it is determined by the court that the action was frivolous. There is no requirement that specific intent to violate the law be proved; "knowing" violation occurs when there is purposeful commission of the prohibited acts. Venue is proper in the county where the action occurred.

KSA 75-4320 provides for civil, not criminal, penalties. A fine may be levied of up to \$500 for each violation of the law as determined by the district court—but only if the action is brought by the Attorney General or a county or district attorney.

Binding action taken at a meeting not in "substantial compliance" with the open meetings law may be voided by court only if suit is brought within 21 days of the public body's action. Such suits must be brought by a county or district attorney or the Attorney General.

Violation of the open meetings law can be grounds for ouster from office pursuant to KSA 60-1205. This is a separate action which must be filed by the Attorney General or the county or district attorney. Alleged violation of the law also can be grounds for recall of public officials.

On or before January 15, 2006, and each year thereafter, the county or district attorney of each county is required to report all complaints of both the Kansas Open Meeting Act and the Kansas Open Records Act and the disposition of each complaint. The Attorney General is required to publish a yearly abstract of this information listing by name the public agencies which are the subject of the complaints.

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