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MEMORANDUM

To: Kansas Senior Care Task Force
From: Office of Revisor of Statutes
Date: September 8, 2021
Re: Kansas Open Meetings Act and Kansas Open Records Act

I. KANSAS OPEN MEETINGS ACT (KOMA)

According to the Kansas Open Meetings Act (KOMA),¹ it is “the policy of the state of Kansas that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”²

A. Groups Subject to KOMA

KOMA applies to “all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including [...] subordinate groups thereof, receiving or expending and supported in whole or in part by public funds [...]”³

B. Elements of a Meeting under KOMA

The term “meeting” is defined within KOMA as: 1) Any gathering or assembly held in person or through the use of a telephone or any other medium for interactive communication; 2)

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 75-4318.

³ *Id.*

by a majority of the membership of a body or agency that is subject to KOMA; 3) for the purpose of discussing the business or affairs of the public body or agency.⁴

1. Gathering or Assembly

Meetings subject to KOMA can take many different forms. Informal gatherings of members, whether before or after scheduled meetings, or at some other time, are subject to KOMA if a majority of members are present and business of the public body is being discussed.⁵ Teleconferences and videoconferences can be utilized as long as other requirements of KOMA are met (i.e. providing the public a way to listen to the discussion and know how individual members voted and following the proper procedure for going into a closed meeting).⁶ It is also possible for a meeting to take place through a series of person-to-person communications if they collectively involve a majority of the membership of the public body, share a common topic of discussion concerning business of the public body, and are intended by any of the participants to reach agreement on a matter that would require a vote by the public body.⁷ Serial communications can also implicate KOMA when a majority of a public body discusses substantive issues through a staff member; but purely procedural matters, such as placing items on the agenda or informing members of scheduling issues, would not be covered under KOMA.⁸

2. Majority of Members

Because this task force consists of 22 members, 12 members would make a majority.⁹ That would also apply to emails, phone calls or teleconference communications with more than 12 members.

⁴ K.S.A. 75-4317a.

⁵ *In re University of Kansas Faculty*, 2 Kan. App. 2d 416, 423 (1978).

⁶ Attorney General Opinion No. 2011-23.

⁷ K.S.A. 75-4318(f).

⁸ Attorney General Opinion No. 98-49.

⁹ L. 2021, ch. 81, § 1; July 1.

3. For the Purpose of Discussing the Business or Affairs of the Public Body

Discussion of the affairs of the public body is what triggers the open meeting requirement, not just formal action.¹⁰ Social gatherings and chance encounters where a majority of members are present will become subject to KOMA if members begin conversing on the business of the body.¹¹

C. KOMA Requirements

Public bodies should make reasonable efforts to allow members of the public to attend and listen to meetings held by the body.¹² KOMA does not require that members of the public be allowed to speak during a meeting.¹³

KOMA does not require that notice of the date, time and place of any meeting be given to any individual unless such notice is specifically requested.¹⁴ Agendas are also not required under KOMA, but any agenda that is created must be made available to any person requesting the agenda.¹⁵ Notice of meetings and an agenda, or agenda information, is required under House Rule 1302.

Regardless of how a meeting is held, whether in person or through an electronic medium, members of the public need to be able to follow how each member of the body votes.¹⁶

KOMA states that “[t]he use of cameras, photographic lights and recording devices shall not be prohibited at any meeting mentioned by subsection (a), but such use shall be subject to reasonable rules designed to [e]nsure the orderly conduct of the proceedings at such meeting.”¹⁷

¹⁰ Attorney General Opinion 79-200.

¹¹ *Id.*

¹² Attorney General Opinion 2005-03.

¹³ *Id.*

¹⁴ K.S.A. 75-4318(b).

¹⁵ K.S.A. 75-4318(d).

¹⁶ Attorney General Opinion 86-176; K.S.A. 75-4318 (“no binding action by such public bodies or agencies shall be by secret ballot”).

¹⁷ K.S.A. 75-4318(e).

D. Closed Meetings

Portions of open meetings may be closed to the public if certain criteria are met. To enter into a closed or executive session, a formal motion must be made, seconded and carried that includes: 1.) A statement describing the subjects to be discussed during the closed or executive meeting; 2.) one of the specific justifications listed in K.S.A. 75-4319(b) for closing the meeting; and 3.) the time and place at which the open meeting shall resume.¹⁸ The complete motion must be recorded in the minutes of the meeting and kept as a permanent record.¹⁹ Binding action cannot be taken during a closed or executive session.²⁰

II. KANSAS OPEN RECORDS ACT (KORA)

According to the Kansas Open Records Act (KORA),²¹ it is the public policy of Kansas that public records be open for inspection by any person unless otherwise provided in the act.²² As a result, each public agency is required to adopt procedures to be followed in requesting access to and obtaining copies of public records.²³

A. Public Agency

The term “public agency” is defined as “the state or any political or taxing subdivision of the state or any office, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.”²⁴ Any working group of this task force falls under the definition of public agency.

¹⁸ K.S.A. 75-4319(a).

¹⁹ *Id.*

²⁰ *Id.*

²¹ K.S.A. 45-215 *et seq.*

²² K.S.A. 45-216(a).

²³ K.S.A. 45-220(a).

²⁴ K.S.A. 45-217(f)(2).

B. Required Procedures

Procedures adopted by a public agency to comply with KORA must provide full access to public records, protect public records from damage and disorganization, prevent excessive disruption of the agency's essential functions, provide assistance and information upon request, and ensure efficient and timely action in response to applications for inspection of public records.²⁵

These procedures are carried out by a public agency's "official custodian," who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control.²⁶

C. Public Records

According to KORA, "all public records shall be open for inspection by any person, except as provided by this act."²⁷ "Public record" means any recorded information, regardless of form, characteristics or location, that is made, maintained or kept by or is in the possession of any public agency or any officer or employee of a public agency.²⁸ The definition of "public record" does not include records that are "made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state."²⁹

III. KOMA and KORA ENFORCEMENT

Members who "knowingly" violate the provisions of KOMA or KORA will be individually liable for the payment of a civil penalty not to exceed \$500 for each violation.³⁰ In lieu of bringing an action against a violator, the attorney general or a county or district attorney may settle the issue by entering into a consent order with the offending party.³¹ A district court or the attorney general may order a violator of KOMA or KORA to complete training to assist such violator in becoming

²⁵ K.S.A. 45-220(a).

²⁶ K.S.A. 45-217(e).

²⁷ K.S.A. 45-218(a).

²⁸ K.S.A. 45-217(g).

²⁹ *Id.*

³⁰ K.S.A. 45-223(a), 75-4320(a).

³¹ K.S.A. 45-251(a), 45-253, 75-4320d(a), 75-4320f.

more familiar with the provisions of the violated act.³² There is precedent for courts to overlook mere technical violations of KOMA where the public body has made a good faith effort to comply and is in substantial compliance with KOMA, and where no one is prejudiced or the public right to know has not been effectively denied.³³

³² K.S.A. 45-222(a), 45-251(a)(1)(A)(i), 75-4320a(a), 75-4320d(a)(1)(A)(i).

³³ *Stevens v. Bd. of Cnty. Comm'rs of Reno Cnty.*, 10 Kan. App. 2d 523, 526, (1985).