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MEMORANDUM

To: Members of the J. Russell (Russ) Jennings Joint Committee on Corrections and Juvenile Justice Oversight

From: Office of Revisor of Statutes

Date: November 18, 2024

Subject: Kansas Open Meetings Act and Kansas Open Records Act Considerations

I. Application of the Kansas Open Meetings Act (KOMA)

The Kansas Open Meetings Act (KOMA) applies to:

- Legislative and administrative bodies and agencies of the state, including boards, commissions, authorities, councils, committees, subcommittees, and other subordinate groups, that receive or expend public funds and that are supported in whole or in part by public funds.¹
- The KOMA generally applies to Kansas Legislature committees and subcommittees, unless House or Senate rules create an exemption.²
- The J. Russell (Russ) Jennings Joint Committee on Corrections and Juvenile Justice Oversight is subject to KOMA. Members should be aware of the implications.

What does the KOMA require?

KOMA requires that: (1) Meetings be open to the public. Public access to the meeting must be available; and (2) notice of meetings must be provided if requested. For legislative meetings, the Committee Chair usually delegates the Committee Assistant with providing the notice to those individuals that request notice.

KOMA is interpreted broadly to achieve its purpose of facilitating an informed electorate. Because KOMA involves a key principle in our democracy of open government, it is a sensitive area for the public and the potential for an appearance of impropriety should always be a consideration. If a question arises, the Attorney General or District Attorney may investigate and closely examine the specific circumstances and communications involved.

¹ K.S.A. 75-4318(a).

² K.S.A. 75-4318(a) and (g)(4). House and Senate Rules adopt KOMA provisions with the certain limited exceptions (e.g., House and Senate caucus meetings may be closed). Senate Rule 23; House Rule 4305.

Determining if a Meeting Exists

“Meeting” means:

- Any gathering or assembly;
- via any method of interactive (two-way) communication, including electronic;³
- or that occurs at any location or social situation;
- involving a majority of the voting members;⁴
- for the purpose of engaging in a discussion (a two-way dialogue) about the business of the body.⁵

Serial Communications:

- A “meeting” also includes interactive communications in a series (e.g. not contemporaneous) if the communications: (1) Collectively involve a majority of the membership, (2) share a common topic of discussion concerning its business or affairs, and (3) are intended by any participant (even just one) to reach agreement on a matter that would require binding action to be taken by the body.⁶
- “Interactive communications” includes the use of any form of communication.⁷
- The consequence of interactive communications constituting a “meeting” under the KOMA is that no notice is provided and the meeting is not open to the public, in violation of the KOMA. In addition to the penalties listed in Section III, KOMA provides for possible additional penalties that may include voided actions, court-issued injunctions, and possible grounds for ouster for severe violations and repeat offenders.⁸

Common KOMA Examples:

- Social events or travel are not meetings if business is not discussed by a majority of the members of the body, however, potential appearances of KOMA violations should be considered.
- Attending an educational convention or listening in on a meeting of another body is not a meeting if no discussion involving a majority of the members about their body’s business occurs.
- Social media or email interactions may constitute a meeting; a one-way email generally would not. To avoid potential issues, warnings not to “reply all” should be included in emails.

³ In-person discussion is only one means of interactive communication. For example, KOMA permits teleconference or video-conference meetings or using such methods for participation by one or more members. The public must have access and be able to hear the discussion and ascertain how each member voted. See AG Opin. Nos. 86-153; 2005-03; 2011-23.

⁴ A majority is determined using the total membership, including any vacancies. Non-voting members are not included. Ex-officio members are included if they have voting privileges. See AG Opin. No. 2013-19.

⁵ K.S.A. 75-4317a.

⁶ K.S.A. 75-4318(f); See AG Opin. No. 98-49.

⁷ AG Opin. No. 2009-22. Examples of potential serial communications that might constitute a “meeting” include phone or email trees, electronic bulletin boards or internet forums that enable two-way communication, use of a staff member to ferry communications back and forth, or a series of small meetings collectively including the majority. If so, notice and reasonable access is required. See also AG Opin. Nos. 98-26; 98-49.

⁸ K.S.A. 75-4320(a).

- Discussions solely limited to planning when and where to meet is not considered a meeting under KOMA. Further discussions concerning potential agenda items may be considered a meeting.⁹
- Informal discussions before, during a recess or after a scheduled meeting may constitute a meeting.

First KOMA Requirement – Ensuring the Meeting is “Open.”

- “Open” means reasonably accessible to the public in light of the circumstances. KOMA does not make specific accommodation or venue requirements, assuming there is no intent to subvert KOMA.¹⁰
- A prior agenda may be changed at the meeting. If a change to the agenda is anticipated prior to the meeting, best practice is to note such possible change in the agenda or issue a revised agenda.
- Recording or videotaping is allowed, subject to reasonable rules of the body.¹¹
- There is no requirement that the public be permitted to speak or participate.¹²
- KOMA does not require minutes (except for executive session motions).

Second KOMA Requirement – Providing Proper Notice

- Notice of meetings (date, time, and place) must be provided upon request, including an oral request, to the requestor.¹³ An agenda is not required by KOMA, but if made must be available upon request for the meeting.¹⁴
- Notice may be provided orally or by other means to the requestor, but best practice is to provide written notice. Publication of notices of meetings is not required but is also recommended.¹⁵
- The person presiding over the meeting has responsibility for providing notice but may delegate to staff.¹⁶
- Notice should be reasonable in manner and timing under the circumstances.¹⁷

⁹ AG Opin. No. 98-49. See also AG Opin. No. 98-26 citing a North Dakota AG Opinion which stated “it would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of opinions, or action) regarding public business that the open meetings law is triggered.”

¹⁰ K.S.A. 75-4318; 75-4317(b).

¹¹ K.S.A. 75-4318(e).

¹² K.S.A. 75-4318.

¹³ K.S.A. 75-4318(b).

¹⁴ K.S.A. 75-4318(d); AG Opin. No. 86-133.

¹⁵ K.S.A. 75-4318(b).

¹⁶ K.S.A. 75-4318(c).

¹⁷ AG Opin. Nos. 86-133; 93-113.

II. Application of the Kansas Open Records Act (KORA)

The Kansas Open Records Act (KORA)¹⁸ is the statutory act that requires public records of a public agency to be open for inspection.

KORA Application for 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.”¹⁹ The committee and any subcommittees from this committee fall under the definition of public agency, as they are supported by public funds appropriated by the state.

Responding to a KORA Request

Pursuant to KORA, public records are required to be provided or made available for inspection in response to a request for such public records.²⁰ Responding to these requests occurs 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.²¹ A response to a KORA request must be made within 3 days of receipt of the request.²²

Records Required to be Disclosed

According to KORA, “all public records shall be open for inspection by any person, except as provided by this act.”²³ “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.²⁴ Public records do not include records “made, maintained or kept” by members of the Kansas Legislature.²⁵ Generally records of legislative committees (i.e. testimony, handouts, proposed amendments) are deemed public records once such record has been distributed to the majority of the members of the committee.

¹⁸ K.S.A. 45-215 *et seq.*

¹⁹ K.S.A. 45-217(k).

²⁰ K.S.A. 45-218.

²¹ K.S.A. 45-217(j).

²² K.S.A. 45-218(d).

²³ K.S.A. 45-218(a).

²⁴ K.S.A. 45-217(l).

²⁵ K.S.A. 45-217(l)(3)(B)

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.²⁶ In lieu of bringing an action against a violator, the attorney general may settle the issue by entering into a consent order with the offending party.²⁷ A district court or the attorney general may order a violator of KOMA or KORA to complete training to assist such violator in becoming more familiar with the provisions of the violated act.²⁸

²⁶ K.S.A. 75-4320(a), 45-223(a).

²⁷ K.S.A. 75-4320d(a), 75-4320f, 45-251(a), 45-253.

²⁸ K.S.A. 75-4320a(a), 75-4320d(a)(1)(A)(i), 45-222(a), 45-251(a)(1)(A)(i).