THE KANSAS OPEN MEETINGS ACT

I. Introduction

In 1972, the Kansas Legislature enacted The Kansas Open Meetings Act (KOMA).[1] The Kansas Open Meetings Act (KOMA) was designed to shed some sunshine upon the workings of the government. In fact, the KOMA has been referred to as the "cornerstone of public access to state and local government in Kansas"[2] and the Kansas Supreme Court has declared that "[d]emocracy is threatened when public decisions are not made in public."[3] These statements evidence the importance of the KOMA to our system of government.

II. Background

As with many laws, a firm grasp of the legislative intent and history surrounding the Acts enhances and simplifies interpretation of and compliance with the KOMA. The KOMA has as its central theme the overall intent of allowing the general public greater access to the business workings of state and local government.[4] It strongly favors openness in governmental transactions. However, not every meeting is open to the public, and not every entity engaged in government business is subject to the KOMA.

Many people (including lawyers) confuse state sunshine laws with the federal Freedom of Information Act (FOIA)[5] and its companion, the Privacy Act,[6] enacted by Congress in 1966 to cover federal actions, agency records and information. The FOIA does not generally apply to the meetings or records of state or local government agencies, nor to private businesses or individuals. However, the FOIA shares with the KOMA the same historical genesis, the Watergate scandal. Regardless of any personal views on that entire political and legal saga, one of its results was a national move toward opening up government affairs. Although many open meeting laws were enacted prior to Watergate, there is no question that many statutes were afterwards enacted or strengthened "at a time of wide-spread public dismay over the Watergate disclosures of extensive secret corruption and abuse of power at the highest levels of federal government."[7] Federal and local politicians of that era became very sensitive to the public's heightened insistence on obtaining information about what the government was "up to."[8] The result was a national outbreak of new and improved "Sunshine laws." Most states historically recognized a common law public right to access and now have their own statutory counterparts to the federal Freedom of Information Act.[9]

III. Purpose and Construction of the KOMA

The purpose of the Kansas Open Meetings Act is to promote an informed electorate.[5] The Act is to be interpreted liberally, and its exceptions narrowly construed, to carry out the purpose of the law.[10] "Elected officials have no constitutional right to conduct government affairs behind closed doors.[11] Their duty is to inform the electorate, not hide from it. The KOMA places no constraints on purely private discussions by public officials. It regulates only the conduct of public business."[12] Access to information about the activities and decision-making processes of government allows voters the opportunity to make more intelligent decisions, to have more

trust in government, and to curtail governmental corruption.[13] Statutory exceptions to the policy of open government allow closure of meetings based upon a reluctance to prematurely disclose information that would disadvantage the government, disclose personal information about a private person, reduce efficiency, negatively impact the free exchange of ideas, or discourage independent judgment.[14] However, the statutes and case law support the general rule that, absent a statutory exception, meetings of public bodies subject to the KOMA should be open.

IV. Bodies Subject to the KOMA

The first, and sometimes most difficult, question in any KOMA situation is whether a specific group is subject to the Act. Under K.S.A. 75-4318, there are two concurrent requirements for determining if a body is subject to the KOMA: The KOMA applies to (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. By its very terms, the KOMA applies to state agency boards, unless otherwise provided by statute. Likewise, the KOMA applies to the more obvious political and taxing subdivisions of the state,[15] including cities, counties, townships,[16] school districts, community colleges,[17] watershed districts,[18] rural water districts,[19] drainage districts,[20] extension councils created under K.S.A. 2-611,[21] and local historic preservation committees administering K.S.A. 75-2724.[22]

It is often more difficult to determine if the KOMA applies to entities that are created by, or subordinate to, a more familiar unit or branch of the government. Such subordinate groups may include boards, commissions, authorities, councils, committees, subcommittees, advisory groups, or task forces. Determining whether the KOMA applies to a specific group requires focusing upon the nature of the group, not its designation or name.[23] Subordinate entities are covered by the KOMA if (1) the funding test is met by the group or the parent body of the group,[24] and (2) they are appointed by the parent body (that is subject to the KOMA in its own right) to weigh options, discuss alternatives, present recommendations or a plan of action. A good test for determining if the KOMA applies to a subordinate entity is whether those on the subordinate body were appointed by some official action of a governmental entity.[25] The KOMA also applies if a majority of a quorum of any governing body, which in its own right is subject to the KOMA, serves on the subordinate body.[26] Examples of subordinate entities that have been found subject to the KOMA include school district advisory boards;[27] fire district advisory boards,[28] commissions formed by the mayor of a city if subordinate to the governing body,[29] committees appointed by a city to hear employee grievances,[30] drug utilization services board created by the department of social and rehabilitation services,[31] parental boards under recreation commissions,[32] and house and senate conference committees.[33]

Government corporations or government-controlled corporations may be subject to the KOMA if they meet all three of the definition tests: (1) The corporation receives or expends public funds, (2) the corporation is subject to control of governmental unit(s) and (3) the corporation acts as a governmental agency in providing services or possesses independent authority to make governmental decisions. All three must be present. It is not enough that the entity receives a grant or other funds from the state or another governmental entity. Rather, the amount and degree of governmental control or authority over the entity in question is often the most

important factor.[34] The Kansas Attorney General has issued several opinions concerning nonprofit corporations and the KOMA. According to these opinions, nonprofit corporations subject to the KOMA include area agencies on aging,[35] the Economic Opportunity Foundation, Inc.,[36] McPherson Co. Diversified Services, Inc.,[37] Three Rivers, Inc.,[38] Cowley County Diversified Services,[39] and HELP, Inc.[40] Those nonprofit corporations found not subject to KOMA include private nursing homes,[41] the University of Kansas and Wichita State University Endowment Associations,[42] Planned Parenthood,[43] the Hutchinson Cosmosphere,[44] Electric Cooperative,[45] a corporation used to run a public hospital,[46] the Parsons Chamber of Commerce,[47] K-10 Corridor Development, Inc.,[48] the Koch Crime Commission,[49] Kansas Venture Capital, Inc.,[50] Mid-America Commercialization, Inc.,[51] Consensus Estimating Group (made up of staff from various state agencies),[52] the Prairie Village Economic Development Commission,[53] and the Hesston Area Senior Center.[54] In every case where KOMA application to a corporation is questioned, the nature of the funding, the entity creating the group, and the powers and duties of the corporation in question must be examined on a case-by-case basis.[55]

The KOMA does not apply to a body merely because it has frequent contact with a governmental entity or regularly discusses government related topics. For example, staff meetings have long been recognized as exempt from the KOMA.[56] A single public official or employee is not a "body" subject to the KOMA.[57] Judicial agencies and bodies are likewise not subject to the KOMA.[58] Under the definition of a "public agency," private organizations are generally not subject to the KOMA.[59]

Certain discussions by public bodies are statutorily exempt from the provisions of the KOMA.[60] K.S.A. 75-4318(a) specifically exempts deliberative discussions by bodies exercising quasi-judicial authority. Quasi-judicial is "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."[61] The Supreme Court of Kansas has described a quasi-judicial proceeding as one that "requires a weighing of the evidence, a balancing of the equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues."[62] In Gawith v. Gage's Plumbing & Heating Co.,[63] the Court discussed the difference between a legislative function and a judicial function:

"There is a distinction between the types of decisions rendered by different administrative agencies; and some such agencies perform judicial or quasi-judicial functions while others do not. In determining whether an administrative agency performs legislative or judicial functions, the courts rely on certain tests; one being whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make, and another being whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body.

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, whereas legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of

those subject to its power.

"In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer or agency which performs it, that determines its character as judicial or otherwise."[64]

One Kansas case concluded that a board of county commissioners acted as a quasi- judicial body, and not a legislative body, when determining whether to grant a zoning change for one specific tract of land.[65] Thus, it appears that the presence of due process rights or considerations may be one good way to distinguish between functions that are legislative and quasi-judicial. Nevertheless, even if a body is acting quasi-judicially, only its deliberations may be closed; binding action must still be taken in an open meeting.[66]

V. What is a Meeting

Once it has been determined that a specific body is subject to the KOMA, the next issue is usually whether or not that body is planning to have or (in the case of a potential violation) has already had a "meeting." A meeting is defined as (1) a gathering, assembly, telephone call or any other medium for interactive communication (2) by a majority of the membership of an agency or public body (3) for the purpose of discussing the business or affairs of the public body or agency.[67]

Prior to 1994, prearrangement was required to constitute a "meeting" and the statute did not mention telephone calls. Nevertheless, the attorney general's office believed that telephone calls could rise to the level of a meeting.[68] In State v. Seward Co.,[69] the Kansas Supreme Court disagreed and 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 Kansas Legislature reacted to this case by deleting the requirement of prearrangement and adding to the definition any "telephone call or any other means of interactive communication." The statute now makes it clear that a discussion on public business, by whatever means, can trigger application of the KOMA. With this change, discussions by members of a governing body need not be prearranged or even intended. Informal discussions before, after, or during recesses of a formally called public meeting can be subject to the Act.[70] The title of the gathering (e.g. "work session," "retreat," "informal meeting," "reception," etc.) is not relevant; the issue is whether the three elements of a meeting are present.[71]

The Kansas Attorney General has opined that interactive serial communications that meet the other two elements of the definition[72] can constitute a meeting. Such communications may occur through calling trees, e-mail or an agent of the body.[73] While this conclusion may trouble attorneys and their public official clients, it is really a common sense rule. It does not prevent one-way communications that are not interactive or even sought. However, if the KOMA is intended to allow the public to listen to discussions that constitute a "meeting" under the KOMA, the rules concerning openness should not fall victim to technology or third party "go-betweens." A face -to -face discussion is not the only way an interactive communication can take place.[74] Thus, members of a body subject to the KOMA, who are aware that their comments

will be shared with other members, should refrain from using some form of modern technology or third parties to evade the requirements of the KOMA. In 2009 the Kansas Legislature in S.B. 135 made a technical amendment to the Kansas Open Meetings Act (KOMA). The bill substituted the phrase **"interactive communications"** in a series for "meetings in a series" to clarify that serial meetings, except for legislative meetings as provided by Section 22 of Article 2 of the Constitution of Kansas, are required to be open under KOMA.

The second element of a meeting subject to the KOMA is the involvement of a majority of a quorum of the body.[75] The purpose behind this part of the definition of meeting is to prevent the number of people necessary to pass a matter from secretly discussing and deciding the matter in a closed manner. "Quorum" means a simple majority of the membership of a body; the number greater than one-half of the total (unless otherwise provided by statute).[76] A "majority" is the number greater than one-half of a quorum; it is the smallest number that can take action on behalf of a body.[77] 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.[78] Conventional wisdom is that a majority of a quorum can never be one. A county commission may, using home rule powers, raise its quorum to a number greater than a majority of its members.[79] Cities also have home rule authority to increase their quorum by charter ordinance.[80] Bodies that are subject to the KOMA but that do not possess home rule authority cannot alter common law rules determining a quorum and may not alter the rules of the KOMA without specific statutory authority.[81] This element was modified by the Kansas Legislature in 2008 to change of a “majority of a quorum” to a “majority”. **Currently, a majority of the of the membership of an agency or public body is now required to trigger the KOMA requirements.** A majority of the Pratt Community College Board of Trustees would be four (4) of the Trustees.

The third and final element of the definition of a meeting under the KOMA is that the discussion between a majority of a quorum of the body be "for the purpose of discussing the business or affairs of the body." It is not necessary that a vote or binding action be taken. Discussion of public business is what triggers application of the KOMA.[82] A meeting includes all gatherings at all stages of the decision-making process.[83] 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. Thus, members of a body subject to the KOMA who attend a conference where items of general interest are discussed (such as a convention of the League of Municipalities) are not in violation of the KOMA, as long as the specific business of a body is not discussed by a majority of a quorum of and between the body's board.[84]

Any allegations that a body subject to its terms has violated the KOMA will necessarily first require evidence that a meeting took place. This issue is often most problematic in the "discussion at the local cafe scenarios. Despite the appearances to the contrary, the members of the body may simply have been discussing grandchildren or the weather. Proving that an illegal meeting took place can be difficult if all those participating in the discussion steadfastly deny discussing any public business. Without a credible witness on what topics were discussed, it becomes difficult to prove that a meeting took place.

The fact that the discussion was in fact about the public business may be inferred from

subsequent action where no public discussion occurred, but proving a KOMA violation requires more than mere suspicion of wrong doing.[85] Moreover, if the discussion in question was conducted in a truly open manner, allowing the complaining witnesses to hear the discussion and confirm that it concerned public business, there is the possibility that the defense will argue that while a meeting may have taken place in an unusual or atypical place, the fact that the public was not prevented from listening shows that it was in fact conducted openly. The effectiveness of this defense can avoided be if there is a request for notice of all meetings that was not honored. Thus, those who are concerned about a meeting simply "breaking out" in any given location can help eliminate that possibility by requesting notice of all public meetings. This alone won't prevent violations of the KOMA, but it may help deter illegal meetings and provide stronger grounds for prosecution.

VI. Notice Under K.S.A. 75-4318

A common misconception about the KOMA is that it requires posting or publication of notice of meetings. It does not.[86] The KOMA requires that actual notice be given, or attempted, directly to those requesting it. Thus, while not prohibited and sometimes a very good idea, publication in a local or legal newspaper, or posting in a common area does not meet the KOMA notice requirements. Notice of meetings must first be requested before the public body is required to provide it.[87] 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 notice as a courtesy does not create a duty to provide it.

If requested, notice must be given to any person or organization requesting it and should contain the date, time and place of the meeting. [88] Residence of the requestor is not relevant.[89] A request for notice expires at the end of the fiscal year, at which time the request must be renewed. However, before the duty to provide notice expires, the public body must notify the requestor of expiration and give them an opportunity to renew their request.[90] It is the duty of the presiding officer to provide notice, but that duty may be delegated.[91]

The KOMA does not dictate how notice should be requested or provided. Thus, oral requests for notice are valid, but prosecution can be difficult because the issue of whether notice was requested must be resolved by relying upon witnesses, who often tell contradictory versions.[92] Those wishing to receive notice of meetings are well advised to make that request in writing, keeping a copy of the request in their files. Likewise, notice to requesters should be given in writing whenever possible.

No time limit is imposed for receipt of notice prior to a meeting.[93] Thus, notice must be given within a "reasonable time," reasonableness depending entirely upon the circumstances.[94] For example, if a meeting must be called at the last minute, for bona fide reasons (such as a bridge washing out in a county), it may not be possible to provide notice by any means other than attempting phone calls to those requesting notice. Public business need not come to a standstill simply because all requesters could not be personally reached before the meeting. On the other hand, if staff and members receive several days advance notice of an impending meeting, it may not be reasonable to wait to provide requesters notice until the day of the meeting. Whether notice is requested or given in a manner that is designed to provide adequate and actual notice is

always a fact issue.

A single notice can suffice for regularly scheduled meetings, however the public body must additionally notify requesters of any special meetings.[95] For example, a single notice would suffice if the public body only meets at 6:00 p.m. every Monday night in the commission room (address included), while additional notice would be required any time a meeting is to be held that differs, i.e. is in a different place, at a different time or on a different day.[96] No fee for notice may be charged.[97] Petitions for notice may be submitted by groups of people, but notice need only be provided to one person on the list.

VII. Agendas and Minutes

Other common misconceptions involve agendas and minutes. The KOMA does not require that an agenda be created. However, if a body chooses to create an agenda, that agenda should include topics planned for discussion.[98] If a public body creates an agenda, it may be amended.[99] This may mean that a gathering entitled "work session," where only a discussion was on an agenda, can nevertheless result in a decision made on the spur of the moment. However, intentionally omitting planned items from an agenda may constitute a violation of the KOMA if the facts in this type of scenario amounts to a noncompliant act "undertaken as subterfuge."[100] Thus, the best agenda related advice for purposes of complying with the KOMA is to include on the agenda all items intended or planned for discussion, making written amendments to include additional items up to the "last minute", which is usually the point at which the agenda is to be finalized or copied and widely distributed.

If agendas exist, copies must be made available to those who request them. However, they do does not have to be mailed out and can simply be provided by placing copies in a public place.[101] Except for recording motions for executive session, the KOMA does not require that minutes be kept.[102] However, statutes on specific matters, local bylaws, ordinances, or policies may impose some record keeping requirements, and thus should also be consulted.

VIII. Open Meetings and Executive Sessions

A. Open Meetings - What does it mean?

K.S.A. 75-4318 requires that meetings be open to the public when a body is subject to the Act. An open meeting is one where any person may attend.[103] The KOMA does not dictate the location of the meeting, the size of the room, or other accommodation considerations.[104] The key to determining whether a meeting is "open" is whether it is accessible to the general public.[105] If a meeting is held at such an inconvenient location or in room so small as to make it inaccessible for public attendance, a meeting might effectively be considered improperly closed under the Act.[106] On the other hand, the KOMA does not require that a public body change its usual meeting place in order to accommodate a crowd that is larger than usual. As always, compliance with the KOMA is common sense related; the body should make reasonable efforts to allow the general public to attend and listen to the discussions. What is reasonable will depend upon the facts of each situation.

Retreats and meetings held in private clubs are usually prohibited, especially if the location makes it impossible for the public to attend without paying to get into an otherwise private place.[107] Thus, while a lunch meeting may be fine, it probably won't pass KOMA muster if the general public has to buy a lunch in order to listen to the continuing discussions. Meetings out of state or in some place different than usual may be permitted under the KOMA if the majority of the public can still attend and there is a bonafide public need to meet in an unusual location.[108] However, merely wanting to "get away" does not provide sufficient grounds for holding a public meeting in a location that is unusual or very difficult for the public to attend.

To the great disappointment of some of our more vocal citizens (and some attorneys who want to speak publicly on behalf of their clients) the KOMA does not require that the public be allowed to speak at a public meeting, nor does it allow the public to force an item onto an agenda.[109] However, while the KOMA grants no right to speak, it may be wise for a public body to consult local ordinances and policies, as well as consider political or due process rights, before placing an absolute ban on public comments at an open meeting.

Conducting an open meeting means that secret ballots are not allowed.[110] The public must be able to ascertain how each member voted.[111] It may also mean that the public should be able to ascertain what has just been approved or rejected by the public body conducting a vote.[112] Thus, while a paper ballot is allowed, the public must be given access to the ballots so that they may determine how each member voted. Subject to reasonable rules, cameras and recording devices must be allowed at open meetings.[113] Telephone conference calls are allowed if the requirements of the act are met.[114]

B. Executive Sessions - K.S.A. 75-4319

Executive sessions occur when the public body discusses something "behind closed doors," outside of the hearing of the general public.[115] They are sometimes called "secret meetings" by those opposed to a public body discussing something in this manner. However, executive sessions are permitted for the purposes and topics specified by statute.[116] The decision to hold an executive session is discretionary; the KOMA never requires an executive session, it merely allows such discussions on the topics listed in the statute. There may be policies adopted by the public body that require an executive session discussion in some situations. Moreover, some public discussions could harm the public in general.[117] Thus, such factors should be considered before deciding what type of discussion - open or in executive session - best serves the public interest.

Discussion is all that can occur in an executive session; binding action may not be taken.[118] However, reaching a consensus in executive session is permitted.[119] A "consensus," however, may constitute binding action and violate the KOMA if a body fails to follow up with a formal open vote on a decision that would normally require a vote.[120] What constitutes a consensus, versus a binding decision, may be difficult to determine in situations involving a narrowing of alternatives.[121] A Washington court found that city council members took "final action" with respect to appointment of an individual to the city planning commission when members marked ballots in closed executive session until consensus was reached on the best candidate, and no formal motion was ever made or adopted.[122] Thus, public bodies may want to carefully

consider how or when to proceed openly, if it is necessary to make a "final" or binding decision after a consensus is first reached while in an executive session discussion.

Before going into an executive session, the public body must first convene an open meeting.[123] K.S.A. 75-4319(a) requires a specific procedure, which must be followed in order to go into executive session, and requires that the process be recorded in the minutes. There must be a formal motion, seconded and carried, that contains a statement of (1) the justification for closure, (2) the subject(s) to be discussed; and (3) the time and place where the open meeting will resume.[124] The motion for going into executive session should contain both the subject and a justification statement; the two are not the same thing.[125] The Kansas Court of Appeals approved one motion to go into executive session that stated the executive session was "for purposes of discussing personnel matters of non-elected personnel because if this matter were discussed in open session it might invade the privacy of those discussed."[126] In approving this statement, the Court noted: "It seems logical to us that the privacy rights of non-elected personnel subject to discussion is sufficient justification for a closed session . . . "[127] While there is some argument as to what constitutes the subject versus the justification, it appears that the subject is one that is listed in K.S.A. 75-4319[128] and the justification is a general explanation or policy statement concerning why an executive session is being held. It is not necessary to reveal confidential information in a motion, nor is it required that the executive session discussion be recorded or recreated in open session.[129]

C. Subjects that may be discussed in an executive session.

K.S.A. 75-4319(b) sets forth a list of fourteen topics that may be discussed in an executive session.[130] The list now includes: (1) Personnel matters; (2) consultation with the body's attorney; (3) employer-employee negotiation related matters;[131] (4) confidential data relating to the trade secrets or financial affairs of a private business; (5) matters or actions that could affect a student, patient, or resident of a public institution; (6) preliminary discussions relating to the acquisition of real property;[132] (7) matters relating to pari-mutuel racing under K.S.A. 74-8804; (8) matters relating to the child in need of care issues under K.S.A. 38-1507; (9) matters relating to the Child Death Review Board under K.S.A. 22a-243; (10) matters relating to Workers Compensation Advisory Council under K.S.A. 44-596; (11) matters relating to the Medicaid drug program under K.S.A. 39- 7,119; (12) matters that a tribal gaming compact requires be discussed in executive session; (13) matters relating to the security of a public body or agency, public building or facility or the information system of a public body or agency, if the discussion of such matters at an open meeting would jeopardize security of such; and (14) legislative committees' discussion of matters relating to child care facility licensing, as permitted by K.S.A. 65-525(f).

One of the most utilized exceptions to openness is the discussion of personnel matters of non-elected personnel.[133] This exception allows discussion only of identified individuals, not groups.[134] The purpose of this exception is to protect the privacy interests of individuals, and thus, discussions of a general nature, such as the consolidation of departments or overall salary structure are not proper under this exception. "Personnel" means employees of the public agency and does not included independent contractors.[135] This exception may be used to discuss applicants for employment. [136] The Kansas Attorney General has opined that the personnel

exception does not allow executive session discussion about an individual appointed to serve on a board or a committee.[137] This interpretation of K.S.A. 75-4319(b)(1) has been criticized, challenged or questioned by entities such as the League of Kansas Municipalities. However, other states have reached the same conclusion[138] and several attempts to amend the KOMA to allow appointed individuals to be discussed in executive sessions have failed. The KOMA does not give the employee being discussed a right to be present in the executive session or to force an open session.[139]

K.S.A. 75-4319(b)(2) permits executive session discussions for the purpose of consulting with the body's attorney. As this is essentially recognition of the attorney-client privilege,[140] all elements of that privilege must exist: (1) The body's attorney must be present,[141] (2) the communication must be privileged, and (3) no other third parties (non-clients) may be present.[142] This exception to the KOMA cannot be used to discuss a letter received from the body's attorney unless the attorney is present.[143] However, contrary to the advice given to some public bodies by their perhaps rightfully paranoid staff or legal counsel, discussing litigation is not the only privileged topic of discussion that can take place between a client and attorney.

An executive session under K.S.A. 75-4319(b)(4) may be used to discuss the confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships. The entities the affairs and trade secrets of which may be protected from public scrutiny include a local economic development group.[144] However, not every entity will qualify as a corporation, partnership, trust or individual proprietorship. In addition, the data being discussed must be truly confidential in nature.[145] There is also some balancing between the public's right to know and the government functions served by allowing the information to remain closed.[146]

K.S.A. 75-4319(b)(5) allows executive session discussion about "matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution,[147] except that any such person shall have the right to a public hearing upon request. In order to utilize this exception, the discussion must concern a particular person, and not the general population, such as all students, inmates, or patients. Unlike the personnel exception in K.S.A. 75-4319(b)(1), the person involved may, by request, prevent the discussion from taking place in an executive session.

In addition to the subjects enumerated in K.S.A. 75-4319, other statutes may permit certain matters to be privately discussed. For example, impaired provider laws allow some discussions (and records) to be closed.[148] Certain laws close discussions by specific public bodies that are reviewing specific issues.[149] Executive session discussions may only take place if a specific law allows a closed discussion on the matter being discussed. Bodies subject to the KOMA should always be careful to insure that a matter they wish to discuss privately clearly falls under a specific provision of the law allowing the public to be excluded from the discussion in question. It is not enough that the public body believes that it is a "good idea" to privately discuss the matter.

D. Who may be present in an executive session?

K.S.A. 75-4319 allows members of a public body to discuss certain listed topics outside the hearing of the general public. Thus, only the members of a public body have the right to attend an executive session.[150] Mere observers may not attend. Inclusion of general observers suggests that the meeting should be open to all members of the public.[151] However, unless the executive session is convened under the attorney-client privilege exception,[152] any person who aids the body in its discussions may be discretionarily admitted.[153] The KOMA does not require the presence of additional persons merely because an individual or another entity has a special interest or connection with the public body conducting the executive session discussion.[154]

One issue not addressed in the KOMA itself, but sometimes hotly debated in terms of public meetings, is the "right" of an individual board or commission member to be present in executive sessions. For example, there have been occasions when one or more members of a particular public body released press statements about executive session discussions, and the aggrieved other board members responded by convening future executive sessions excluding that person. The question then becomes whether the excluded member has a right to be admitted into an executive session. The KOMA does not speak to this issue. It provides the public body with authority to privately discuss certain topics and obviously presumes the presence of any available members of the public body. There are no reported cases or attorney general opinions that discuss whether the KOMA provides a board member with any right to attend executive sessions. Thus, it appears that any rights possessed by the aggrieved board member being excluded from executive sessions, or other meetings for that matter, must be enforced using authority other than the KOMA.

IX. Enforcement of KOMA

The methods used to enforce the KOMA are primarily designed to encourage and ensure compliance, rather than to punish the guilty or disrupt the orderly flow of the public's business.[155]

Any county or district attorney and the attorney general have concurrent jurisdiction to investigate or bring an action.[156] It is currently the policy of the attorney general's office to first refer an alleged violation to the county or district attorney, the local law enforcement officer for the state. The decision to investigate or prosecute is discretionary on the part of the prosecutor.

The county or district attorney and attorney general can issue investigative subpoenas and in general conduct discovery prior to filing a lawsuit.[157] This authority was added by the 2000 Legislature, as an attempt to enhance the fact gathering power of public prosecutors.[158] Private individuals may file an action to enforce the KOMA, but do not have such investigative tools at their disposal, and thus may be required to first file suit in order to utilize standard civil procedure discovery techniques.

If a KOMA action is filed, the burden of proof is on the plaintiff, who must prove a prima facie case. The burden then shifts to the defendant to justify its actions.[159] The plaintiff may receive

court costs if a violation is established, but the defendant may receive costs only if the action was frivolous.[160] The KOMA does not require specific intent in order to prove a violation of the law. A "knowing" violation occurs when there is purposeful commission of the prohibited acts.[161] Venue is proper in the county where the action occurred.[162] Courts are to give KOMA cases precedence.[163]

A. Penalties

K.S.A. 75-4320 sets forth the penalties that may be imposed if a court finds that the Act has been violated. These are civil, not criminal, penalties.[164]

Fines, for up to $500 for each knowing violation of the KOMA may be assessed by a court, but only if the attorney general or a county or district attorney brought the action. This provision appears to intend that the $500 is per body member, and thus each individual member involved in a KOMA violation can be fined in that amount, for each violation involving him or her individually. However, courts historically have not awarded significant fines for violating the KOMA.[165]

K.S.A. 75-4320 also permits a court to void any binding action taken at a meeting not in "substantial compliance" with the KOMA. A county or district attorney or the attorney general must bring that type of action.[166] Private individuals cannot use the KOMA to void an action taken at an illegal meeting.[167] Any lawsuit to void action must be filed within 10 days of the alleged violation and meeting.[168] Perhaps because of this time limit and the difficulty in obtaining sufficient evidence that quickly, this kind of action is rarely filed.[169] If a prosecutor believes there is sufficient evidence to bring an action to void a decision or vote, within this narrow 10-day time frame, the public body is often also persuaded that they clearly violated the KOMA. In such situations, the more reasonable and prudent public officials voluntarily rescind the binding action, and hold a proper and open meeting to discuss the issue. In some instances this will help avoid an embarrassing and costly lawsuit against them.

The KOMA permits any party, including private individuals, to seek injunction, mandamus, or a declaratory judgment. This type of penalty is almost always part of any KOMA judgment, in that the reviewing court makes some declaration as to whether there was a violation. As this is the only kind of remedy available to private parties, it is perhaps not surprising that private citizens rarely bring KOMA actions. However, one enterprising Reno County citizen brought two such cases, one against the board of county commissioners and the other against the Hutchinson city counsel.[170] This gave the Kansas Court of Appeals the opportunity to create what is now known as the "technical violation" rule. Under this court created rule, 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 has not been effectively denied.[171] In those situations where the public's right to know is not substantially harmed, and the public body does not have a history of ignoring the KOMA requirements, it is less likely that a court would impose penalties. Thus, even when a violation of the KOMA exists, a prosecutor who is trying to decide whether to file suit will usually consider this test. The violation should be egregious enough to overcome this technical violation "exception." When a prosecutor determines that a technical

violation has occurred, it is not uncommon for them to decline prosecution, but issue a warning letter to the violators, thus putting them on notice that they have now had their "one bite" of the KOMA apple.[172] Another approach to penalizing a "technical violation" of the KOMA has been to enter into a consent agreement with the offending body, wherein the facts and conclusions are agreed to, and the public body agrees to receive additional education on the KOMA rules and otherwise "do better" in the future.

There can be other consequences if there is an allegation or conviction under the KOMA. Violation of the KOMA can provide grounds for ouster from office pursuant to K.S.A. 60-1205.[173] A mere allegation of a KOMA violation has in the past been sufficient grounds for recall effort.[174] However, even if there is a court decision finding the KOMA has been violated, neither recalls nor ouster is automatic; each action must be separately pursued.[175] A public prosecutor must bring ouster cases, and will only be persuaded to do so when there is strong evidence of malfeasance or failure to meet minimum requirements of the office.[176] Private citizens may pursue recall of an elected local official; however, the county or district attorney must first review the recall petition to determine the sufficiency of the alleged grounds.[177]

X. Conclusion

"A popular Government without popular information or the means of acquiring it, is but a Prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."[178] The KOMA and its counterpart, the Kansas Open Records Act, ensure that citizens have the right to see public documents and attend public meetings. The information gleaned from such records and meetings allows the general public to take a more active role in their government. With the passage of the KOMA and the KORA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the `need to know' standard has been replaced by a `right to know' doctrine. The government now has to justify the need for secrecy. The closure of public records or meetings should be based upon the law and done to serve the public good, not upon an official's or bureaucrat's wish to be left alone in order to more easily conduct public business.

The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Government business is the business of the people. Whether conducting meetings on public business, or deciding whether to provide the public with access to public documents, those involved should keep these principles in mind. Doing so should make it easier to follow the dictates and honor the spirit of the KOMA and the KORA.

Footnotes:

1. 1972 Kan. Sess. Laws 301, §1, codified at K.S.A. 75-4317 et seq.

2. Brad Smoot & Louis Clothier, Open Meetings Profile: The Prosecutors View, 20 Washburn. L.J. 241, 242 (1981).

3. Murray v. Palmgren, 231 Kan. 524, 534, 646 P.2d 1091 (1982).

4. K.S.A. 45-216 (it is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy). K.S.A. 75-4318 (in recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public).

5. 5 U.S.C. § 552.

6. 5 U.S.C. § 552b; 28 C.F.R. Part 16 (2001).

7. Ann Taylor Schwing, Open Meeting Laws, 3, National Institute of Municipal Law Officers, Fathom Publishing Co (1994).

8. Chief Justice Earl Warren stated in 1974, "If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of government." Warren, Governmental Secrecy: Corruption's Ally, 60 A.B.A.J. 550 (1974).

9. 37A Am. Jur. 2d Freedom of Information Acts §2 (1994). The original Pennsylvania Constitution required open legislative proceedings in 1776 as did the 1818 Connecticut Constitution. Taylor Schwing, supra note 10, at 2.

10. Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663, 669, 722 P.2d 1093 (1986).

11. Likewise there is no constitutional provision giving open meetings rights to the general public. These laws are statutory in nature.

12. State v. Marino, 23 Kan.App.2d 106, 929 P.2d 173 (1996), quoting from Murray v. Palmgren, 231 Kan. 524, 533, 646 P.2d 1091(1982).

13. Smoot & Clothier supra note 3, at 245.

14. Smoot & Clothier supra note 3, at 245.

15. See e.g., Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984), U.S.D. No. 407 v. Fisk, 232 Kan. 820, 660 P.2d 533 (1983), State ex rel Stephan v. Board of Sedgwick County Commissioners, 244 Kan. 536, 770 P.2d 455 (1989).

16. Kan. Att'y Gen. Op. No. 81-288.

17. Kan. Att'y Gen. Op. No.81-258.

18. Kan. Att'y Gen. Op. No. 85-161.

19. Kan. Att'y Gen. Op. No. 88-97 and 89-91.

20. Kan. Att'y Gen. Op. No. 90-69.

21. Kan. Att'y Gen. Op. No. 2000-63.

22. Kan. Att'y Gen. Op. No. 99-22.

23. See Kan. Att'y Gen. Op. No. 86-92. See also Kan. Att'y Gen. Ops. No. 80-21; 77-53; 76-140; 76-122; 73-235; 86-38.

24. State ex rel., Murray v. Palmgren, 231 Kan. 524, 646 P.2d 1091 (1982).

25. Kan. Att'y Gen. Op. No. 86-48.

26. Kan. Att'y Gen. Op. No. 84-103; See also Kan. Att'y Gen. Op. No.91-150.

27. Kan. Att'y Gen. Op. No. 84-81.

28. Kan. Att'y Gen. Op. No. 86-84.

29. Kan. Att'y Gen. Op. No. 88-25.

30. Kan. Att'y Gen. Op. No. 91-31.

31. Kan. Att'y Gen. Op. No. 93-41.

32. Kan. Att'y Gen. Op. No. 93-73.

33. Kan. Att'y Gen. Op. No. 93-113.

34. Hybrid government/private entities are more likely to be public agencies subject to sunshine laws if they are under substantial governmental control or performing a traditional governmental function. See 37A Am Jur 2d Freedom of Information Acts§20 (1994).

35. Kan. Att'y Gen. Op. No. 79-219.

36. Kan. Att'y Gen. Op. No. 84-10.

37. Kan. Att'y Gen. Op. No. 79-284.

38. Kan. Att'y Gen. Op. No. 87-143.

39. Kan. Att'y Gen. Op. No. 87-188.

40. Kan. Att'y Gen. Op. No. 88-27.

41. Kan. Att'y Gen. Op. No. 79-221.

42. Kan. Att'y Gen. Op. Nos. 80-239 and 82-172.

43. Kan. Att'y Gen. Op. No. 81-253.

44. Kan. Att'y Gen. Op. No. 82-256.

45. Kan. Att'y Gen. Op. No. 85-175.

46. Memorial Hospital v. Knutson, 239 Kan. 663, 722 P.2d 1093 (1986).

47. Kan. Att'y Gen. Op. No. 89-149.

48. Kan. Att'y Gen. Op. No. 94-42.

49. Kan. Att'y Gen. Op. No. 94-55.

50. Kan. Att'y Gen. Op. No. 94-107.

51. Kan. Att'y Gen. Op. No. 94-99.

52. Kan. Att'y Gen. Op. No. 94-93.

53. Kan. Att'y Gen. Op. No. 99-64.

54. Kan. Att'y Gen. Op. No. 01-02.

55. McKinney's Public Officers Law §§102, subd. 2, 103(a). Smith v. City University of New York, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 133 Ed. Law Rep. 559 (1999). (formally chartered entity with officially delegated duties and organizational attributes of a substantive nature should be deemed a public body that is performing a governmental function for purposes of Open Meetings Law. Student activity fees overseen by community college association were public funds, for purposes of determining whether association was subject to Open Meetings Law; although funds were segregated from the general revenues of the university that operated the college, the fees were mandatory and were dedicated to support student expressive activities in a public university).

56. Smoot & Clothier, supra note 3, at 250 ("Although no reported cases have specifically considered the issue, to be subject to the Kansas Open Meetings Act the person or persons in question must constitute a body or agency... the Act has been applied only to groups of persons who exercise authority as a "body" and not to subordinate staff personnel who gather together but do not take collective action").

57. Kan. Att'y Gen. Op. No. 99-22 (individuals are generally not considered to come within the KOMA because under such an interpretation the KOMA's provisions would be reduced to absurdity; if an individual were subject to KOMA, the individual would also constitute a majority of a quorum and could not talk to him or herself without giving notice to those who have requested notice).

58. Kan. Att'y Gen. Op. No. 82-254.

59. Kan. Att'y Gen. Op. No. 81-94 (private/parochial schools); Kan. Att'y Gen. Op. No. 79-221 (privately owned nursing homes).

60. See, e.g., Kan. Att'y Gen. Ops. No. 89-42 and 94-157.

61. Blacks Law Dictionary 1121 (5th ed. 1979); Adams v. Marshall, 212 Kan. 595, 599, 512 P.2d 365 (1973) (an administrative body empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature is acting in a quasi-judicial capacity); Thompson v. Amis, 208 Kan. 658, 663, 493 P.2d 1259, cert. denied 409 U.S. 847 (1972) (it may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate the

facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature).

62. Golden v. City of Overland Park, 224 Kan. 591, 597, 570 P.2d 886 (1978).

63. Gawith v. Gage's Plumbing & Heating Co., 206 Kan. 169, Syl. ¶¶ 1, 2, 3, 4, 476 P.2d 966, (1970).

64. Thompson v. Amis, supra note 57.

65. McPherson Landfill, Inc. v. Bd. Of County Comm'rs of Shawnee County, July 12, 2002 Kansas Supreme Court Slip Opinion Case No. 88,075; See also Kan. Attn'y Gen. Ops. No. 78-13 and 91-31.

66.Attn'y Gen. Ops. No. 97-41, 91-31; 84-50; and 79-225.

67. K.S.A. 75-4317a.

68. Kan. Att'y Gen. Op. No. 80-159 ("In view of the purposes of the Kansas Open Meetings Act and the liberal interpretation to which it is entitled, we can find no justification for reaching a conclusion that would restrict the word 'gathering' to include only face to face contacts. Indeed it is the discussion among members of a governing body which is the real subject of the Act and related case law").

69. 254 Kan. 446, 866 P.2d 1024 (1994).

70. Coggins v. Public Employees Relations Board, 2 Kan.App.2d 416, 420, 581 P.2d 817, rev. denied 225 Kan. 843 (1978).

71. Kan. Att'y Gen. Ops. No. 80-197 and 90-47.

72. Interactive communications between a majority of a quorum of a public body, the purpose of which is to discuss a common topic of business or affairs of that body by the members.

73. Kan. Att'y Gen. Ops. No. 95-13, 98-26, and 98-49.

74. Smoot & Clothier, supra note 3, at 259-262.

75. Kan. Att'y Gen. Op. No. 87-45 (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 of an open meeting).

76. Kan. Attn'y Gen. Ops. No. 83-6; 91-73; 93-140; and 96-32.

77. Kan. Attn'y Gen. Ops. No. 86-110; 93-140; 81-26 and 91-73.

78. Kan. Att'y Gen. Op. No. 86-110 (in mayor-council form of government, the mayor is not included as a member of the body).

79. State ex rel. Stephan v. Board of Sedgwick County Comm'rs, 244 Kan. 536, 770 P.2d 455 (1989).

80. Kan. Att'y Gen. Ops. No. 87-45 and 83-74.

81. Kan. Att'y Gen. Op. No. 83-174 (change by airport authority not authorized); Kan. Att'y Gen. Op. No. 93-140 (change by recreation commission not authorized); Kan. Att'y Gen. Op. No. 96-32 (change by Kansas dental board not authorized).

82. Kan. Att'y Gen. Op. No. 79-200.

83. Coggins v. Public Employees Relations Board, at fn 66.

84. Kan. Attn'y Gen. Ops. No. 82-133 and 2000-64 (it is not a violation of the KOMA for a majority of a quorum of members of a public body or agency, without giving KOMA notice, to independently attend a meeting concerning city business so long as the members do not engage in the discussion; the members do violate the KOMA under these facts if no notice is given to those requesting it and the members engage in the discussion of city business).

85. In The Kansas City Star v. Shields, 771 S.W.2d 101 (Mo. App. W.D. 1989), the chairman and two members of the Kansas City Council Finance Committee, the city manager and the city budget director held a luncheon meeting without notice in a private dining room of a Kansas City restaurant. The following day the committee unanimously adopted a budget agreement. The court held that the luncheon meeting, where public business was discussed, constituted a public meeting. See also Mo. Att'y Gen. Op. No. 10-75.

86. Some states do have laws that require posting or publication notice. In Georgia, governing boards and agencies are required to post information as to the time, place and dates of regular meetings. If a meeting is to be held at other places or times, the agency must provide 24 hours advance notice both by posting notification at the place at which regular meetings are held and by notifying either the local legal newspaper or one with a circulation at least as large as the legal newspaper and to any media that requests it in writing. The notice must be given by telephone or facsimile at least 24 hours in advance of the meeting. The law was amended in 1992 to provide that a governing board or agency may hold an emergency meeting with less than 24 hours notice but must give such notice of the meeting and the subjects expected to be considered as is reasonable, including notice to the newspaper. O.C.G.A. 50-14-1 (2)(d) and (2)(e).

87. K.S.A. 75-4318.

88. K.S.A. 75-4318(b); Kan. Att'y Gen. Op. No. 86-133.

89. Kan. Att'y Gen. Op. No. 81-137.

90. K.S.A. 75-4318(b)(3).

91. K.S.A. 75-4318(c).

92. Kan. Attn'y Gen. Ops. No. 81-15; 81-22; and 86-133.

93. K.S.A. 75-4318(b)(1). Kan. Att'y Gen. Op. No. 86-133.

94. Kan. Att'y Gen. Op. No. 81-15.

95. Kan. Att'y Gen. Op. No. 83-173.

96. Kan. Att'y Gen. Op. No. 96014 (the notice requirements and intent of the KOMA are violated by

giving notice that a meeting will begin on one day and then subsequently continuing that meeting to another day without making a good faith attempt to provide requesters with notice of the new date).

97. Kan. Attn'y Gen. Ops. No. 81-137 and 82-141.

98. Stevens v. City of Hutchinson, 11 Kan.App.2d 290, 293, 726 P.2d 279 (1986).

99. U.S.D. 407 v. Fisk, 232 Kan. 820, 660 P.2d 533 (1983).

100. Stevens fn. 92.

101. K.S.A. 75-4318(d); Kan. Att'y Gen. Ops. No. 79-218; 81-15; and 86-133.

102. Kan. Att'y Gen. Op. No. 90-47.

103. Kan. Att'y Gen. Op. No. 80-43.

104. While these concerns may fall under the American Disability Act, the KOMA itself does not require that a public meeting place be of a certain size or provide for attendance by those with special needs.

105. Kan. Attn'y Gen. Ops. No. 86-153; 79-253; 82-133; and 80-148.

106. Stevens v. City of Hutchinson, 11 Kan.App.2d 290, 726 P.2d 279 (1986).

107. Kan. Attn'y Gen. Ops. No. 82-133 and 80-148.

108. Kan. Att'y Gen. Op. No. 86-163; A licensing board may meet out of state, in order to allow more of the public to attend. This may also allow such boards to meet in other unusual locations, e.g. with another state's licensing board, if the meeting will serve the public and necessarily occurs out of the state.

109. However, other statutes outside the KOMA may provide for or allow such comment and thus other statutes that may impact the matter should be consulted to see if those laws allow or require the right to speak at a public meeting to a specific category of person.

110. K.S.A. 75-4318(a).

111. Kan. Attn'y Gen. Ops. No. 86-176; 79-167; 81-106; 65-167; and 93-55.

112. The public sometimes complains about the vague wording of a motion, or the failure of the body to provide copies to documents being publicly approved; as long as the document or more detail is later made available to the public, the KOMA's prohibition against secret votes is probably not implicated.

113. K.S.A. 75-4318(e).

114. A call can constitute a meeting subject to the KOMA, triggering all it's requirements, including notice (if notice has been requested) and free access by the public. Attn'y Gen. Op. Nos. 81-268; 80-173; and 80-159.

115. Which can mean either that the body itself goes somewhere else or the public be asked to temporally to leave the room.

116. K.S.A. 75-4319.

117. Matters calling into question the personal conduct of a public employee, land that may be purchased by the public body, premature disclosure that could cause speculation and a rise in the asking price, or discussion of a potential hazard on public property are topics that may be discussed in an executive session.

118. K.S.A. 1995 Supp. 75-4319(c); Kan. Att'y Gen. Op. No. 91-31.

119. O'Hair v. U.S.D. No. 300, 15 Kan. App. 2d 52, 805 P.2d 40, (1991).

120. City of Topeka v. Watertower Place Development Group, 265 Kan. 148, 959 P.2d 894 (1998).

121. In one Pennsylvania case, a decision by a school board acting in executive session to choose three of five school district superintendent candidates to go forward for further consideration was held to not be "official action," within meaning of state sunshine act provision requiring "official action" to be taken publicly, since decision merely advanced selection process and did not commit board to particular course of action. Morning Call v Board of Sch. Directors 642 A2d 619, 22 Media L R 2084 (Pa. 1994).

122. Miller v. City of Tacoma, 138 Wash. 2d 318, 979 P.2d 429 (1999).

123. K.S.A. 1995 Supp. 75-4319(a); Kan. Att'y Gen. Op. No. 81-22.

124. 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."

125. Kan. Att'y Gen. Ops. No. 91-78; 86-33. But see State v. U.S.D. 305, 13 Kan. App. 2d 117, 764 P.2d 459 (1988).

126. State v. USD 305, 13 Kan. App. 2d 17, 764 P.2d 459 (1988).

127. State v. USD 305, 13 Kan. App. 2d 17, 764 P.2d 459 (1988). (emphasis added).

128. Or some other law.

129. Several attempts have been made to legislatively require the recording of executive sessions. However, thus far, all have failed, perhaps due in part to the reluctance of public bodies to create a document, which may then later be discovered or made public.

130. Kan. Att'y Gen. Op. No. 80-43 (public bodies cannot have executive session under this exception when meeting with the employees).

131. See Kan. Att'y Gen. Ops. No. 79-125 (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); 80-43 (public bodies cannot have executive session under this exception when meeting with employees); 92-51 (school boards have special rules under K.S.A. 72-5423(b)).

132. Kan. Att'y Gen. Ops. No. 87-91 (this exception applies to acquisition only. It does not cover sale of real property); 89-92 (this exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is insufficient).

133. K.S.A. 75-4319(b)(1).

134. Kan. Att'y Gen. Ops. No. 81-39; 88-25; 80-102.

135. Kan. Att'y Gen. Op. 87-169.

136. Kan. Att'y Gen. Op. No. 96-61.

137. Kan. Att'y Gen. Op. No. 87-10.

138. Mo. Att'y Gen. Ops. Nos. 48-88, 184-89 and 77-92; Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. App. W.D. 1980) (independent contractors, members of volunteer citizen boards and elected officials are not employees for purposes of Section 610.021(3)).

139. Other laws or contracts may, so a public body should consider such things as employee policies and union contracts.

140. K.S.A. 60-426. See also Pickering v. Hollabaugh, 194 Kan. 804, 496 P.2d 1320 (1965).

141. Manning v. City of East Tawas, 234 Mich. App. 244, 593 N.W.2d 649 (1999) (city attorney, although he changed his role from advocate to witness for purposes of city council's closed meeting discussion of pending litigation regarding an application for approval of a recreation vehicle park site plan, was city council's "attorney," for purposes of Open Meeting Act; exemption permitting public body to enter closed session to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation. Public body's "attorney," for purposes of Open Meeting Act exemption permitting public body to enter closed session to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, is any attorney who, through exercise of an attorney-client relationship with the public body, helps the public body prepare for specific pending litigation.)

142. Kan. Attn'y Gen. Ops. No. 78-202; 80-43; 82-130; 82-176; 82-247; and 92-56.

143. Kan. Att'y Gen. Op. No. 86-162.

144. Kan. Att'y Gen. Op. No. 88-148.

145. See K.S.A. 60-3320; Southwestern Bell Telephone Co v. KCC, 6 Kan. App. 2d 444, 457, 629 P.2d 1174 (1980), rev. den. 230 Kan. 819 (1981); All West Pet Supply v. Hill's Pet Products, 840 F.Supp. 1433, 1437 (Kan. 1993).

146. Public Citizen Health Research Group v. FDA, 185 F.3d 898 (D.C. Cir. 1999) (the FOIA "does not apply to matters that are ... trade secrets and commercial or financial information obtained from a person and privileged or confidential. "Information that a person is required to submit to the government may be withheld under this exception only if its disclosure is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the

information was obtained). See also Niagara Mohawk Power v United States Department of Energy, 169 F.3d 16 (D.C. Cir.1999).

147. See Kan. Att'y Gen. Op. No. 80-102 (inmates as residents of institutions).

148. K.S.A. 65-4925; Kan. Att'y Gen. Op. No. 89-42.

149. E.g. K.S.A. 44-596 (applies to the Worker's Compensation Advisory Council's discussions on matters they are studying); K.S.A. 22a-243 (allows legislative committees to privately review Child Death Review Board information or records); K.S.A. 38-1507 (permits legislative committees to use executive sessions to review and discuss child in need of care records); K.S.A. 39-7119 (the Medicaid Drug Utilization Review Board may go into executive sessions when considering matters related to an identifiable patient or provider); K.S.A. 46-2201 (the joint legislative committee is authorized to use executive sessions in order to discuss KPERS related matters); K.S.A. 74-3006 (the banking board may go into executive sessions to discuss information made confidential by K.S.A. 9-1712); K.S.A. 74-4905 (the KPERS board of trustees may use executive sessions to receive and discuss criminal background information concerning prospective KPERS board members); and K.S.A. 74-8804 (the Kansas Racing Commission is authorized to convene executive sessions to review and discuss criminal background checks done on certain individuals).

150. Kan. Att'y Gen. Op. No. 86-14.

151. Kan. Attn'y Gen. Ops. No. 82-176; 86-143; and 92-56.

152. As with any attorney-client discussion, the privileged nature of the discussion is voided by the presence of anyone who is not either the attorney or client. Kan. Att'y Gen. Op. No. 82-247.

153. Kan. Att'y Gen. Op. No. 91-3.

154. Kan. Att'y Gen. Ops. No. 86-143 (members of advisory boards for a school district have no right to attend school board executive session discussions); 87-170 (a county clerk has no right to attend the county commissioner's executive sessions).

155. Smoot & Clothier, supra note 3, at 280.

156. K.S.A. 75-4320.

157. K.S.A. 74-4320b. In investigating alleged violations of the Kansas Open Meetings Act, the attorney general or county or district attorney may: (a) subpoena witnesses, evidence, documents or other material; (b) take testimony under oath; (c) examine or cause to be examined any documentary material of whatever nature relevant to such alleged violations; (d) require attendance during such examination of documentary material and take testimony under oath or acknowledgment in respect of any such documentary material; and (e) serve interrogatories.

158. L. 2000, ch. 156 § 7, contains the much-amended bill prompted by the 1999 press "sting." It changes both the KOMA and the KORA, in the Senate Substitute for the House Substitute to House Bill No. 2864.

159. K.S.A. 75-4320a(b).

160. K.S.A. 75-4320a(c) and (d).

161. Murray v. Palmgren, 231 Kan. 524, 536, 537, 646 P.2d 1091 (1982)

162. K.S.A. 75-4320a(a).

163. K.S.A. 75-4320a(e).

164. Smoot & Clothier, supra note 3, at 280 (the original version of the KOMA provided for criminal penalties, but after five years without a criminal prosecution, the act was amended to insert civil penalties).

165. Smooth & Clothier id. at 282 ("imposing civil fines on the inadvertent participant in an illegal meeting seems unfair and does not deter future conduct ... [M]eetings under the act may be initiated by someone other than the chairperson ... The head of a local interest group who invites members of a government body to attend a meeting to discuss public business cannot be prosecuted. Administrative aides who call meetings of a body are beyond the reach of the act").

166. Stoldt v. City of Toronto, 234 Kan. 957, 678 P.2d 153 (1984).

167. City of Topeka v. Watertower Place, 265 Kan. 148, 959 P.2d 894 (1998) (while private parties have standing to seek injunctive and mandamus relief, only the attorney general, district attorneys, and county attorneys have standing to void governmental acts based upon violations of KOMA. Thus, Watertower was precluded from seeking the voidance of the city council's actions based on a KOMA violation).

168. Id. (during oral argument, Watertower stated it had requested the attorney general to void the contract, as permitted by KOMA. The attorney general refused to do so because Watertower's request was not timely pursuant to KOMA. Voidance of the city's actions, under KOMA, must be done within 10 days).

169. Smooth & Clothier, supra note 3, at 281 ("only when the violation was flagrant or the statute rigid have the courts reversed actions of public bodies").

170. Stevens v. Board of County Commissioners of Reno County, 10 Kan. App. 2d 523, 710 P.2d 698(1985) (private citizen filed suit, claiming that meeting of county commissioners during recess of meeting of board of county commissioners violated the Kansas Open Meetings Act). Stevens v. City of Hutchinson, 11 Kan. App. 2d 290 , 726 P.2d 279 (1986) (suit was brought seeking to enjoin city from purported violations of the Open Meetings Act, and seeking writ of mandamus requiring city to list on its agenda certain topics to be discussed).

171. Stevens v. Board of Reno County Comm'rs, 10 Kan. App. 2d at 526.

172. Any subsequent violations by the same individuals could undermine their "good faith effort to comply" defense.

173. Kan. Att'y Gen. Op. No. 80-168 (this is a separate action, which must be filed by a public prosecutor).

174. Unger v. Horn, 240 Kan. 740, 732 P.2d 1275 (1987); K.S.A. 25-4301 et seq. But see 2003 SB 103, signed into law by Gov. Sebelius on April 21, 2003, SJ 820. This new law amended the grounds for recall to make misconduct in office mean a violation of the law that impacts the officer's ability to perform the official duties of that office. It remains to be seen what impact this legislation may have upon the rules established by the Unger case.

175. Rich Smith and Theresa Nuckolls, Recall of Local Officials in Kansas, 70. J. Kan. Bar Assn. 8, 18 (2001).

176. State ex rel Stovall v. Meneley, 271 Kan. 355, 22 P.3d 124 (2001) (sheriff found to have knowingly and willfully concealed evidence of deputy's theft of drug evidence from the sheriff's office); State ex rel Stephen v. Adam, 243 Kan. 619, 760 P.2d 683 (1988) (person ousted from position as nonlawyer member of Supreme Court Nominating Commission after she obtained temporary permit to practice law); State ex rel. Miller v. Richardson, 229 Kan. 234, 623 P.2d 1317 (1981) (gross and repeated sexual improprieties by a county treasurer); State ex rel Tomasic v. Cahill, 222 Kan. 570, 567 P.2d 1329 (1977) (expense accounts claims for reimbursement for travel expenses submitted by two members of city board of public utilities were false, excessive and knowingly padded); State ex rel Londerholm v. Schroeder, 199 Kan. 403, 430 P.2d 304 (1967) (county commissioner sold utility generators and other items of equipment to county through other business names but did not deliver some of the merchandise paid for and had charged excessive prices); State ex rel Ferguson, v. Robinson, 193 Kan. 480, 394 P.2d 48 (1964) (a sheriff who allowed a prisoner to leave the confines of the jail and to spend the nights at home unsupervised); State ex rel Anderson v. Stice, 186 Kan. 69, 348 P.2d 833 (1960) (removal and ouster of a judge on ground of his disbarment; because the statute provided that each judge shall, at time of election, be admitted to practice law and required each attorney becoming judge to continue to possess right to practice law); State ex rel Fatzer v. Axton, 169 Kan. 49, 216 P.2d 784 (1950) (failure of mayor to enforce city criminal ordinances, including those prohibiting gambling and operation of slot machines); State ex rel Beck v. Harvey, 148 Kan. 166 (1938) (the alleged "borrowing" by clerk of district court of money belonging to the office of the clerk for her own personal use constituted embezzlement of those funds, as regards question of removal of clerk for willful misconduct).

177. K.S.A. 25-4302 (grounds for recall are conviction of a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law).

178. James Madison, in a letter to W.T. Barry, Aug. 4, 1822, The Writings of James Madison (G.P. Hunt, ed., IX 103 1910).