



## Kansas Attorney General Derek Schmidt

### A GUIDE TO OPEN MEETINGS (KOMA) AND OPEN RECORDS (KORA)

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## Kansas Open Meetings Act K.S.A. 75-4317 *et seq.*



### KOMA issues/concerns

- Executive sessions
  - Improper motions for executive sessions
  - Calling an executive session for one reason/subject, then discussing different subject matter in session
  - Inclusion of non-Commission/Council members in executive sessions
  - Extending an executive session without reconvening the open meeting, making a motion and voting
  - Failure to return to open meeting at the stated time/place after executive session
  - Revealing information discussed in executive session
- Serial communications
- Majority of membership of public body gathered together without notice
- Failure to provide notice of meetings



### History of open meetings

- K.S.A. 19-218 – Every board of county commissioners “shall sit with open doors, and all persons conducting in an orderly manner may attend their meetings. . . .”
- First adopted in 1868; last amended in 1923
- KOMA adopted in 1982; provides rules that allow members of the public to observe the nearly 4,000 units of government in Kansas making decisions



### Policy, construction, purpose

- K.S.A. 2016 Supp. 75-4317(a) - Meetings shall be open to the public because “a representative government is dependent upon an informed electorate. . . .”
- Law enacted for the “public benefit,” so construed broadly in favor of the public to give effect to its specific purpose of openness. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982)
- KOMA interpreted liberally and exceptions applied narrowly to carry out purpose



### Who is subject to KOMA?

- All legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds K.S.A. 2016 Supp. 75-4318(a)
- “Subordinate groups” – not defined; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



## Who is subject to KOMA?

- State bodies
  - State Legislature, its committees and subcommittees unless the rules state otherwise
  - State administrative bodies, boards and commissions
  - State Board of Regents
  - **Supreme Court nominating commission**
- Local Governments
  - Cities, counties and townships
  - School districts
  - Fire districts
  - **District judicial nominating commission**



## Who is not subject to KOMA?

- An otherwise covered entity when exercising a "quasi-judicial" function - K.S.A. 2016 Supp. 75-4318(g)(1)
- Hearings conducted under the Kansas Administrative Procedures Act (KAPA) K.S.A. 2016 Supp. 77-523(f); K.S.A. 2016 Supp. 75-4318(g)
- Judiciary
- Private organizations
- Staff meetings of a covered entity



## What is a meeting?

- Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of a public body or agency subject to the act
- For the purpose of discussing the business or affairs of the public body or agency

K.S.A. 2016 Supp. 75-4317a



## Gathering or assembly

- May conduct meetings by telephone or other medium (conference call, video, skype, go to meeting) if comply with all KOMA requirements
- Informal discussions before, after or during a recess of a public meeting may be subject to the KOMA
- Name of the gathering is irrelevant



## "Serial communications"

- Interactive communications outside of a noticed meeting may be a meeting under KOMA if:
    - Collectively involve a **majority of the membership** of the public body or agency
    - Share a **common topic** of discussion
    - Are **intended** by any or all participants **to reach an agreement on a matter that requires binding action** to be taken by the public body or agency
- K.S.A. 2016 Supp. 75-4318(f)
- Emails, calling trees, use of an agent (staff member)
    - Tip - DO NOT REPLY ALL, DO NOT FORWARD



## Majority of the membership

- Next whole number greater than one-half the total number of members
- Can be different than a quorum



## Discussion

- Binding action or voting not necessary
- Meeting includes all gatherings at all stages of the decision making process
- Social gatherings
- Retreats and meetings held in private
- Educational conference/seminar
  - Tip – when traveling to such meetings, advise members of public body to avoid discussing business or affairs



## Notice

- *Contrary to popular belief*, KOMA does not require notice of meetings to be published in a newspaper or on a website
  - Must request notice of meetings
  - No formalities to requesting notice – can be verbal or written
  - A request is valid for one fiscal year
  - Must notify of expiration before terminating notice
  - Presiding officer has duty to provide notice, but duty may be delegated
  - Provide date/time/location where public body will meet to person requesting notice a "reasonable time" before meeting
  - Group request for notice – provide to designated individual
- K.S.A. 2016 Supp. 75-4318(b)



## Meeting conduct

- KOMA does not address meeting procedures
- Agenda
  - Not required to create
  - Any agenda must include topics planned for discussion (if known) but may be amended during a meeting unless a statute or rule prohibits an amendment
  - If an agenda exists, must make agenda available to any person requesting the agenda
  - Agenda does not have to be mailed out in advance of meeting – may simply place the agenda in a public place



## Meeting conduct

- Use of cameras, photographic lights and recording devices
  - Public may record meeting as long as not disruptive
  - Use subject to reasonable rules to ensure orderly conduct of the meeting
- No public right to speak, but only to listen and observe
- Location of meeting - is it accessible to the public?
- No secret ballots
- Minutes – only required to record motion to go into executive session, but bylaws, ordinances, policies, etc., may require minutes to be kept



## Executive sessions

- Permits discussion of certain enumerated matters outside of public view
- An open meeting must be convened first and then **recess** into executive session
- No binding actions may be taken in an executive session, but a consensus is allowed
- If a consensus is achieved, an open and formal vote must be taken in open session



## Executive sessions

- Must be a formal motion seconded and carried; motion recorded in the minutes
  - Parts of the motion for executive session:
    - ✓ Justification for closure (brief description of topic to be discussed)
    - ✓ Subject matter (from the statute)
    - ✓ Time/place open meeting will resume
- K.S.A. 2016 Supp. 75-4319



## Executive sessions

Commonly used subject matters:

- Personnel matters of non-elected personnel
- Consultation with the public body's attorney
- Employer - Employee negotiations
- Confidential data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship (economic development)
- Matters affecting a student, patient or resident of a public institution
- Preliminary discussions relating to the acquisition of real property
- Security measures

K.S.A. 2016 Supp. 75-4319



## Executive sessions

Subject matter allowed:

### Personnel matters of non-elected personnel

- To protect the privacy interests of the employee
- Does not include independent contractors, appointments to boards or committees, or public officers
- May discuss applicants for employment

K.S.A. 2016 Supp. 4319(b)(1)



## Executive sessions

Subject matter allowed:

### Consultation with the body's attorney

- The attorney must be present
- The communication must be privileged
- No third parties may be present (breaks privilege)

K.S.A. 2016 Supp. 75-4319(b)(2)



## Executive sessions

Subject matter allowed:

### Employer-Employee negotiations

- For the purpose of formal negotiations – not general employee meetings or discussions
- School boards have special rules

K.S.A. 2016 Supp. 75-4319(b)(3)



## Executive sessions

Subject matter allowed:

### Confidential data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship

- Called the economic development exception, but make sure that the data being reviewed is confidential or a trade secret

K.S.A. 2016 Supp. 75-4319(b)(4)



## Executive sessions

Subject matter allowed:

### Matters affecting a student, patient or resident of a public institution.

- With this subject, any hearing must be open if requested by the person involved

K.S.A. 2016 Supp. 75-4319(b)(5)



## Executive sessions

Subject matter allowed:

Preliminary discussions relating to the acquisition of real property

- Acquisition only – not sale
- Remember – no binding action in executive sessions

K.S.A. 2016 Supp. 75-4319(b)(6)



## Executive sessions

Subject matter allowed:

Security Measures

- Open discussion would jeopardize security measures that protect infrastructure and the public; includes intelligence information, tactical plans, resource deployment and vulnerability assessments

K.S.A. 2016 Supp. 75-4319(b)(13)



## Kansas Open Records Act

K.S.A. 45-215 *et seq.*



## KORA issues/concerns

- Calculation and explanation of the “reasonable” fee/actual costs
- Records provided did not meet requester’s expectations
- Requester believes there should be existing public records, but none are found
- Is agency/entity covered by KORA, and if not, why not?
- Failure to respond within 3 business days
- Failure to provide the requested records
- Access to criminal investigation records



## Policy, construction, purpose

- “Public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy” – K.S.A. 45-216(a)
- KORA enacted in 1984; it replaced version enacted in 1957
- KORA provides the procedure for the public to view and make copies of governmental records
- KORA also defines and categorizes records



## Public record defined

- Any recorded information, regardless of form, characteristics **or location**, which is made, maintained or kept by or is in the possession of:
    - Any public agency
    - **Any officer or employee of a public agency pursuant to the officer’s or employee’s official duties and which is related to the functions, activities, programs or operations of any public agency**
  - Includes written records, photographs, computer data, and email
- K.S.A. 2016 Supp. 45-217(g)



## Public record defined

- Does not include:
  - Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds
  - Private person – **does not include an officer or employee of a public agency who is acting pursuant to the officer's or employee's official duties**
  - Records 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
  - Records not in existence at time of request
- Do not need to create records in order to fulfill a request  
K.S.A. 2016 Supp. 45-217(g)



## What is a “public agency?”

- The state
- Any political or taxing subdivision of the state, or any office, ~~office~~, agency or instrumentality thereof, or
- Any other entity receiving or expending or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision
- Instrumentality – not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered  
K.S.A. 2016 Supp. 45-217(f)(1)



## What is not a “public agency?”

- Private companies, even if they receive public funds in exchange for goods and services
- Municipal or state judge/justice  
K.S.A. 2016 Supp. 45-217(f)(2)



## Applying KORA to a request

- KORA is, in part, a procedural statute
- Best illustrated by reviewing the sequence of actions that should take place



## KORA requirements for public agencies

- Appoint a FOI officer to assist with KORA requests
- Display, distribute or otherwise make available a brochure describing requester rights, public agency responsibilities and procedures for inspecting or obtaining copies of public records
- Include the name/title of records custodian, fees and office hours available for anyone to make a request  
K.S.A. 45-226 and K.S.A. 45-227



## Who may make a request?

- Any person may make a request
- The person need not be a resident
  - *But see McBurney v. Young, US Sup. Ct., April 2013* (Not a violation of privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia)
- The person need not provide a reason for their request



## Form of the request

The public agency may require:

- The request to be in writing
- Only the requester's name and address
- Proof of identification
- Written certification that the requester will not use names and addresses obtained from the records to solicit sales or services



## Rights of the requester

- Unless closed by law, the public has the right to review all public records
- Any person may make abstracts or request copies of records
- If copies cannot be made where the record is located, arrangements must be made to allow copying
- If portions of a record are closed, the remainder must be made available to the requester



## Limitations on requester's rights

- Requester may not remove a public record without the written consent of the custodian
- Public agency not required to make copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations unless shown at a public meeting
- Copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening.



## Responding to the request

- The request must be "acted upon" as soon as possible, but not later than the end of the 3<sup>rd</sup> business day following date request is received – K.S.A. 45-218(d)
- The three acceptable responses:
  1. The record is provided (in the form requested, if possible)
  2. The request is under review and the records, if permitted, will follow
  3. The request is denied, with a detailed explanation for the denial

*Telegram Publishing Co., Inc. v. Kansas Department of Transportation, 275 Kan. 779, ¶ 4 (2003)*



## Allowable fees and charges

- Public agency may only recover actual costs to provide the requested records
  - These costs include staff time to retrieve, review and redact information from a record
  - Fees may be estimated and collected before the records are provided
- K.S.A. 45-218(f) and K.S.A. 2016 Supp. 45-219



## Categorizing records

- Presumption of openness
- Requested public records must be released unless an exemption to disclosure applies
- Burden rests on public agency to prove the requested records are exempt from disclosure
- Exemptions to disclosure – discretionary or mandatory closure
- Redaction – if record contains material not subject to disclosure, public agency "shall separate or delete such material" and make the record available



**Policy reasons records may be closed**

- Personal privacy
- Safety/security
- Internal communications while policies are developed or administrative procedures are underway



**Discretionary closure – personal privacy**

- Medical, psychiatric, psychological or alcoholism/drug dependency treatment records pertaining to identifiable patients – K.S.A. 2016 Supp. 45-221(a)(3)
- Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants **EXCEPT** exemption shall not apply to:
  - Names of employees
  - Positions/Titles
  - Salaries or actual employment contracts, including employment related contracts or agreements
  - Length of service
  - K.S.A. 2016 Supp. 45-221(a)(4)



**Discretionary closure – personal privacy**

- Clearly unwarranted invasion of personal privacy
    - Information that would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.
    - Examples – Mother’s maiden name, DOB, street address, phone number
- K.S.A. 2016 Supp. 45-221(a)(30)



**Discretionary closure – personal privacy**

- Records that would disclose the name, home address, email address, phone/cell number, or other contact information for concealed carry licensees, applicants or persons enrolled in or who completed weapons training – K.S.A. 2016 Supp. 45-221(a)(53)
- Records “shall not be disclosed unless otherwise required by law”
- Records relating to persons issued licenses, applicants or persons denied a license shall be confidential and cannot be disclosed pursuant to KORA; disclosure a class A misdemeanor – K.S.A. 2016 Supp. 75-7c06(b)
- Records of person whose license suspended or revoked subject to public inspection under KORA – K.S.A. 2016 Supp. 75-7c06(c)



**Discretionary closure – safety/security**

**Criminal investigation records**

- Protects innocent persons whose names might be involved in an investigation as suspects or informants
  - Protects integrity of an on-going case and investigative techniques
  - Built in standard of review
  - Definition
    - **Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera**
    - Records of investigatory agency or criminal justice agency compiled in the process of preventing, detecting or investigating violations of criminal law
- K.S.A. 2016 Supp. 45-221(a)(10)



**Discretionary closure – safety/security**

**Criminal investigation records**

- **Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera**
- Following categories of people may request to listen or view, and law enforcement agency shall allow listening or viewing:
  - Subject of recording
  - Parent/legal guardian of subject under 18 years of age
  - Attorney for subject of recording or parent/legal guardian
  - Heir at law, executor or administrator of decedent who is subject of recording
- Law enforcement agency may charge a reasonable fee





**Discretionary closure – safety/security**

**Criminal investigation records**

- What is a criminal investigation record?
  - Standard arrest reports – K.S.A. 2016 Supp. 22-4701(b); AGO 98-38
  - Mugs shots – AGO 87-25
  - Log of breath test machine results – AGO 87-63
  - Records pertaining to vehicular homicides
  - Coroner reports filed with the clerk of the district court which are designated as a criminal investigation record – K.S.A. 22a-232
  - Records of death investigations may be closed even if the death turns out to be from natural causes as long as there was initially a criminal investigation



**Discretionary closure – safety/security**

**Criminal Investigation Records**

- What is not a criminal investigation record?
  - Police blotter entries
  - Wanted posters
  - Court records of public proceedings or published opinions
  - Inmate rosters for jails/correctional/detention facilities
  - Violations of any traffic law other than vehicular homicide
  - Front page of Standard Offense Report but redact the name/identifying information of the victims of sex offenses and portions that constitute clearly unwarranted invasion of privacy
  - Custody time



**Discretionary closure – safety/security**

**Criminal Investigation Records**

- (A) Is in the public interest; *must be in the public interest – mere curiosity is NOT enough*
- (B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;
- (C) would not reveal the identity of any confidential source or undercover agent;
- (D) would not reveal confidential investigative techniques or procedures not known to the general public;
- (E) would not endanger the life or physical safety of any person; and
- (F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.



**Discretionary closure – safety/security**

- Records of a public agency on a public website which are searchable by a keyword search and that identify the home address or home ownership of a federal judge, supreme court justice, court of appeals judge, district judge, magistrate judge, **municipal judge**, US attorney for Kansas, assistant US Attorney, **special assistant US attorney**, AG, assistant AG, **special assistant AG**, county/district attorney, assistant CA/DA, **special assistant CA/DA**, **city attorney**, **assistant city attorney** or **special assistant city attorney**
  - Individual shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; individual may file new request for restriction at any time
- K.S.A. 2016 Supp. 45-221(a)(52)



**Discretionary closure – internal communications or procedures**

- Records privileged under rules of evidence, unless consent – K.S.A. 2016 Supp. 45-221(a)(2)
- Records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure – K.S.A. 2016 Supp. 45-221(a)(11)
- Correspondence between a public agency and a private individual, unless intended to give notice of a public agency action, policy or determination – K.S.A. 2016 Supp. 45-221(a)(14)



**Discretionary closure – internal communications or procedures**

- Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed **except** where such records are publicly cited/identified in an open meeting or in an agenda of an open meeting – K.S.A. 2016 Supp. 45-221(a)(20)
- Attorney work product - K.S.A. 2016 Supp. 45-221(a)(25)



### **Discretionary closure – internal communications or procedures**

- Appraisals/engineering/feasibility estimates/evaluations by or for a public agency relating to acquisition *or disposal* of property, prior to the award of formal contracts – K.S.A. 2016 Supp. 45-221(a)(13)
- Specifications for competitive bidding, until officially approved by the public agency - K.S.A. 2016 Supp. 45-221(a)(27)
- Sealed bids and related documents until a bid is accepted or all bids rejected – K.S.A. 2016 Supp. 45-221(a)(28)



### **Mandatory closure of records**

- There are records that are required to be closed by federal or state statute that are not found in KORA
- KORA will look to other statutes first
- Records custodian must be familiar with those records and what must be separated into the open and closed portions of a record



### **Mandatory closure of records Search and arrest warrants**

#### **Accessing warrants *executed before July 1, 2014***

- Closed to the general public
- Affidavits and sworn testimony given to obtain warrant were closed without a written court order
- Exception - the defendant or defendant's counsel – K.S.A. 22-2302(b) (arrests); K.S.A. 22-2502(d) (searches)



### **Mandatory closure of records Search and arrest warrants**

#### **Accessing warrants *executed on or after July 1, 2014***

- Must file request with *Clerk of the Court*
- Clerk must "promptly notify" defendant or defendant's counsel, the prosecutor, and the magistrate that such request was filed
- **Prosecutor shall promptly notify any victim**
  - Victim includes victim of any alleged crime that resulted in issuance of warrant OR
  - Victim's family if victim is deceased
  - Family defined in K.S.A. 74-7335



### **Mandatory closure of records Search and arrest warrants**

#### **Grounds for magistrate to redact or seals affidavit(s) or sworn testimony**

- Jeopardize **physical, mental or emotional** safety / well being of victim, witness, confidential source or undercover agent or cause destruction of evidence
- Reveal information from wiretap or unexpired warrant for a tracking device
- Interfere with any prospective law enforcement action, criminal investigation or prosecution
- Reveal identity of any confidential source or undercover agent
- Reveal confidential investigative techniques or procedures not known to general public
- Endanger life / physical safety of any person



### **Mandatory closure of records Search and arrest warrants**

#### **Grounds for magistrate to redact or seal affidavit(s) or sworn testimony**

- Reveal identifying information of victim of any sexual offense
- Reveal name of minor
- Reveal DOB, phone numbers, DL#, ID#,SSN, EIN, taxpayer ID #, VIN or financial account information
- **Constitute clearly unwarranted invasion of personal privacy**
  - Revealing information that is highly offensive to a reasonable person AND
  - Is totally unrelated to the alleged crime that may pose a risk to a person or property and is not of legitimate concern to the public



## Mandatory closure of records Search and arrest warrants

### Disclosure of warrants executed on or after July 1, 2014

- Judge orders disclosure with redactions – affidavit/sworn testimony part of court record that is accessible to the public
- Judge seals – affidavit/sworn testimony part of court record that is not accessible to the public
- Any request for disclosure of affidavit/sworn testimony is part of court record and is accessible to the public



## Mandatory closure of records Search and arrest warrants

- Criminal disclosure of an arrest or search warrant – K.S.A. 2016 Supp. 21-5906
  - Making public that warrant applied for or issued
  - Content of affidavit or testimony supporting warrant
  - Penalty - disclosure is a class B non-person misdemeanor
- LEO can disclose arrest or search warrant:
  - To gain assistance in executing warrant
  - To encourage the person named in the warrant to voluntarily surrender
  - Where warrant is issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by court issuing the warrant



## Redaction

- If a record contains material that is not subject to disclosure, the agency “shall separate or delete such material” and make the record available
- You can charge for staff time to redact

K.S.A. 2016 Supp. 45-221(d)



## Investigative Authority and Graduated Enforcement Options



## Investigative authority

- Attorney general, and district/county attorney may:
  - Issue subpoenas
  - Take testimony under oath
  - Examine relevant documentary material
  - Require attendance and take testimony under oath concerning such documentary materials
  - Serve interrogatories
- Any written assertion of confidentiality by public agency must be respected by the attorney general and county/district attorney who may not release the records received during an investigation without a court order (KORA)

K.S.A. 2016 Supp. 45-228; K.S.A. 2016 Supp. 75-4320b



## Investigative authority

- Mechanism to enforce investigative demands
- If any person willfully fails or refuses to file a response, attorney general or district/county attorney may, after notice, apply to district court to enforce
- District court may, after hearing:
  - Issue an order requiring a response
  - Grant other relief as required until the person responds

K.S.A. 2016 Supp. 45-228; K.S.A. 2016 Supp. 75-4320b



### Graduated enforcement options

- Consent judgment
- Consent order (CO)
- Finding of violation (FOV)
- District court enforcement of CO or FOV
- Enforcement action pursuant to K.S.A. 2016 Supp. 45-222 or K.S.A. 2016 Supp. 75-4320a



### Consent judgment

- Attorney general or county/district attorney
  - May accept a **consent judgment** in lieu of action per K.S.A. 45-222
  - Consent judgment may contain any remedy available to district court but shall not include an award of reasonable expenses, investigation costs or attorney fees
  - District court must approve consent judgment and enter judgment
  - Breach of consent judgment is violation of court order and subject to penalties provided by law
- K.S.A. 2016 Supp. 45-253; K.S.A. 2016 Supp. 75-4320f



### Consent order

- Preponderance of evidence standard
  - Anytime prior to filing an enforcement action per K.S.A. 2016 Supp. 45-222 or K.S.A. 2016 Supp. 75-4320a, AG may enter into a **consent order** that may:
    - Contain **admissions** of fact
    - Require completion of AG approved training
    - Impose civil penalty up to **\$250** for each violation
    - Set forth agreement to comply with the KORA/KOMA
    - Require submission of proof CO requirements met
- K.S.A. 2016 Supp. 45-251(a)(1)(A); K.S.A. 2016 Supp. 75-4320d(a)(1)(A)



### Consent order

- Signature of head of public body or agency, any officer found to have violated the KORA/KOMA, and of any other person required by the AG
  - KORA – if the public agency is a **governing body**, all members shall sign the CO
- K.S.A. 2016 Supp. 45-251(a)(1)(B); K.S.A. 2016 Supp. 75-4320d(a)(1)(B)



### Finding of violation

- Preponderance of evidence standard
  - AG issues FOV to public body or agency
  - FOV may contain **findings of fact** and **conclusions of law**
  - FOV may require the public agency to do any or all of the following:
    - Cease and desist from further violation
    - Comply with the KORA/KOMA
    - Complete AG approved training
    - Pay civil penalty up to **\$500** for each violation
    - Submit proof of compliance with the FOV
- K.S.A. 2016 Supp. 45-251(a)(2); K.S.A. 2016 Supp. 75-4320d(a)(2)



### CO/FOV enforcement

- AG may apply to district court to enforce CO or FOV
  - AG shall make demand of public agency or public body to comply with CO or FOV, and provide **reasonable opportunity to cure** the violation
  - Venue – county where CO or FOV issued or effective
  - KORA - District court may view records in chambers
- K.S.A. 2016 Supp. 45-251(c); K.S.A. 2016 Supp. 75-4320d(c)



### CO/FOV enforcement

- If district court finds that the AG did not abuse discretion, then court **shall**:
  - Enjoin the public agency or public body to comply with CO or FOV
  - Impose civil penalty not less than AG imposed and not more than **\$500** per violation
  - Require public agency or public body to pay AG's **court costs** and **investigative costs**
  - Impose other remedy authorized by K.S.A. 45-222(a)

K.S.A. 2016 Supp. 45-251(c)(4); K.S.A. 2016 Supp. 75-4320d(c)(3)



### CO/FOV enforcement

- If court finds the KORA/KOMA was violated, the court **may** require the public agency or public body to pay AG's **reasonable attorney fees**
- If the court finds the KORA was violated **and** the violation was not made in good faith and without a reasonable basis in fact or law, the court **shall** require the public agency or public body to pay the AG's **reasonable attorney fees**

K.S.A. 2016 Supp. 45-251(c)(5); K.S.A. 2016 Supp. 75-4320b(c)(4)



### Enforcement Action

- KOMA and KORA are civil statutes – not criminal
- Any person, county/district attorney, or the attorney general may bring an enforcement action in the district court of any county in which a meeting is held or where the records are located
- Such actions "shall take precedence over all other cases and shall be assigned for hearing and trial at the earliest practicable date" – K.S.A. 2016 Supp. 75-4320a(f) (KOMA)
- Such actions "shall be assigned for hearing and trial at the earliest practicable date" – K.S.A. 2016 Supp. 45-222(g) (KORA)



### Enforcement Action

- Venue – district court of county where meeting was held or the public records are located
- Burden of proving an exemption from disclosure is on the public agency
- Any member of a public body or agency who **knowingly** violates KOMA provisions or who **intentionally** fails to provide notice shall be liable
  - Purposeful commission of the prohibited acts
  - Specific intent to violate the law not required
- Any public agency that **knowingly** violates KORA provisions or **intentionally** fails to furnish information as required by the KORA
  - Review is *de novo* and court may review records in chambers



### Enforcement Action

- Remedies
  - Voiding action taken (attorney general or county/district attorney only) – KOMA only
    - Binding action taken at a meeting not in substantial compliance may be voided
    - Filed within 21 days of the meeting where alleged violation occurred
  - Injunction
  - Mandamus
  - Declaratory judgment
  - Other appropriate order



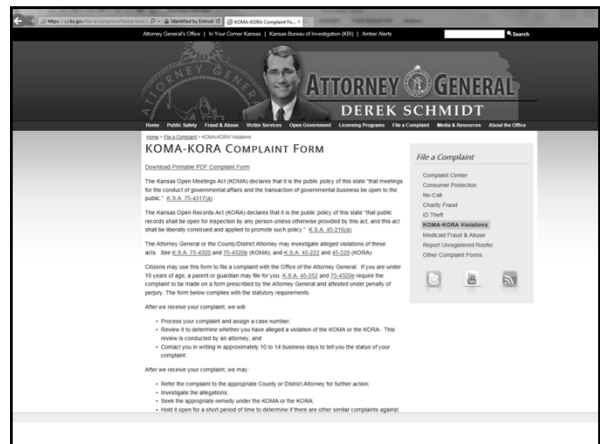
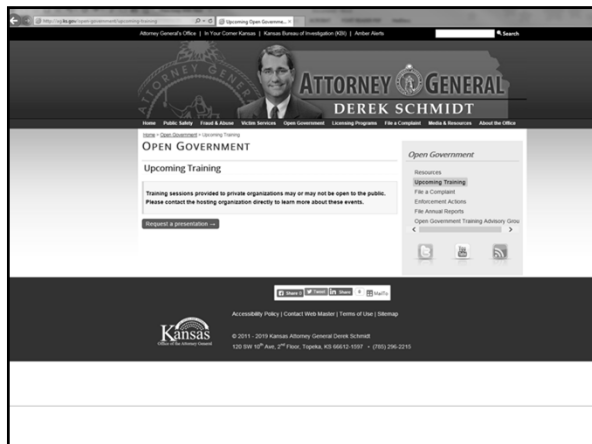
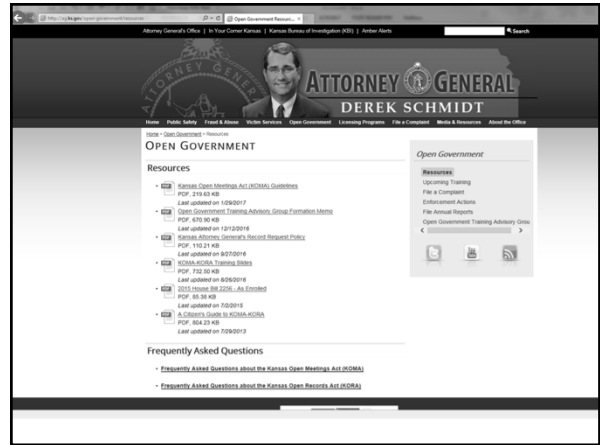
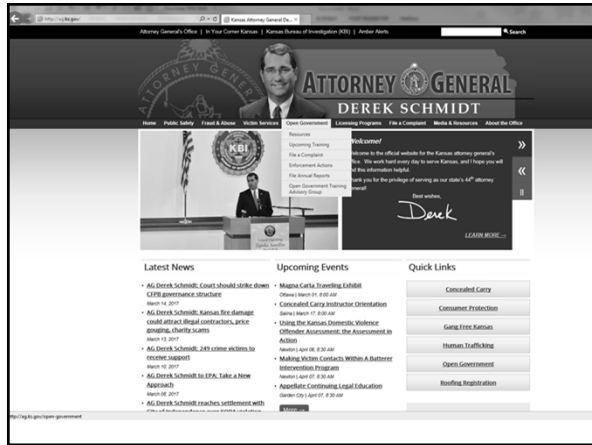
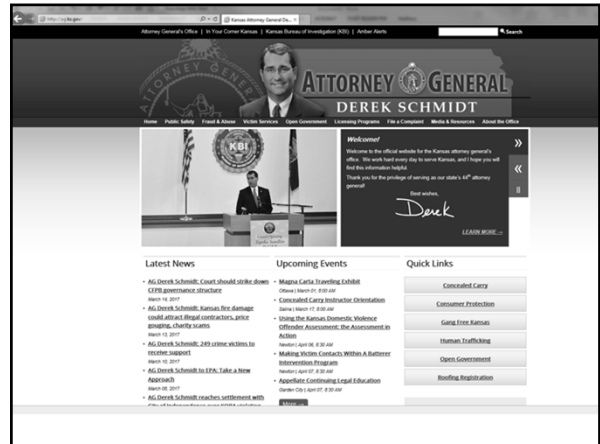
### Enforcement Action

- Penalties for violations - KOMA
  - Court may award **court costs** to person seeking enforcement of KOMA; award assessed against public body or agency
  - Court may award **court costs** to defendant if plaintiff maintained action frivolously, not in good faith or without reasonable basis in law or fact
  - Can be grounds for ouster or recall from office
- Penalties for violations - KORA
  - Costs/reasonable attorney's fees if public agency's denial not in good faith and without reasonable basis in fact/law; includes appeals
  - Costs/reasonable attorney's fees to public agency if requester's action not in good faith and without reasonable basis in fact/law; includes appeals



# Enforcement Action

- Fines up to \$500 per person for each violation (KOMA); up to \$500 for each violation (KORA)
- Court **may** award to AG or county/district attorney reasonable expenses, investigation costs and attorney fees
- Court **shall** award to AG or county/district attorney reasonable expenses, investigation costs and attorney fees if the violation was not made in good faith and without reasonable basis in fact or law



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100% Open Government

## OPEN GOVERNMENT

Enforcement Actions

The Attorney General's Office investigates and enforces the provisions of the Kansas Open Meetings Act (KOMA) and the Kansas Open Records Act (KORA). This is an index of enforcement actions taken by the Office of the Attorney General to help ensure transparency and open government. The Attorney General prods these actions to help educate the public, as well as members of governing bodies and public agencies, about the requirements of each act, pursuant to K.S.A. 40-2101 and K.S.A. 75-4305(a).

Enforcement Action	Issued On	Type	Size
2017-05-0201 City of Independence Kansas Open Records Act Failure to Provide Record	March 07, 2017	PDF	2.25 MB
2018-05-0202 Lawrence County Commission Kansas Open Meetings Act Violative Sessions	September 13, 2018	PDF	1.08 MB
2018-05-0203 Washington City Council Kansas Open Meetings Act Notice of Meetings	March 14, 2018	PDF	1.39 MB

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 Open Meeting Training  
 File a Complaint  
 Enforcement Actions  
 File Annual Reports  
 Open Government Training Authority (OTA)

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# Questions?

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## Thank you!

Additional resources:  
<http://ag.ks.gov/>  
<http://ag.ks.gov/open-government/resources>  
<http://ag.ks.gov/media-center/ag-opinions>  
<http://ksag.washburnlaw.edu/>  
 (Attorney General Opinions)