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December 28, 2011

ATTORNEY GENERAL OPINION NO. 2011- 023

The Honorable Susan Wagle
State Senator, Thirtieth District
4 Sagebrush
Wichita, KS 67203

RE: State Boards, Commissions and Authorities—Bioscience Authority—
Quorum Required to Transact Business; Executive Session, When Used,
Open Meetings Act Exceptions; Closing Meeting for Executive Session to
Discuss Marketing or Operational Strategies

State Departments; Public Officers and Employees—Open Public
Meetings—Open Meetings Declared Policy of State; Meeting Defined,
Conducting an Open Public Meeting Outside the State of Kansas

Synopsis: K.S.A. 2010 Supp. 74-99b07(b)(3) authorizes the Kansas Bioscience
Authority to close an open meeting for the purpose of having an executive
session to discuss or consider marketing or operational strategies absent
a "contract for" such topics if the KBA finds disclosure of such information
would be harmful to its competitive position. A public entity subject to the
Kansas Open Meetings Act may conduct meetings outside of Kansas or
by teleconference or videoconference if the public entity complies with all
of the requirements of the Kansas Open Meetings Act. Cited herein:
K.S.A. 2010 Supp. 74-99b02; 77-99b06; 74-99b07; 75-4317; 75-4317a;
75-4319.

* * *

Dear Senator Wagle:

As State Senator for the Thirtieth District, you request our opinion on two issues. First, you ask whether the Kansas Bioscience Authority (KBA), which is a public entity subject to the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, may close an open

meeting to have an executive session to discuss marketing or operational strategies unrelated to a contract. Your other question is whether a public entity that is subject to KOMA may conduct a meeting outside of Kansas.

Statutory Authority for an Executive Session

A quorum of the KBA Board is required to transact the business of the KBA at a meeting.¹ KOMA sets forth the public policy of Kansas "that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public."² Like other public agencies subject to KOMA,³ the KBA may close an open meeting to have an executive session for any of the exceptions enumerated in K.S.A. 2010 Supp. 75-4319(b).⁴ The KBA also may close an open meeting for an executive session pursuant to its own statutory provision—subsection (b) of K.S.A. 2010 Supp. 74-99b07. The pertinent part states:

Notwithstanding any provision of [KOMA], in the case of the [KBA], discussion and consideration on any of the following may occur in executive session, when in the opinion of the board, disclosure of the items would be harmful to the competitive position of the [KBA]:

...

(3) contracts for bioscience research, bioscience product manufacturing or commercialization, construction and renovation of bioscience facilities and marketing or operational strategies.

You question whether K.S.A. 2010 Supp. 74-99b07(b)(3) authorizes an executive session to discuss "marketing or operational strategies" absent a contract. In other words, does the phrase "contracts for" require the existence of a contract on a topic listed in K.S.A. 2010 Supp. 74-99b07(b)(3) as a condition to invoke an executive session. The short answer is no.

When interpreting a statute, parts of one provision cannot be read in isolation.⁵ An interpretation of subsection (3) requires that it be read in conjunction with the introductory paragraph of K.S.A. 2010 Supp. 74-99b07(b). It provides despite any contrary provisions in KOMA, "*discussion and consideration on any of the following* may occur in executive session, when in the opinion of the board, disclosure of the items would be harmful to the competitive position of the [KBA]."⁶ Arguably, the italicized

¹ K.S.A. 2010 Supp. 74-99b07(a).

² K.S.A. 2010 Supp. 75-4317(a).

³ See K.S.A. 2010 Supp. 75-4318(a) (sets forth criteria to determine whether a public agency is subject to KOMA).

⁴ K.S.A. 2010 Supp. 74-99b07(c).

⁵ *State v. McDaniel*, 292 Kan. 443, 445 (2011) (In construing a statute, a court does not consider only a certain isolated part or parts of an act but considers and construes together all parts thereof in *pari materia*).

⁶ K.S.A. 2010 Supp. 74-99b07(b). Emphasis added.

language implies the legislature intended a broader application than the suggested interpretation of "contracts for . . . marketing or operational strategies." This interpretation would authorize an executive session to discuss possible marketing or operational strategies and to determine if a contract to implement such strategies was necessary. By contrast, the suggested interpretation requires an existing contract on marketing or operational strategies for an executive session.

To determine legislative intent, we consider the purpose of the act and the effect the statute may have under other possible constructions. As far as practicable, the different provisions must be reconciled so that they are consistent, harmonious, and sensible.⁷

When it enacted the Bioscience Authority Act (the Act), the legislature made six declarations.⁸ Two of those declarations state:

[T]he mission of the [KBA] is to make Kansas the most desirable state in which to conduct, facilitate, support, fund and perform bioscience research, development and commercialization, to make Kansas a national leader in bioscience, to create new jobs, foster economic growth, advance scientific knowledge and improve the quality of life for the citizens of the state of Kansas.

[T]he needs of the citizens of the state of Kansas and the public and private entities engaged in the biosciences will be best served by an independent public authority charged with the mission of facilitating, supporting, funding and performing bioscience projects for the benefit of its citizens to promote the state's research, development and commercialization objectives.⁹

These declarations set forth an essential role of the KBA—to compete with locations outside of Kansas in the research, development, commercialization, funding, education, and performance of bioscience technology. To carry out this role, it is reasonable to conclude that KBA's development of plans and strategies in the bioscience field must remain confidential so that a competitor outside of Kansas does not usurp the role that the legislature entrusted to KBA or unjustly benefit from such confidential information. Another provision of the Act supports this conclusion.

K.S.A. 2010 Supp. 74-99b06(b)(1) provides:

Notwithstanding any provision of [the Kansas Open Records Act] to the contrary, the following records of the [KBA] shall not be subject to the provisions of the Kansas Open Records Act, when in the opinion of the board, the disclosure of the information in the records would be harmful to the competitive position of the [KBA]:

⁷ *McDaniel*, 292 Kan. at 445.

⁸ L. 2004, Ch. 112, § 2(a)(1)-(6); now codified in K.S.A. 2010 Supp. 74-99b02(a)(1)-(6).

⁹ *Id.* at (a)(5) and (6).

(A) Proprietary information gathered by or in the possession of the authority from third parties pursuant to a promise of confidentiality;

(B) contract cost estimates prepared for confidential use in awarding contracts for research development, construction, renovation, commercialization or the purchase of goods or services; and

(C) data, records or information of a proprietary nature produced or collected by or for the authority, its employees, officers or members of its board; financial statements not publicly available that may be filed with the authority from third parties; the identity, accounts or account status of any customer of the authority; *consulting or other reports paid for by the authority to assist the authority in connection with its strategic planning and goals; and the determination of marketing and operational strategies where disclosure of such strategies would be harmful to the competitive position of the authority.*¹⁰

The language for an executive session in K.S.A. 2010 Supp. 74-99b07(b)(3) must be reconciled with the language for the closure of records in K.S.A. 2010 Supp. 74-99b06(b)(1)(C) so that they are consistent, harmonious, and sensible.¹¹ If we were to conclude that the KBA must discuss in an open meeting marketing or operational strategies that did not involve a contract, the result would be KBA would have to discuss in open meeting the records concerning its marketing or operational strategies that can be closed under K.S.A. 2010 Supp. 74-99b06(b)(1)(C). Such discussions in an open meeting could be detrimental to the competitive position of the KBA. Thus, the suggested interpretation of K.S.A. 2010 Supp. 99b07(b)(3) is not consistent or harmonious with K.S.A. 2010 Supp. 99b06(b)(1)(C).

We conclude that K.S.A. 2010 Supp. 74-99b07(b)(3) authorizes the KBA to close an open meeting and have an executive session to discuss or consider marketing or operational strategies absent a "contract for" such topics if the KBA finds disclosure of such information would be harmful to its competitive position.

Open Meetings Conducted Outside of Kansas

Your other question is whether a governmental entity subject to KOMA may conduct a meeting outside of Kansas. We have addressed this issue in prior opinions¹² and you inquire whether our conclusion in those opinions remains unchanged. The answer is yes.

¹⁰ Emphasis added.

¹¹ *McDaniel*, 292 Kan. at 445.

¹² See Attorney General Opinion Nos. 82-133 and 86-153.

As noted above, public bodies subject to KOMA must conduct meetings open to the public.¹³ KOMA does not contain any requirement that a public body hold an open meeting at a certain location or that the open meeting be held in Kansas. Rather, KOMA provides that "[i]t is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings."¹⁴ In our prior opinions, we identified factors for determining whether a meeting outside of Kansas could subvert the policy of open meetings.

In Attorney General Opinion No. 82-133, the question was whether KOMA would be violated if city commissioners of Lawrence conducted an open meeting in Colorado if those who had asked to be notified of all city commission meetings were invited to attend. We rejected the notion that compliance with all procedural and notice requirements contained in KOMA made the meeting open to the public. For a meeting to be open, it must be accessible to the public. We concluded that the open meeting by the Lawrence City Commissioners would violate KOMA because a meeting in Colorado would result in additional inconvenience and excessive expenses for the public citizens who attended the meeting.

By contrast, in Attorney General Opinion No. 86-153, we determined that the Kansas Dental Board would not violate KOMA if it held an open meeting in Kansas City, Missouri, at the alumni meeting of the University of Missouri School of Dentistry. The considerations of expense and inconvenience did not operate as barriers of public access to the meeting because many of the Board's licensees were alumni of that school. Thus, the meeting would make the Board more accessible to the persons most interested in the business conducted by the Board.

Since the issuance of the above opinions, electronic communication has changed. The definition of a meeting now reflects that change. A meeting, for purposes of KOMA, "means any gathering or assembly in person or *through the use of a telephone or any other medium for interactive communication* by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."¹⁵

Based upon this definition of a meeting, we determined in Attorney General Opinion No. 2005-3 that a public entity subject to KOMA may conduct meetings through electronic means such as teleconference or videoconference. When utilizing these alternatives, the public agency must still meet the requirements of KOMA. Thus, the general public should be provided with a means of listening to the discussion and be able to ascertain how individual members of the public body voted on matters, and the public entity may close the meeting in accordance with K.S.A. 2010 Supp. 75-4319 and must provide notice of the electronic meeting if notice was requested.

¹³ K.S.A. 75-4317(a).

¹⁴ K.S.A. 75-4317(b).

¹⁵ K.S.A. 2010 Supp. 75-4317a. Emphasis added.

Because the legislature has not changed the statutes upon which the above opinions are based, we cannot discern any reason to change our conclusions. Thus, if a public entity is subject to KOMA and the meeting satisfies the criteria of a meeting under KOMA, a public entity can hold its meeting outside of Kansas if it determines that: (1) it is considered reasonably necessary to conduct public business outside of Kansas rather than a subversion of the policy for open public meetings; (2) persons requesting notice of the meeting will be given such notice; and (3) the inconvenience and cost for interested persons to attend a meeting outside of Kansas or by teleconference or videoconference is not excessive.

In summary, a public entity subject to KOMA may conduct meetings outside of Kansas or by teleconference or videoconference if it complies with all of the requirements of KOMA.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Janet L. Arndt

Janet L. Arndt
Assistant Attorney General

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