

BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Shawnee County, Kansas

In the Matter of the)
)
Baldwin City Council.)

Case No. 2017-OG-0005

CONSENT ORDER

NOW on this 5th day of October, 2017 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(d)(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about June 26, 2017, the Attorney General's Office received a complaint alleging that the Baldwin City Council (the council) violated the KOMA. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the council engaged in serial communications in violation of K.S.A. 2016 Supp. 75-4318(f), which provides such interactive communications in a series shall be open if they collectively involve a majority of a public body, have a common topic of discussion concerning the business or affairs of the public body, and are intended by any or all or the participants to reach an agreement on a matter that would require binding action to be taken by the public body.

2. The council is a public body that is subject to the requirements of the KOMA and must comply with the KOMA.

3. Investigation and/or statements provided by or on behalf of the council, as described in a letter dated August 30, 2017, to the council's attorney Matthew H. Hoy, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violations of the KOMA by a preponderance of the evidence:

- a. On or about June 20, 2017, Mayor Pearse relayed to City Clerk Laura Hartman a conversation the mayor had with city council member Kathy Gerstner concerning an upcoming appointment to a vacant city council seat.

Shortly after her conversation with Ms. Gerstner, the mayor received a phone call from council member David Simmons expressing his “displeasure with her upcoming appointment to a vacant council seat.” “In the words of Mayor Pearse ‘he (David) could have at least used his own words . . . [m]eaning, he said verbatim what Kathy Gerstner said. Later that same date, Christi Darnell called the Mayor, [sic] with the same concerns about the Mayors [sic] upcoming appointment to the city council.” According to the mayor, Ms. Gerstner “talked to her after the city council meeting and stated ‘they are going to put together a resolution’ saying the appointment is unqualified or unfit . . . Mayor Pearse concluded it was clear three (3) council members had already decided to write a resolution.” The council stipulates to these factual statements. These discussions outside of an open meeting constitute serial communications in violation of K.S.A. 2016 Supp. 75-4318(f).

- b. On March 7, 2017, the council failed to comply with the requirements set forth in K.S.A. 2016 Supp. 75-4319(a) for recessing into executive session when its motion failed to state the justification for the executive session. The council stipulates to this violation.

4. Based upon the above information, Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown, individually admit and agree that they violated the KOMA as set out in paragraphs 3.a. and 3.b. above.

5. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown now fully understand and agree that they fully intend to comply with the requirements of K.S.A. 2016 Supp. 75-4318(f) concerning serial communications.

6. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown now fully understand and agree that for each executive session held they intend to comply with the requirements of L. 2017, Ch. 73, Section 4 (HB 2301).

7. The Attorney General and Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown, mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

8. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown understand and waive all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

9. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown waive any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open meetings (KOMA), and subject to an action for civil penalties or enforcement, and thus they do not have a right to appeal under the KJRA.

10. The Attorney General accepts the waivers and stipulations by Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown be subject to this Order based on the provisions of K.S.A. 2016 Supp. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body for violation of the KOMA in a Consent Order;

AND WHEREAS the Attorney General and Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown consent to the following terms and conditions, and the Attorney General orders that:

11. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown agree to and shall:

- a. Ensure that the mayor and each council member individually obtains at least one (1.0) hour of training on the provisions of the KOMA to be presented by an attorney experienced in dealing with open meetings issues, within three months of the date of this Consent Order;
- b. Provide the Attorney General's Office with a written statement confirming that each board member has

obtained the required KOMA training within ten days of receiving the training; and

- c. Not engage in any future violations of the KOMA.

12. Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown understand and agree that if they fail to comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 2016 Supp. 75-4320d(c) and amendments thereto.

13. Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown understand and agree that if they engage in any future violation of the KOMA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

14. Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown agree and understand that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KOMA may be subject to investigation proceedings as provided by K.S.A. 2016 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

15. In consideration of these admissions and agreements by Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KOMA set forth herein.

16. Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown agree that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

17. Except as provided in paragraphs 12 and 13, this Consent Order shall operate as a complete release of all claims Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Mayor Marilyn Pearce, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown agree not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such

litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown agree that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

18. Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(e) and amendments thereto.

19. This Consent Order shall be a public record in the custody of the Office of the Attorney General.

20. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

21. This Consent Order shall become effective on the date indicated in the Certificate of Service.

WHEREFORE, the Attorney General and Mayor Marilyn Pearse, and council members Christi Darnell, Kathy Gerstner, David Simmons and Tony Brown consent to these provisions.

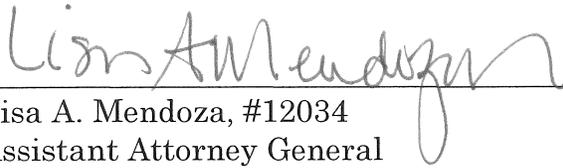
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Derek Schmidt", is written over a horizontal line.

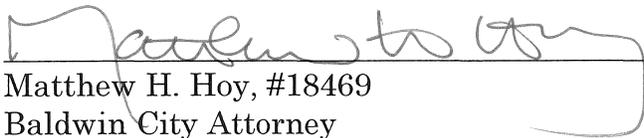
Derek Schmidt
Kansas Attorney General

Prepared By:



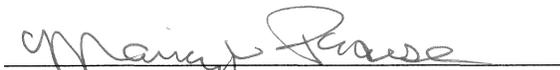
Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597

Approved By:



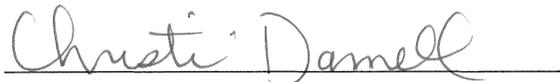
Matthew H. Hoy, #18469
Baldwin City Attorney
c/o Stevens and Brand LLP
900 Massachusetts, Suite 500
Lawrence, KS 66044
Attorney for the Baldwin City Council

Baldwin City Council



Marilyn Pearse, Mayor

9/19/17
Date



Christi Darnell

9/19/17
Date



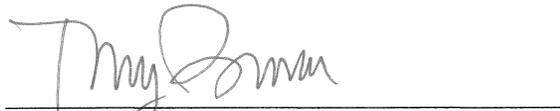
Kathy Gerstner

9/19/17
Date



David Simmons

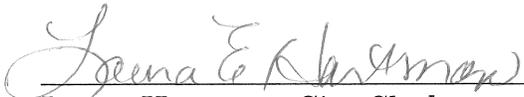
9/19/17
Date



Tony Brown

19 Sept 2017
Date

ATTEST:



Laura Hartman, City Clerk

09.19.2017

Date

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2017, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Matthew H. Hoy
Baldwin City Attorney
c/o Stevens and Brand LLP
900 Massachusetts, Suite 500
Lawrence, KS 66044
Attorney for the Baldwin City Council



Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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August 30, 2017

Matthew H. Hoy
Stevens & Brand, LLP
US Bank Tower
900 Massachusetts, Suite 500
PO Box 189
Lawrence, KS 66044-0189

RE: KOMA Complaint – Baldwin City Council

Dear Mr. Hoy:

On June 27, 2017, this office received a complaint from Baldwin City Clerk Laura Hartman reporting a possible violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.* by the Baldwin City Council.

The complaint raises concerns that a majority of the council's members discussed an upcoming appointment to a vacant council seat outside of an open meeting. As a remedy, Ms. Hartman seeks the following: "Other: Remind Council of KOMA, education [sic]."

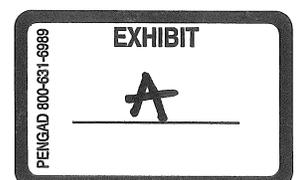
The purpose of this letter is to inform you of the results of our review. We relied on the complaint, the council's submission, the provisions of the KOMA, caselaw and prior Attorney General Opinions as noted herein, in reviewing this matter.

Following our review, it is clear that the council is a public body or agency subject to the KOMA,¹ and thus this office has jurisdiction to review any complaint that the KOMA has been violated.²

During our review, we identified two issues that warrant further discussion.

¹ K.S.A. 2016 Supp. 75-4318(a).

² See K.S.A. 2016 Supp. 75-4320(a), 75-4320b and 75-4320d.



Preliminary matters

As a preliminary matter, we note that the City of Baldwin City is a city of the third class, and has adopted the Mayor/Council form of government.³ There are five council members in addition to a mayor. The mayor in cities of the third class “shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other, and shall have general supervision over the affairs of the city. The mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and he or she shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty.”⁴ The “membership of the body in a mayor-council form of municipal government does not include the mayor for the purposes of determining the minimum number of persons that can constitute a meeting.”⁵

Pursuant to the Code of the City of Baldwin City, Kansas, the governing body consists of the mayor and five councilmembers.⁶

Serial communications

a. Complaint allegations

The basis of the complaint is that a majority of the Baldwin City Council engaged in a series of communications outside of an open meeting concerning the appointment to fill a vacant council position, and that these communications constituted serial meetings in violation of the KOMA.

b. What is a meeting under the KOMA?

It is the public policy of Kansas that all meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.⁷ A meeting is defined as “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 public body or agency subject to [the KOMA] for the purpose of discussing the business or affairs of the public body or agency.”⁸

The definition of “meeting” as set out in the KOMA contains three distinct elements. All must be met in order to constitute a meeting.

³ K.S.A. 15-101.

⁴ K.S.A. 15-301.

⁵ AGO 86-110, <http://ksag.washburnlaw.edu/opinions/1986/1986-110.pdf>, accessed August 23, 2017.

⁶ Code of the City of Baldwin City, Kansas, Article 2, Governing Body, Section 1-201, Governing body, <http://baldwincity.citycode.net/index.html#!articleGoverningBody>, accessed August 24, 2017.

⁷ K.S.A. 2016 Supp. 75-4317(a).

⁸ K.S.A. 2016 Supp. 75-4317a.

The first element is a “gathering or assembly, in person or through the use of . . . any other medium for *interactive communication*.”⁹ Electronic communication, or email, can be a method of interactive communication, but the communication must be “interactive” to meet this requirement.¹⁰ For the purposes of the KOMA, “interactive communication” requires a *mutual or reciprocal exchange* between or among members of a body or agency subject to the Act.¹¹ “Simply sending a message to other board members [does] not constitute interactive communication within the meaning of the KOMA.”¹² Interactive communication does not occur when a non-member of a public body communicates with a majority of that body and a member responds and shares that response with other members.¹³

The second element is that a *majority* of the public body is involved in the interactive communication.¹⁴ A majority has been defined as the number greater than half of any total.¹⁵ For a public body such as the council that has five members, a majority is three of the five members.

The third element is that the interactive communication must be *for the purpose of discussing the business or affairs of the body*. Cities are generally empowered to determine their local affairs and government by ordinance,¹⁶ and are also authorized to levy taxes in each year for the general fund and other city purposes.¹⁷ A city’s business includes such things as improving streets;¹⁸ regulation of levees, depots/depot grounds, freight storage, railway crossings, the running of railway engines except speed, adoption of rules and restrictions to prevent accidents at railways crossings, and on railway tracks and to prevent engine fires;¹⁹ and entering contracts.²⁰

Typically, the meetings of a public body occur in person. However, a meeting may also occur by means of a serial communication.²¹ Some communications are only one way

⁹ *Id.* Emphasis added.

¹⁰ Attorney General Opinion 95-13, <http://ksag.washburnlaw.edu/opinions/1995/1995-013.htm>, accessed August 23, 2017.

¹¹ Attorney General Opinion 2009-22, <http://ksag.washburnlaw.edu/opinions/2009/2009-022.htm>, accessed August 23, 2017.

¹² *Id.*

¹³ *Id.*

¹⁴ K.S.A. 2016 Supp. 75-4317a.

¹⁵ Attorney General Opinion 1996-32, <http://ksag.washburnlaw.edu/opinions/1996/1996-032.htm>, accessed August 23, 2017.

¹⁶ K.S.A. 12-101.

¹⁷ K.S.A. 12-101a

¹⁸ K.S.A. 15-427.

¹⁹ K.S.A. 15-438.

²⁰ K.S.A. 12-101.

²¹ K.S.A. 2016 Supp. 75-4318(e) (“ . . . interactive communications in a series shall be open if they collectively involve a majority of the membership of the public body or agency, share a common topic of discussion concerning the business or affairs of the public body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the public body or agency.”).

and do not reach a majority of the public body. In some circumstances, the communications between members on the same topic may be serial, ultimately reaching a majority of the membership of the public body. “This type of communication is subject to the KOMA’s requirement of openness.” Such interactive communications in a series are colloquially known as “serial communications.” “Interactive communications in a series shall be open if they collectively involve a majority of the membership of the public body or agency, share a common topic of discussion concerning the business or affairs of the public body or agency, and are intended by any or all of the participants to reach agreement on matter that would require binding action to be taken by the public body or agency.”²² “Each communication between members of a governing body or agency must be reviewed to determine if the four conditions contained in the definition” of serial communications are met.²³ Thus, whether a series of communications is a violation of the KOMA is very fact specific, and each situation must be decided on its facts.²⁴

With these rules in mind, we turn to the facts of this case, and a review of the communications that were exchanged.

c. Relevant facts

At the time of the complaint, the council was comprised of the following:

- Marilyn Pearse, Mayor
- Christi Darnell, Council Member
- Kathy Gerstner, Council Member
- David Simmons, Council Member
- Tony Brown, Council Member, and
- A.J. Stevens, Council Member.

On July 5, 2017, Mr. Stevens was installed as a council member to fill the unexpired term of council member Steve Bauer. On May 19, 2017, Mr. Bauer and his wife Alison were killed in an automobile accident.²⁵ The actions giving rise to the complaint occurred prior to Mr. Stevens’ installation as a council member on July 5, 2017.²⁶

²² K.S.A. 2016 Supp. 75-4318(f).

²³ Attorney General Opinion 2009-22, *supra*.

²⁴ Attorney General Opinion 1998-49, <http://ksag.washburnlaw.edu/opinions/1998/1998-049.htm>, accessed August 16, 2017.

²⁵ Kevin Surbaugh, *Two Baldwin City Residents Killed in Anderson County Accident*, BALDWIN CITY GAZETTE, May 20, 2017, <http://www.baldwingazette.com/2017/05/two-baldwin-city-residents-killed-in.html>, accessed August 24, 2017.

²⁶ City of Baldwin City, Minutes from the July 05, 2017, Regular Council Meeting, <http://www.baldwincity.org/cms/images/July-5-2017-Minutes.pdf>, accessed August 24, 2017.

After Mr. Bauer's untimely death, the council and mayor were faced with the difficult task of identifying and installing a new member to complete Mr. Stevens' unexpired term of office. According to the council's response, differences arose in the process to select a new council member.²⁷ The city code provides that, "[I]n case of a vacancy in the council occurring by reason of resignation, death, or removal from office or from the city, the mayor, by and with the advice and consent of the remaining council members, shall appoint an elector to fill the vacancy until the next election for that office. . . ."²⁸

According to the complaint,²⁹ on or about June 20, 2017, Mayor Pearse relayed to Ms. Hartman a conversation the mayor had with city council member Kathy Gerstner concerning an upcoming appointment to a vacant city council seat. Shortly after her conversation with Ms. Gerstner, the mayor received a phone call from council member David Simmons expressing his "displeasure with her upcoming appointment to a vacant council seat." "In the words of Mayor Pearse 'he (David) could have at least used his own words . . . [m]eaning, he said verbatim what Kathy Gerstner said. Later that same date, Christi Darnell called the Mayor, [sic] with the same concerns about the Mayors [sic] upcoming appointment to the city council." According to the mayor, Ms. Gerstner "talked to her after the city council meeting and stated 'they are going to put together a resolution' saying the appointment is unqualified or unfit . . . Mayor Pearse concluded it was clear three (3) council members had already decided to write a resolution. Later that day, [Ms. Hartman] called the League of Kansas Municipalities and spoke with their legal counsel to find out the wording of the Resolution as requested by the Mayor. The LKM attorney stated, 'how do they know they are going to have a Resolution?' [Ms. Hartman] explained the conversations above and was then told that this sounds like a possible violation of [the] Open Meetings Act. [Ms. Hartman] alerted by City Administrator as well as Mayor Pearse . . . because the legal counsel at the League of Municipalities told [Ms. Hartman] this could be a possible violation of the Open Meetings Act; [sic] that we should report it as so."

In its response, the council states as follows:

. . . the governing body acknowledges the general accuracy of the statement provided by the City Clerk, Laura Hartman . . . and hereby stipulates to those factual statements. In short, the governing body is admitting to the KOMA violations referenced [in the complaint] as a result of interactive communications reaching a majority of the governing body. The governing body is doing this to 'own up' to this matter and

²⁷ Governing Body of Baldwin City, Kansas Response to KOMA Complaint, August 15, 2017, p. 1.

²⁸ Code of the City of Baldwin City, Kansas, Article 2, Governing Body, Section 1-202, Same; vacancy in office, subsection (a), <http://baldwincity.citycode.net/index.html#!articleGoverningBody>, accessed August 24, 2017.

²⁹ Complaint of Laura Hartman dated June 26, 2017, p. 4-5.

assume responsibility for the violations of the KOMA expressed in [the complaint]. . . .³⁰

The council states that as the governing body, it “is cognizant of its singular nature even though the governing body is comprised of six individuals. In responding to the KOMA complaint, this response is given in unison, which recognizes the singular nature of the governing body even though not each individual of the governing body was involved in actions which comprise the KOMA complaint.”³¹

No member of the council has ever been found to be in violation of the KOMA.

Included in the council’s response is a written statement from the mayor and each council member, including Mr. Stevens, which states in part, “as a member of the governing body of Baldwin City, this letter shall serve as my statement that I will not take any action in the future in violation of the Kansas Open Meetings Act. . . .”³²

We will discuss additional facts as necessary to an understanding of our discussion and conclusions.

d. Discussions outside of an open meeting

Because the council stipulates that it engaged in serial communications, we need not engage in an in-depth review of its communications. By stipulating to serial communications, the council is admitting that its communications were mutual or reciprocal exchanges of information that collectively involved a majority of the membership of the council, shared a common topic of discussing concerning the business or affairs of the council, and was intended by any or all of the participants to reach an agreement on a matter that would require binding action to be taken by the council. These communications completed the slide down the slippery slope³³ to a KOMA violation.

In light of the council’s stipulations, we must conclude that the council engaged in serial communications in violation of the KOMA.

Although the council admits that it violated the KOMA by engaging in serial communications, our analysis does not end there. We must consider whether this is more than a technical violation³⁴ of the KOMA. “Technical violation” is a term of art adopted by courts in discussing KOMA violations. “Our courts will look to the spirit of

³⁰ Governing Body of Baldwin City, Kansas Response to KOMA Complaint, August 15, 2017, p. 2.

³¹ *Id.*, p. 2.

³² *Id.*, pp. 9-14.

³³ Attorney General Opinion 2000-64, <http://ksag.washburnlaw.edu/opinions/2000/2000-064.htm>, accessed August 18, 2017.

³⁴ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted].”³⁵

We understand that the council was confronted with a difficult and even painful task—finding a new council member to complete the unexpired term of a valued colleague and friend. However, we must also be mindful of the KOMA’s procedural safeguards, which are designed to ensure that the public’s business is discussed in public. “The thrust of the KOMA is openness in the cluster of concepts that flavor the democratic process: discussion, analysis, and decision-making among members of a governing body.”³⁶ The legislature did not intend for such discussion, analysis and decision-making to occur in secret and undetected.³⁷ Therefore, we cannot condone the conversations council members held outside of an open meeting related to who each member could or could not support to fill the vacant council seat. “Public bodies cannot be allowed to do indirectly what the legislature has forbidden.”³⁸

Certainly the council’s actions of discussing who should be installed to complete Mr. Bauer’s unexpired term harmed the spirit and intention of the KOMA. The council failed to recognize and appreciate the danger of serial communications. The red flag from the attorney for the League of Municipalities came too late. It appears that council members’ desire to honor their friend overcame the boundaries designed to ensure the public discussion of the public’s business imposed by the KOMA. This is simply not acceptable.

In mitigation, the council’s June 6, June 20, and July 5, 2017 agenda’s contained discussion items concerning the process for appointment to the vacant unexpired council seat,³⁹ and its meeting minutes reflect the council’s discussion of this matter during its open meeting, as well as the appointment, approval and installation of a new council member.⁴⁰ We have no evidence to suggest that council members routinely engage in serial communications, or that their actions were meant as a subterfuge to

³⁵ *Id.*

³⁶ *State ex rel. Stephan v. Board of County Com’rs of Seward County*, 254 Kan. 446, 452, 866 P.2d 1024, 22 Media L. Rep. 1430 (1994).

³⁷ *Id.*; *see also* K.S.A. 2016 Supp. 75-4317(a) (declaring public policy that “meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”).

³⁸ *Memorial Hospital Ass’n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

³⁹ City of Baldwin City Council Meeting Agenda, <http://www.baldwincity.org/cms/images/Council-Packet-06.06.2017-1.pdf> (June 6, 2017); <http://www.baldwincity.org/cms/images/Council-Packet-06.20.2017-1.pdf> (June 20, 2017); <http://www.baldwincity.org/cms/images/July-5-2017-Council-Packet-1.pdf> (July 5, 2017), accessed August 24, 2017.

⁴⁰ City of Baldwin City Minutes from the June 06, 2017 Regular Council Meeting, <http://www.baldwincity.org/cms/images/06.06.2017-Minutes.pdf>; City of Baldwin City Minutes from the June 20, 2017 Regular Council Meeting, <http://www.baldwincity.org/cms/images/06.20.2017-Minutes.pdf>; City of Baldwin City Minutes from the June 20, 2017 Regular Council Meeting, <http://www.baldwincity.org/cms/images/July-5-2017-Minutes.pdf>, accessed August 24, 2017.

avoid the transaction of business in the public eye, thus defeating the purposes of the KOMA. The council did not hesitate to take responsibility for the violation and “own[ed] up” to it, rather than trying to explain it away or denying that it occurred. Finally, the council has been engaged, cooperative and forthcoming in its responses to our inquiries.

The KOMA exists to protect the public. The public’s right to know is protected when the transaction of governmental business, including the appointment of an individual to fill a vacant council seat for an unexpired term, is conducted in an open meeting. When such discussions are held outside of an open meeting, there is a danger that there will be no *public* discussion of such matters.

After considering the totality of the circumstances, we find that the council’s serial communications impinge on the public’s right to know and undermines the foundation of the KOMA. Although perhaps understandable, we believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

Matters not identified in the complaint

We identified an additional matter during our review that merits further discussion.

As part of our initial request for information, we advised the council that we had identified a concern related to its executive session motions. Our concern arose from our review of the council’s available meeting meetings. Specifically, it appeared that when the council recessed into executive session, it did not always meet the statutory requirements.⁴¹

It bears repeating that meetings for the conduct of government affairs and the transaction of governmental business must be open to the public.⁴² A public body may, but is not required to, hold an executive session. If the public body decides to recess into executive session, the public body must follow a specific procedure in order to comply with certain statutory requirements.⁴³ Although the law has since been amended,⁴⁴ during the relevant time period it provided as follows: “Upon formal motion made, seconded and carried, all public bodies and agencies subject to [the KOMA] may recess but not adjourn, open meetings for closed or executive meetings. Any motion for [executive session] shall include a statement of (1) the justification for closure, (2) the subjects to be discussed during the closed or executive meeting and (3)

⁴¹ K.S.A. 2016 Supp. 75-4319(a). On July 1, 2017, the provisions of HB 2301 became effective. It substantively amends K.S.A. 75-4319(a). However, all the executive session motions we reviewed occurred prior to July 1, 2017, and are governed by the prior version of the law.

⁴² K.S.A. 2016 Supp. 75-4317(a).

⁴³ See K.S.A. 2016 Supp. 75-4319(a).

⁴⁴ L. 2017, Ch. 73, Section 4, http://www.kssos.org/pubs/sessionlaws/2017/2017_Session_Laws_Volume_1.pdf, accessed August 24, 2017. Section 4 *substantially* amends the KOMA’s provisions concerning executive sessions.

the time and place at which the open meeting shall resume.”⁴⁵ The public body must record the motion and the required statement in the minutes.⁴⁶

Under the prior law, the “subject matter” referred to one of the topics identified in K.S.A. 2016 Supp. 75-4319(b)(1) through (16). This included discussion of such things as personnel matters of nonelected personnel, preliminary discussions relating to the acquisition of real property, and the like. The “justification” referred to an explanation of *what* was to be discussed, without revealing confidential information. Typically, the justification was a brief explanation of the reason the public body believed the information needed to be protected. For example, when discussing the subject matter of nonelected personnel, the justification was usually reported to be to protect the privacy rights of the nonelected personnel subject to discussion.⁴⁷ The reason for stating the time and place at which the open meeting was to resume is simple—it allows members of the public to know when and where the public body will take up the public or open portion of the meeting. The announcement of place is required even when the council does not recess to another location to hold its executive session.

When we brought this matter to the council’s attention, we reviewed an executive session motion to illustrate our concern:

J. Executive Session – Kathy Gerstner moved and Christi Darnell seconded to go into executive session for personnel and return to this room at 9:15 p.m. Motion carried with a vote of 5 yes and 0 no.⁴⁸

As we indicated to you, this motion did not comply with the KOMA as it existed at the time the motion was made. While it properly stated the statutory subject matter the council intended to discuss during executive session (“personnel”), and the time and place the open meeting will resume (“return to this room at 9:15 p.m.”), it did not set out a justification for recessing into executive session. Under the prior law, the “justification” was an explanation of *what* was to be discussed, without revealing confidential information. Typically, the justification was a brief explanation of the reason the public body believed the information needed to be protected. For example, when discussing the subject matter of nonelected personnel, the justification was usually reported to be to protect the privacy rights of the nonelected personnel subject to discussion.⁴⁹

⁴⁵ K.S.A. 2016 Supp. 75-4319(a).

⁴⁶ *Id.*

⁴⁷ See *State v. USD 305*, 13 K.A.2d 117, 121, 764 P.2d 459, 50 Ed. Law Rep. 554 (1988) (“It seems logical to us that the privacy rights of non-elected personnel subject to discussion is sufficient justification for a closed session to meet the requirements of the KOMA.”)

⁴⁸ City of Baldwin City, Minutes from the March 7, 2017 Regular Council Meeting, <http://www.baldwincity.org/cms/images/03.07.2017-Minutes.pdf>, accessed July 13, 2017.

⁴⁹ See *State v. USD 305*, 13 K.A.2d 117, 121, 764 P.2d 459, 50 Ed. Law Rep. 554 (1988) (“It seems logical to us that the privacy rights of non-elected personnel subject to discussion is sufficient justification for a closed session to meet the requirements of the KOMA.”).

In its response, the council stipulates that its motion on this occasion failed to a justification as required.⁵⁰

We reviewed the other available meeting minutes for the council located on its website,⁵¹ including its archived meeting minutes. We discovered that while the council does not have frequent executive sessions, when it does, the recorded motions consistently failed to include the required justification, and at times the time and place the open meeting would resume.

We also noted several occasions where the council held an executive session, and then when additional time was needed for discussion, it moved to “extend” the executive session.⁵² Its motions for extension did not contain the subject matter, justification or place the open meeting was to resume.⁵³ Based on the language in the council’s minutes, it seems to have considered the additional executive sessions on the same subject matter as a mere continuation of the same discussions that prompted the executive sessions in the first place. However, under the provisions of the KOMA in effect at the time of the motions, there was no provision for the “continuation” or “extension” of an executive session. The language then in effect required that *any* motion for executive session *shall include* the statutory requirements set out in K.S.A. 2016 Supp. 75-4319(a), as well as binding action taken in public.

The requirements for the executive session motion help to ensure that the public’s right to know is not harmed or impaired. The motion promotes the policy and purpose of the KOMA by ensuring the public knows the reason given by the public body for holding any discussions outside of public view, and how long those closed discussions will last. It is also a reminder to the public body that the KOMA stands for more than mere procedural requirements.

Since the time of the change in the law, it appears that the council has held at least one executive session and that it is generally cognizant of the new statutory requirements for executive sessions.⁵⁴ We caution, however, that we are not reaching any conclusion about the council’s compliance with the new statutory requirements. We decline to do so here because the council has not had an opportunity to review and address this matter.

⁵⁰ Governing Body of Baldwin City, Kansas Response to KOMA Complaint, August 15, 2017, p. 2.

⁵¹ Baldwin City Council Agendas and Minutes, <http://www.baldwincity.org/directory/city-council/council-agenda-minutes/>, accessed August 24, 2017.

⁵² *See e.g.*, City of Baldwin City Council, Minutes from the August 17, 2015 Regular Council Meeting, p. 3, EXECUTIVE SESSION; City of Baldwin City, Minutes from the December 7, 2015 Regular Council Meeting, p. 3, Item J, Executive Session. On these occasions, the council was comprised of Mayor Pearse, and council members Kathy Gerstner, Tony Brown, Steve Bauer, David Simmons, and Christi Darnell.

⁵³ *Id.*

⁵⁴ *See* FN 38.

Based on the foregoing, it appears the council had fallen into the bad habit of failing to ensure that its motions for executive session complied with the statutory requirements. It is unclear whether the council's shortcomings are the result of careless practices, ignorance of the law's requirements, or both. However, it is clear that going back to at least 2015, the council's motions for executive session failed to meet all the statutory requirements for such motions. Thus, we find that the council violated the KOMA.

However, that is not the end of our inquiry on this issue. The council's pattern of deficient motions certainly merits consideration as an aggravating factor. However, in mitigation, the council substantially complied with the statutory requirements, even though their motions were technically deficient. Additionally, the council recorded the motions in its meeting minutes as required. By making the motions, the public was aware that the council was recessing into executive session and the subjects to be discussed. The complaint does not specifically raise this issue. Rather, we identified this issue during the course of our review of this matter. Because of this, we have no evidence of prejudice resulting from these actions, or that the public's right to know was effectively denied. Likewise, we have no evidence that the council's failure to meet the required elements for recessing into executive session was an effort to circumvent or thwart the purposes of the KOMA. We have no other complaints raising the failure of the council's executive session motions to meet the statutory requirements. Finally, the council has stipulated that its motion on at least one occasion did not comply with the KOMA.

In light of the foregoing, we believe the failure to comply with the statutory requirements for recessing into executive session is a technical violation of the KOMA. Notwithstanding our conclusion that the deficient motions for executive session are a technical violation of the KOMA, we believe the pattern of deficient motions requires remedial action.

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.⁵⁵ Additionally, completion of training concerning the requirements of the KOMA may be required.⁵⁶ Any member of a public body subject to the KOMA who knowingly violates any provisions of the act, or intentionally fails to furnish information as required by K.S.A. 2016 Supp. 75-4318(b) concerning notice, may be subject to these penalties. "To 'knowingly' violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific

⁵⁵ K.S.A. 2016 Supp. 75-4320(a).

⁵⁶ See K.S.A. 2016 Supp. 75-4320a(a); see also K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii); and see K.S.A. 2016 Supp. 75-4320f(b).

intent to violate the law.”⁵⁷ In other words, the violation need not be willful or intentional. Rather, if the KOMA prohibits the action or conduct, and the public body engages in the conduct, that is a knowing violation of the law.⁵⁸ “Ignorance of the law is no excuse.”⁵⁹

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the Baldwin City Council knowingly violated the KOMA when it engaged in serial communications by discussing the vacant council position outside of an open meeting. Likewise, we find by a preponderance of the evidence that the council knowingly violated the KOMA when it failed to meet all the statutory requirements for recessing into executive session, but that these are technical violations. We also find that remedial action is required to ensure compliance with the KOMA.

On the facts of this case, including the council’s prompt admission and stipulation to the KOMA violations, we have determined that the imposition of a civil penalty⁶⁰ as authorized by the KOMA is not warranted. The council has no prior violations of the KOMA, and we have no evidence that its actions were a subterfuge to defeat the purposes of the KOMA.

Ms. Hartman’s suggested remedy was to “remind Council of KOMA, education [sic],” and the council agrees that KOMA training is necessary. We believe this is a reasonable requirement that will help ensure the council understands the significance of its obligations under the Act.

In light of the foregoing, we are seeking the council’s voluntary compliance through the means of a Consent Order as provided for by the KOMA.⁶¹ We have enclosed the Consent Order for the council’s review. The Consent Order requires the council to acknowledge violation of the KOMA and to attend at least one hour of training on the provisions of the KOMA presented by an attorney experienced in dealing with open meetings issues within three months. Although not required, we strongly urge the council to require its clerk, city administrator, and other executive level staff to attend training as well to help ensure the council complies with the KOMA.

Because the actions described above occurred before Mr. Stevens was appointed to the city council, we are not requiring his signature on the Consent Order. However, we

⁵⁷ K.S.A. 2016 Supp. 75-4320(a); *see also State el rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091 (1982).

⁵⁸ *Id.*, 231 Kan. 536-37.

⁵⁹ *Id.*, 231 Kan. 536.

⁶⁰ K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii).

⁶¹ K.S.A. 2016 Supp. 75-4320d(a)(1).

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August 25, 2017
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strongly encourage Mr. Stevens to attend a KOMA training to ensure that he understands and complies with the law.

Our offer of a Consent Order as authorized by K.S.A. 2016 Supp. 75-4320d(a)(1) is effective up to **5:00 p.m. on Friday, September 29, 2017**. Because it meets regularly, we believe this will offer you sufficient time to confer with the council about this matter. If additional time is needed to discuss this matter, the council may wish to call a special meeting.

If the Consent Order is approved, please secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files. You do not need to complete the dates on the first page or the certificate of service on the last page. We will insert the dates when the Attorney General executes the Consent Order.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, September 29, 2017**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2016 Supp. 75-4320a, 75-4320d, and/or 75-4320f.

We note that this office is sponsoring KOMA training in the near future. This training is free and open to the public. At least two of the trainings are within easy traveling distance for the council—one in Leavenworth on September 8, 2017, and one in Topeka on October 6, 2017. You may find more information about the training, including registration details, on our website: <http://ag.ks.gov/open-government/upcoming-training>.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or lisa.mendoza@ag.ks.gov with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
Derek Schmidt



Lisa A. Mendoza
Assistant Attorney General
Director, Open Government Enforcement Unit

Enclosure (Consent Order)