

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)
Board of Education of)
Unified School District 376,)
Sterling, Kansas.)

Case No. 2018-OG-0002

CONSENT ORDER

NOW on this 1th day of December, 2018 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2018 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 April 30, 2018, the Attorney General's Office received a complaint alleging that Unified School District (USD) No. 376 Board of Education ("the board"), specifically board members Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty and Jaret Wohler violated the KOMA. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the Board improperly discussed matters in executive session in violation of K.S.A. 2018 Supp. 75-4319(a) and (b), which require that a public body follow a certain procedure to recess into executive session and limit its discussions during executive session to specific statutory topics.

2. The Board 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 Board, as described in a letter dated October 5, 2018, to the Board's attorney Granville M. "Scott" Bush, 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 February 12, 2018, the Board recessed into executive session on two (2) occasions using as the justification the need to discuss "data relating to the

financial affairs of an individual”; the statement describing the subject to be discussed was “acquisition of a vehicle.” The purpose of the executive session was to discuss the purchase of a 2008 Chevy truck from an individual. The board did not discuss any matters regarding or related to “the need . . . to discuss data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships.” The Board stipulates to these factual statements. The matters discussed during executive session did not concern confidential data relating to financial affairs or trade secrets in violation of K.S.A. 2018 Supp. 75-4319(b). Board member Amy Svaty was absent from this meeting and did not participate in the executive sessions.

- b. On or about April 9, 2018, the board recessed into executive session on one (1) occasion using as the justification “the need . . . for the preliminary discussion of the acquisition of real property”; the statement describing the subject to be discussed was “for the purpose of discussing a Sterling College lease agreement.” The Board did not discuss the acquisition of real property or real estate purchase contract. The Board stipulates to these factual statements. The matters discussed during executive session did not concern the acquisition of real property in violation of K.S.A. 2018 Supp. 75-4319(b). All board members were present for this meeting.
- c. On February 12, 2018, and April 9, 2018, the Board failed to comply with the requirements set forth in K.S.A. 2018 Supp. 75-4319(a) for recessing into executive session when its motion failed to include the place where the open meeting would resume. The Board stipulates to this violation.

4. Based upon the above information, Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, and Jaret Wohler, individually admit and agree that they violated the KOMA as set out in paragraphs 3.a. and 3.c. above concerning the February 12, 2018, executive sessions.

5. Based upon the above information, Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler, individually admit and agree that they violated the KOMA as set out in paragraphs 3.b. and 3.c. above concerning the April 9, 2018, executive session.

6. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler now fully understand and agree that they fully intend to comply with the requirements of K.S.A. 2018 Supp. 75-4319(a) and (b) concerning executive sessions.

7. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler now fully understand and agree that for each executive session held they intend to comply with the requirements of K.S.A. 2018 Supp. 75-4319.

8. The Attorney General and Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler, mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

9. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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. 2018 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

10. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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.

11. The Attorney General accepts the waivers and stipulations by Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler be subject to this Order based on the provisions of K.S.A. 2018 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 Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty,

and Jaret Wohler mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler consent to the following terms and conditions, and the Attorney General orders that:

12. The Board agrees and shall:
 - a. For the executive session violations on February 12, 2018, and April 9, 2018, Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, and Jaret Wohler agree to and shall individually pay a civil penalty of \$100.00 each. Such payment shall be made payable by certified check, personal check or money order to the Office of the Attorney General pursuant to K.S.A. 2018 Supp. 75-760 within 30 days of the effective date of this Consent Order;
 - b. For the executive session violations on April 9, 2018, board member Amy Svaty agrees to and shall individually pay a civil penalty of \$50.00. Such payment shall be made payable by certified check, personal check or money order to the Office of the Attorney General pursuant to K.S.A. 2018 Supp. 75-760 within 30 days of the effective date of this Consent Order;
 - c. Ensure that each board 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 (3) months of the effective date of this Consent Order;
 - d. Provide the Attorney General's Office with a written statement confirming that each board member has obtained the required KOMA training within ten (10) days of receiving the training; and
 - e. Not engage in any future violations of the KOMA.

13. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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. 2018 Supp. 75-4320d(c) and amendments thereto.

14. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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.

15. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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. 2018 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2018 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

16. In consideration of these admissions and agreements by Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KOMA set forth herein.

17. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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.

18. Except as provided in paragraphs 13 and 14, this Consent Order shall operate as a complete release of all claims Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler 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).

19. Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2018 Supp. 75-4320d(e) and amendments thereto.

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

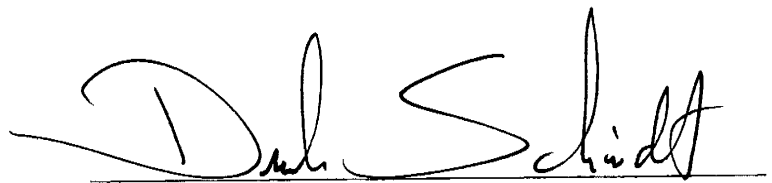
21. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

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

WHEREFORE, the Attorney General and Dr. Ken Brown, President, and board members Melissa Conard, Michael Gray, Brian Inwood, Jon Oden, Amy Svaty, and Jaret Wohler consent to these provisions.

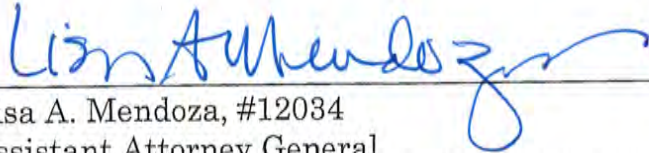
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL

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

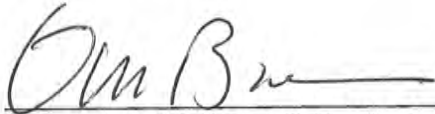
Derek Schmidt
Kansas Attorney General

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
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Phone: (785) 296-2215

Approved By:



Granville M. "Scott" Bush, # _____
Bush, Bush & Shanelec
229 S. Broadway Ave., PO Box 6
Sterling, KS 67579
Phone: (620) 278-2331
Attorney for USD No. 376 Board of Education (Sterling)

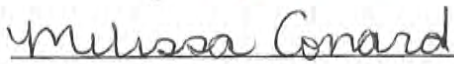
USD No. 376 Board of Education (Sterling)



Dr. Ken Brown, President

11-12-18

Date



Melissa Conard

11/12/2018

Date



Michael Gray

11/12/18

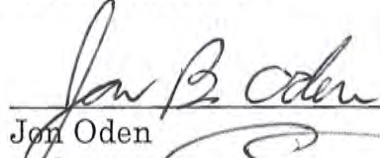
Date



Brian Inwood

11/12/18

Date



Jon Oden

11/12/18

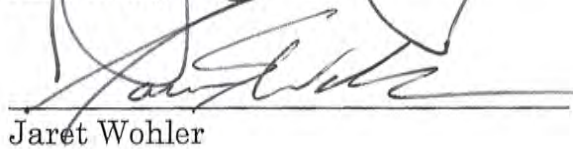
Date



Amy Svaty

11/12/18

Date

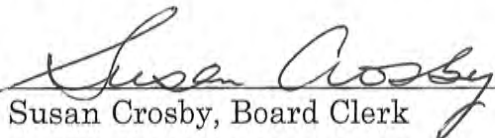


Jaret Wohler

11/12/18

Date

ATTEST:



Susan Crosby, Board Clerk

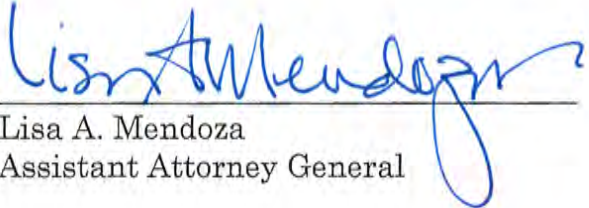
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Date

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2018, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Granville M. "Scott" Bush
Bush, Bush & Shanelec
229 S. Broadway Ave., PO Box 6
Sterling, KS 67579
Attorney for USD No. 376 Board of Education (Sterling)



Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

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WWW.AG.KS.GOV

October 5, 2018

Granville M. "Scott" Bush
Bush, Bush & Shanelec
229 S. Broadway Ave., PO Box 6
Sterling, KS 67579

Re: KOMA Complaint – USD No. 376 Board of Education (Sterling)

Dear Mr. Bush:

We are advised that you represent the USD No. 376 Board of Education ("the board"). We are writing to you concerning the results of our investigation into a complaint that the board violated the Kansas Open Meetings Act (KOMA).¹ On April 30, 2018, we received a complaint from Myrna Jane Ray alleging possible violation of the KOMA by the board. According to Ms. Ray, the board held a private retreat in Hutchinson, Kansas, which was closed to the press and public, and the distance adversely impacted the ability of the public to attend. Additionally, Ms. Ray raised concerns regarding the board's use of executive sessions and possible binding action during executive session. Ms. Ray's requested remedy was to receive records and to void certain actions. However, the time to void any actions taken by the board expired before this office received Ms. Ray's complaint. Ms. Ray did not describe what records she was seeking.

Following our review, it is clear that the board is a public body subject to the KOMA,² and thus this office has jurisdiction to review any complaint that the KOMA has been violated.³ During our review, we identified three issues that warrant further discussion.

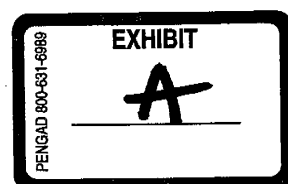
As a preliminary matter, we note that at the time of the events raised in the complaint and through to the present day, the board was comprised of the following:

- Dr. Ken Brown, President
- Melissa Conard, board member
- Michael Gray, board member
- Brian Inwood, board member
- Jon Oden, board member
- Amy Svaty, board member, and
- Jaret Wohler, board member.

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 2018 Supp. 75-4318(a).

³ See K.S.A. 2018 Supp. 75-4320(a), 75-4320b and 75-4320d.



Board "retreat" at the Cosmosphere

Ms. Ray alleged that on March 24, 2018, the board held a "private board retreat" in Hutchinson, Kansas, that was not open, and that the distance to this "retreat" adversely impacted the ability of the public to attend.

According to the board's response, it did not hold a *private* "retreat" or group getaway to take time to contemplate their purpose and goals. The board discussed the "retreat" in its open meetings on at least three different occasions: December 11, 2017, January 8, 2018, and March 5, 2018. The board explained that it held the "retreat" at the Cosmosphere in Hutchinson because it was "our hope that a change in our meeting environment might help spur some innovative thinking as we set [sic] to develop goals for our district for the upcoming year." Prior to the "retreat," the board sent notice of the meeting and copies of the agenda to all individuals who requested notice.

Ms. Ray reported that "when our local newspaper was asked why no reports of this meeting was [sic] published the reply was 'It was a private retreat and the press was not invited.'" The board reported that at no time did it state or imply that the public or the press were not welcome to attend. After the meeting, the board approved its minutes during an open meeting, and posted the minutes on its website⁴ for the public to review. The meeting minutes described this as "USD 367 Board of Education *Regular Meeting/Retreat*, March 24, 2018, 8:00 a.m., Executive Board Room, Cosmosphere, Hutchinson, Kansas."⁵

The City of Sterling is located in Rice County, Kansas. The Cosmosphere is located in Reno County, Kansas. The approximate distance from the board's offices at 308 East Washington Avenue, Sterling, to the Cosmosphere is 24.3 miles. Approximate travel time is between 31 and 33 minutes depending on the particular route traveled.

The KOMA requires all meetings of public bodies to be open.⁶ The KOMA does not require that a public meeting be held at a certain location, or even that it be held in the state of Kansas. However, the KOMA does provide that a public meeting cannot be adjourned to another time or place in order to subvert the policy of open public meetings.⁷ "The key to determining whether the location of a meeting would subvert the statutory mandate of openness is accessibility of the meeting to the public. Assuming the notice requirements and other provisions of the KOMA are met," a meeting held in another location than a public body's usual meeting place does not necessarily violate the KOMA.⁸ However, a public body cannot make it inconvenient and expensive for those wishing to attend.⁹

⁴ We note that we previously accessed the board's meeting minutes for its retreat on its website. However, in a recent review of the board's website, only the meeting minutes for the current school year are posted.

⁵ Emphasis added.

⁶ K.S.A. 75-4317(a).

⁷ K.S.A. 75-4317(b).

⁸ Attorney General Opinion 86-153, <http://ksag.washburnlaw.edu/opinions/1986/1986-153.pdf>, September 26, 2018.

⁹ Attorney General Opinion 82-133, <http://ksag.washburnlaw.edu/opinions/1982/1982-133.pdf>, accessed September 26, 2018 (proposed retreat in Colorado by Lawrence City Commission would be inconvenience and expensive, thus operating as an effective bar to attendance by most, if not all, Lawrence residents, and would violate the KOMA).

Here, the distance between the board’s offices and the Cosmosphere is less than 25 miles, and travel time is approximately 30 minutes or so. While Ms. Ray was concerned about the possible “impact on citizens attending meetings 30 miles from Sterling,” she did not provide any information that suggested she or any other individual was unable to attend due to distance or expense. Additionally, we have received no other complaints alleging this meeting was inaccessible.

Ms. Ray argues that the use of the word “retreat” suggested that this meeting would be private. However, the board sent notice of the meeting, as well as the agenda, to those asking for notice as provided in the KOMA.¹⁰ It discussed the “retreat” at least three times during its open meetings. Whatever term or phrase the board used to describe the meeting, it was clearly open to the public and the press. While the board must provide notice to anyone who has requested to be notified of its meetings, it is not required to issue invitations to its meetings to the press or the public. We note that this office has not received any information or complaint that suggests any individual requested but was denied the opportunity to attend and be present for this meeting in person, by conference call, or by any other means of electronic communication.

Based on the foregoing, we cannot say that public access to the board’s meeting on March 24, 2018, at the Cosmosphere was either directly or indirectly denied, or that considerations of expense and inconvenience operated as a barrier to public access of this meeting. Because this meeting was open and accessible to the public and notice was provided to those requesting it, the KOMA was not violated on these facts and no further enforcement action is warranted on this allegation. We now consider this portion of Ms. Ray’s complaint closed.

Executive sessions and binding action in executive session

Ms. Ray next alleged that the board improperly recessed into executive session on February 12 and April 9, 2018. She further appears to suggest that the board took binding action during its February 12, 2018, executive sessions.

a. “Sand/labor/bus exchange” and binding action in executive session

During its February 12, 2018, meeting, the board held several executive sessions. Ms. Ray was concerned with two of the board’s executive sessions described in its agenda as being held to discuss “the possible purchase of a vehicle.” She alleged the board discussed an exchange of “sand/labor for an old school bus” and took binding action during these during executive sessions: “A local businessman exchanged sand/labor for an old school bus – no documentation – not [sic] vote after session – just the executive session[s] and the deed was done.”

The board denied that it discussed the exchange of sand and labor for the school bus during its executive sessions or took binding action during executive session. Instead, it reported the “sand/labor/bus exchange” was properly discussed during its open meeting. According to its Agenda, this discussion was listed as an item under Section 4.0, Superintendent Report:

¹⁰ K.S.A. 2018 Supp. 75-4318(b).

4.1 Tennis Court Work:

To make the courts safer and more playable in rainy weather we are adding 4 feet of concrete on the insides of the courts, and pouring a new pad for the bleachers that will span the space. The city topped the trees and Dean, Mark and Tracy hauled away the limbs and branches. The guys at Superior Sand are going to knock down the stumps and bring out sand, hopefully in trade for bus #25 which we retired last year. Jon is loaning a Bobcat for the dirt work. Mr. Pounds and his class are going to drill the 120 or so holes in the pads for the rebar pins and they'll set the forms. I'll do the rebar and mat work, then Conrad, Brad, and I can do the pouring. We'll need about 20 yards of concrete so we are looking at less than \$2500. Curtis has donated \$1,000 towards the cost. . . . [sic]

According to the board, a "non-running bus was declared surplus at a previous meeting and we tried unsuccessfully to sell it at auction. When making arrangements for dirt work with Superior Sand, they asked about the bus and the superintendent agreed to give them the bus for the sand, removal of two very large tree stumps, removal of a 16'x16' concrete slab, and leveling of the dirt area between our tennis courts. They also loaned us a bobcat for a week to help with our concrete work. . . ."

The board reported while it did not take binding action during its executive session on this matter, it also did not take a public vote to approve this transaction. "The superintendent mistakenly assumed that since [the bus] was declared surplus and put up for auction but didn't sell, it would be acceptable to make the exchange agreement. The board never took action on this agreement . . . It has come to the attention of the superintendent that since the old bus was not sold at auction as authorized by board action, the new arrangement should have come before the board for a vote."

Although the board may delegate authority to the superintendent to take action on some matters, it does not appear it delegated authority to him to carry out this particular transaction. Because it had not delegated authority to the superintendent to complete this type of transaction, the board acknowledged that it was required to take binding action. Under the KOMA, binding action means voting publicly to approve or deny a particular request.¹¹ That did not occur. Here, it appears the superintendent described the transaction, but did not request that the board take action due to a mistake or confusion about his independent authority to take action under these circumstances. It does not appear that the board objected to the "sand/labor/bus exchange." It simply never voted to approve the exchange because it believed the superintendent had the authority to complete the transaction. Thereafter, the superintendent made the exchange as explained. It does not appear that the board ever took action to ratify the superintendent's actions.

As acknowledged by the board, the board and superintendent made a mistake concerning the delegation of authority to the superintendent, and the board should have taken a public vote on the "sand/labor/bus exchange" after the superintendent advised them of the requested

¹¹ Attorney General Opinion 84-50, <http://ksag.washburnlaw.edu/opinions/1984/1984-050.pdf>, accessed September 27, 2018.

transaction. Is the failure to take a public vote as required by the board's policies a violation of the KOMA?

The KOMA mentions binding action by a public body in three places. First, the KOMA provides that "no binding action by [] public bodies . . . shall be by secret ballot."¹² Second, it provides that "[n]o binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of the act."¹³ Finally, it provides that any binding action taken at a meeting that is not in substantial compliance with the KOMA shall be voidable in an action brought in district court.¹⁴

The board did not take binding action by secret ballot or during an executive session, thus its actions are not voidable. Instead, after hearing a report on this matter from the superintendent during its open meeting, it mistakenly assumed that it had delegated authority to the superintendent to approve the "sand/labor/bus exchange" and thus did not vote. The board's mistaken failure to vote as required by its own policies certainly calls into question the validity of the "sand/labor/bus exchange" and surely violates the spirit and intention of the KOMA, which calls for the transaction of the board's business in public. However, this matter was reported and discussed during the board's open meeting. Because the matter was publicly discussed, we do not believe it was a subterfuge to violate the KOMA, but rather a very unfortunate mistake. Therefore, we conclude that the mistaken failure to follow its own policies and take a public vote to approve this transaction is not a violation of the KOMA.

Nevertheless, we believe remedial action is required to ensure this situation does not occur in the future. We request that the board take prompt action at its next regular board meeting to publicly ratify and approve this transaction. We also request that it provide this office with a copy of its agenda and draft meeting minutes within ten (10) days of its meeting showing that it has fulfilled our request.

Because we conclude that the KOMA was not violated on these facts, no further enforcement action is warranted on this allegation. We must emphasize that each set of facts is evaluated on its own merits, and that this conclusion might be different under another set of circumstances.

We now consider this portion of Ms. Ray's complaint closed.

b. Executive sessions on February 12 and April 9, 2018

So what did the board discuss during the two February 12, 2018, executive sessions? The board's meeting minutes describe the purpose of the executive sessions as follows:

Motion made by Michael Gray, seconded by Jaret Wohler to enter executive session at 8:40 p.m. relating to the acquisition of a vehicle, pursuant to the exemption for data relating to the financial affairs of an individual under KOMA. Those in attendance shall be the Board and Superintendent. The board shall return to open session at 8:50 p.m.

¹² K.S.A. 2018 Supp. 75-4318(a).

¹³ K.S.A. 2018 Supp. 75-4319(c).

¹⁴ K.S.A. 2018 Supp. 75-4320(a).

Motion passed 6-0

The Board returned to open session at 8:50 p.m.

Motion made by Michael Gray, seconded by Jaret Wohler to enter executive session at 8:50 p.m. relating to the acquisition of a vehicle, pursuant to the exemption for data relating to the financial affairs of an individual under KOMA. Those in attendance shall be the Board and Superintendent. The board shall return to open session at 8:55 p.m.

Motion passed 6-0

The Board returned to open session at 8:55 p.m. . . . [sic]¹⁵

According to the meeting minutes, board member Svaty was absent from the February 12, 2018, meeting.

The board candidly admitted in its response that it actually discussed "the purchase of a 2008 Chevy truck" during the executive sessions. The board further explained its actions as follows:

. . . The executive session[s] in question [were] about purchasing a 2008 Chevy truck from an individual. The superintendent wanted to determine the highest price that the board was willing to pay for the truck so that the superintendent could negotiate the best possible deal for the district. Originally, the justification listed for the executive session was 'preliminary discussion relating to the acquisition of real property.' However, it was realized that the truck did not constitute 'real property.' It was determined that the appropriate justification was 'data relating to financial affairs of an individual' because the discussion was to be regarding the financial offer for this individual's vehicle. After talking to KASB and with our attorney, we see that the only appropriate way to discuss this matter would have been in an open session, not in executive session, as this discussion did not fit any of the statutorily approved justifications. . . .

The board concedes that its discussion of the 2008 Chevy truck during executive session did not involve any reference to such things as the financial accounts, balance sheets, receipts and expenditures, budget, payroll or other similar financial affairs of the owner of the truck. Additionally, it was only considering a verbal offer. The board eventually purchased the truck for \$13,000.00; the board completed this purchase on February 28, 2018. The board did not vote on this purchase during its open meeting. This is because under board policy DJFA, Purchasing Authority, the superintendent is authorized to execute contracts on behalf of the district for the purchase of goods and services if the amount is less than \$20,000. The superintendent must report any such contracts to the board. It appears that he complied with this policy.

¹⁵ As set out in its agenda, the board originally proposed to hold these executive sessions "to talk about the possible purchase of a vehicle justified by the acquisition of real property exception under KOMA." As the board now acknowledges, this would have been improper.

Ms. Ray also alleged that on April 9, 2018, the board improperly discussed a lease with Sterling College during an executive session.

On April 9, 2018, the board recessed into executive session four times. Of these, one of the executive sessions was used to discuss a lease agreement with Sterling College. The board's motion is recorded in its minutes as follows:

Motion made by Amy Svaty, seconded by Michael Gray to enter executive session at 8:45 p.m. for the purpose of discussing a Sterling College lease agreement pursuant to the preliminary discussions relating to acquisition (not sale) of real property exception under the KOMA. Those in attendance shall be the Board and Superintendent. The board shall return to open session at 9:09 p.m.

Motion passed 7-0

The Board returned to open session at 9:09 p.m. . . . [sic]

According to the board, it did in fact discuss a lease agreement with Sterling College, and further explained its actions as follows:

. . . We did discuss the renewal of the lease agreement for use of the football field and track. We talked at length about the terms of the lease, including the length of time, what should be included, and the price to be paid. It was mistakenly assumed that because we were acquiring the right to use the property it could be considered acquisition of real property.

Discussions with KASB and our attorney have shown us this type of discussion is not allowed. The superintendent was looking for the board's guidance so that he could effectively negotiate the best deal for the school district . . . The purpose of the lease agreement was to provide a framework by which the school district could make use of the football and track facilities owned by Sterling College . . . There were no discussions regarding the school district purchasing real property from Sterling College, or Sterling College purchasing property from the school district . . . [and] [t]he board did not enter into a contract to purchase property from Sterling College

. . . .

The board did not attempt to argue that leasing or renting property constitutes the acquisition of real property contemplated by the KOMA. Instead, it admits this matter could not be discussed during executive session because the lease did not involve the purchase of real property. The board eventually entered into a lease agreement with Sterling College, and voted to approve the "Stadium and Facilities Lease Agreement" and an accompanying "Maintenance Agreement" with the college during its July 11, 2018, open meeting.

No member of the board has ever been found to be in violation of the KOMA. Only board members Inwood and Conard, along with Superintendent Jim Goracke, have somewhat recently attended KOMA training, in December of 2017. These individuals attended a training titled "Foundations of Boardmanship." This training is designed for new school board members, was presented by

the Kansas Association of School Boards, and contains a component that discusses the KOMA. Dr. Brown attended a similar training in 2007, and then again when he became president of the board in 2013.

In its response, the board stated that it has adopted and follows policy BCBK, Executive Sessions. The board stated that the complete wording of a motion for executive session is listed in its agenda. "The board president says something to the effect of 'the next item on the agenda is executive session to discuss the negotiated agreement.' A board member will move, another will second, then the president say [sic] 'It has been moved and seconded to go into executive session ...' [sic] and he will read the full motion as printed in the agenda. The board will then enter executive session and all individuals not specifically mentioned in the motion will leave the meeting. The board will then return to open session at the expiration of the time noted in the motion." Although not described, the board's minutes reflect that there is a vote on the motion and the motion is recorded in the meeting minutes.

The KOMA requires all meetings of public bodies to be open.¹⁶ A public body may, but is not required to, hold an executive session. If the public body decides to recess into executive session, it must follow a specific procedure in order to comply with certain statutory requirements.¹⁷ A motion for executive session must include a statement describing the subjects to be discussed, and a justification as listed in the statute.¹⁸ The presence of other individuals during the executive session is permissible if they will assist with the executive session discussion.¹⁹

Under the current law, "subject" refers to an explanation of *what* is to be discussed, without revealing confidential information; the statement of the subject must be more than a generic or vague summary, or a list of the subject(s) to be discussed. "However, the KOMA does not require that the statement describing what will be discussed to be so detailed that it negates the usefulness of" an executive session.²⁰ The determination about whether the motion sufficiently describes the subject(s) to be discussed in a specific situation is a fact-sensitive question that must be determined on a case-by-case basis.

A "justification" refers to one of the topics identified in K.S.A. 2018 Supp. 75-4319(b). A motion to recess into executive session may only utilize one justification, but multiple subjects may be discussed if those subjects fall within the justification cited in the motion for executive session.²¹

¹⁶ K.S.A. 2018 Supp. 75-4317(a).

¹⁷ K.S.A. 2018 Supp. 75-4319(a) ("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: (1) A statement describing the subjects to be discussed during the closed or executive meeting; (2) the justification listed in subsection (b) for closing the meeting; and (3) the time and place at which the open meeting shall resume. The complete motion shall be recorded in the minutes of the meeting and shall be maintained as part of the permanent records of the public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.").

¹⁸ *Id.*

¹⁹ Attorney General Opinion 92-56, <http://ksag.washburnlaw.edu/opinions/1992/1992-056.pdf>, accessed September 27, 2018. The one exception to this general rule is when the executive session is held for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship.

²⁰ Attorney General Opinion 2018-1, <http://ksag.washburnlaw.edu/opinions/2018/2018-001.pdf>, accessed September 27, 2018.

²¹ Attorney General Opinion 2018-1.

The motion for executive session must also include the time and place at which the open meeting will resume. The reason for this 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 public body does not recess to another location to hold its executive session.

The KOMA also establishes certain requirements for the recording of the motion for executive session. The recording of the motion “is not ‘complete’ if it merely summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion. . . .”²²

Because the board admits it improperly recessed into executive session as described above on February 12 and April 9, 2018, we need not engage in an in-depth review of the executive sessions. However, we would be remiss if we did not briefly describe how the executive sessions and the motions to recess into executive session fell short of complying with the KOMA.

Substantively, the justification “data relating to the financial affairs of an individual” used during the February 12, 2018, executive sessions at issue does not accurately reflect the actual statutory justification. The KOMA describes this justification as involving “the need . . . to discuss data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships.”²³ A public body need not use the exact statutory language in its motion for executive session. However, the board’s motion demonstrates the danger when a public body chooses not to use the statutory language. The truncated language used in the motion here may have led the board to misconstrue the purpose of this particular justification.

This justification is generally referred to as the “economic development” exception. Although the language has been slightly changed over time, the data being discussed must still be confidential data relating to financial affairs or a trade secret. This exception cannot be invoked simply to discuss transacting business with a private concern.²⁴ Because this exception is designed to protect private business interests, generally this exception is used when a private business asks a public body to protect its confidential information. Otherwise, there is little reason for secrecy. Discussions that do not focus on confidential financial data or trade secrets do not fall under the exception. This determination must be made on a case by case basis. When in doubt, members of a public body must remember that exceptions to the open meetings law are interpreted narrowly.

Here, the board admitted that the two executive session discussions on February 12, 2018, concerning the purchase of a vehicle did not involve confidential data relating to financial affairs or a trade secret and thus should have taken place during its open meeting. Therefore, it is clear that the two executive sessions, although called for a statutorily recognized justification, were ultimately improper because the board used the executive sessions to discuss how much it was

²² *Id.*

²³ K.S.A. 2018 Supp. 75-4319(b)(4).

²⁴ See K.S.A. 60-3320(4) (“‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”).

willing to pay for a vehicle. In so doing, the board completed the slide down the slippery slope²⁵ to a KOMA violation.

The April 9, 2018, executive session held to discuss a lease agreement with Sterling College was similarly improper. Although "the need . . . for the preliminary discussion of the acquisition of real property" is a recognized statutory justification for an executive session, generally the purpose of a lease is to convey the right to use and/or occupy property for a fixed period of time in exchange for consideration.²⁶ A lease is typically not the same as a contract to purchase or acquire real property, unless it contains some type of lease-purchase provisions. The lease agreement here contains no language suggesting that it was exclusive, or that it was a lease-purchase agreement. The lease here was entered into so the school district could use the college's football and track facilities. The board admits that holding this executive session was improper. Because the board was not permitted to discuss the lease agreement in executive session, it violated the KOMA.

Although not the primary focus of the complaint, the board's motions also fell short of compliance with the statutory requirements. First, the motions as set forth in the minutes appear to be more of a summary than the "complete motion" required to be recorded. Second, while the board did have statements describing the subjects to be discussed, generally set out a justification identified in the statute (even though ultimately it was not a proper justification to use under the circumstances), and identified the time the open meeting would resume. However, the motions did not include the place where the open meetings were to resume. This element is consistently missing from the board's motions for executive session that we reviewed.²⁷

Based on the foregoing, the board's motions for executive session as described above did not comply with the requirements set forth in K.S.A. 2018 Supp. 75-4319(a), and thus violated the KOMA.

Although we conclude that the commission violated the KOMA, our analysis does not end there. We must consider whether this is more than a technical violation²⁸ 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 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]."²⁹

The procedural and substantive requirements for executive session help ensure that the public's right to know is not harmed or impaired. The motion itself 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, how long those closed discussions will last, and where the open

²⁵ Attorney General Opinion 2000-64, <http://ksag.washburnlaw.edu/opinions/2000/2000-064.htm>, accessed September 26, 2018.

²⁶ "Lease," Black's Law Dictionary, 10th ed. 2014.

²⁷ The board's executive session policy correctly identifies the place at which the open meeting will resume as a required element of a motion for executive session. Notwithstanding its adopted policy, the board consistently failed to include this element.

²⁸ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

²⁹ *Id.*

meeting will resume. It is also a reminder to the public body that the KOMA stands for more than mere procedural requirements. By being required to set forth the justification in the motion, the public body is reminded of the public policy in the KOMA that discussions in closed or executive sessions are limited to certain authorized topics.

With these considerations in mind, it is clear that the board’s action of discussing the purchase of a vehicle and a lease agreement in executive session harmed the spirit and intention of the KOMA. These are matters that should have been discussed during the board’s open meetings.

There were commonsense red flags that should have warned the board that it was skating on thin ice. These red flags included the fact that the matters it intended to discuss during executive session—the purchase of a vehicle and a lease agreement—clearly fell outside the reason or purpose for each justification it used. This cannot be ignored.

In mitigation, the superintendent had independent authority to approve the purchase of the vehicle, so no public vote to approve this purchase was required. The board approved the lease and maintenance agreement during its July 11, 2018, open meeting. We have no evidence to suggest that the board routinely uses improper justifications to recess into executive session. In responding to our inquiries, the board was candid and forthright in admitting its actions may have violated the KOMA. The board further stated that it was not attempting to subvert or avoid the KOMA’s requirements. Moreover, the board has “taken note of these issues and you can be assured that we will endeavor to be more diligent in determining the appropriate justification and subject matter when deciding to utilize executive sessions in the future.” It further stated that “[i]t may be valuable for staff and the school board to receive additional training and education in this area.”

While the board was engaged, cooperative and forthcoming in this matter, ultimately we must be mindful of the KOMA’s procedural and substantive safeguards. These safeguards 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.”³⁰ Except under limited circumstances, the legislature did not intend for discussion, analysis and decision-making by a public body to occur outside of public view, especially where the expenditure of public monies is involved. Therefore, we cannot condone the discussion of such matters in executive session. “Public bodies cannot be allowed to do indirectly what the legislature has forbidden.”³¹

The KOMA exists to protect the public. The public’s right to know is protected when the transaction of governmental business, including any discussion involving the purchase of a vehicle and the expenditure of public funds on a lease agreement, is carried out in an open meeting. After considering the totality of the circumstances, we find that the board’s actions impinged on the public’s right to know and undermined the public policy embodied in the KOMA. We believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

³⁰ *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).

³¹ *Memorial Hospital Ass’n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.³² Additionally, completion of training concerning the requirements of the KOMA may be required.³³ 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. 2018 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 intent to violate the law."³⁴ 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.³⁵ "Ignorance of the law is no excuse."³⁶

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the board knowingly violated the KOMA when on February 12 and April 9, 2018, it recessed into executive session to discuss matters that did not fall under the identified justification. We also find that remedial action is required to ensure compliance with the KOMA.

Based on the facts of this case, we have determined that the imposition of a civil penalty³⁷ as authorized by the KOMA is warranted. Although the board acknowledged it improperly recessed into executive session, has no prior violations, and we have no evidence that its actions were a subterfuge to defeat the purposes of the KOMA, this was not an isolated problem. One time may be a mistake. Improperly discussing matters during executive session two times is cause for concern. The third time, it becomes a pattern.

Because the board was candid and forthcoming in its response, we have determined not to impose the maximum civil penalty permitted by the KOMA. However, we believe the imposition of a civil penalty is an important reminder to the board of the importance of the KOMA and its obligations under the Act. In its response, the board indicated it would be "valuable for staff and the school board to receive additional training and education in this area. We believe training is a reasonable requirement that will help ensure the commission understands the significance of its obligations under the KOMA.

For the above reasons, we are seeking the board's voluntary compliance through the means of a Consent Order as provided for by the KOMA.³⁸ We have enclosed the Consent Order for the board's review. In addition to imposing a civil penalty, the Consent Order requires the board 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 90 days. Although not required, we strongly urge the board to require its staff and the clerk to attend training as well to help ensure the board complies with the KOMA.

³² K.S.A. 2018 Supp. 75-4320(a).

³³ See K.S.A. 2018 Supp. 75-4320a(a); see also K.S.A. 2018 Supp. 75-4320d(a)(1)(A)(ii); and see K.S.A. 2018 Supp. 75-4320f(b).

³⁴ K.S.A. 2018 Supp. 75-4320(a); see also *State el rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091 (1982).

³⁵ *Id.*, 231 Kan. 536-37.

³⁶ *Id.*, 231 Kan. 536.

³⁷ K.S.A. 2018 Supp. 75-4320d(a)(1)(A)(ii); penalties are assessed against the individual, not the public body.

³⁸ K.S.A. 2018 Supp. 75-4320d(a)(1).

Letter to Granville M. "Scott" Bush
October 5, 2018
Page 13

Our offer of a Consent Order as authorized by K.S.A. 2018 Supp. 75-4320d(a)(1) is effective up to **5:00 p.m. on Friday, November 16, 2018**. Because it meets regularly, we believe this will offer you sufficient time to confer with the board about this matter. If additional time is needed to discuss this matter, the board 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, November 16, 2018**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2018 Supp. 75-4320a, 75-4320d, and/or 75-4320f.

We note that this office periodically offers KOMA training. This training is free and open to the public. You may find more information about any upcoming training on our website: <http://ag.ks.gov/open-government/upcoming-training>. We note we currently have one upcoming trainings—on October 19, 2018, in Topeka, Kansas. The Kansas Association of School Boards also offers KOMA 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)