

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)
Bourbon County Commission.)
_____)

Case No. 2021-OG-0002

CONSENT ORDER

NOW on this 21st day of July, 2021²¹ this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 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 10, 2020, the Attorney General's Office received a complaint alleging the Bourbon County Commission ("the commission") comprised of Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Nick Ruhl, violated the KOMA. Commissioner Clifton Beth was not on the commission at the time of these events. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into several allegations, including that the commission failed to comply with the statutory requirements for recessing into executive session and for recording these motions in its minutes, and that it improperly recessed into executive session for consultation with an attorney. These actions violated K.S.A. 75-4319(a) and (b), which establish certain requirements for recessing into executive session.

2. The commission is a public body that is subject to the requirements of the KOMA, and any meetings it holds must comply with the KOMA.

3. Investigation and/or statements provided on behalf of the commission, as described in a letter dated December 31, 2020, to County Counselor Justin Meeks, 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. Between February 20 and June 9, 2020, the commission recessed into executive session 56 times, and its motions

did not comply with the requirements of K.S.A. 75-4319(a); it also did not record the complete motion in its minutes as required by K.S.A. 75-4319(a).

- b. On March 3 (one session) and March 10, 2020 (two sessions), the commission failed to use the proper justification for recessing into executive session as required by K.S.A. 75-4319(b), thus leaving the public unaware of the reason for the executive sessions.

4. Based upon the above information, Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl individually admit and agree that they violated the KOMA as set out in paragraph 3 above.

5. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl now fully understand and agree that for each meeting held, they intend to comply with the requirements of K.S.A. 75-4319(a) and (b).

6. The Attorney General and Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

8. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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.

9. The Attorney General accepts the waivers and stipulations by Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper for Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl to be subject to this Order based on the provisions of K.S.A. 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 Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl consent to the following terms and conditions, and the Attorney General orders that:

10. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl agree to and shall:

- a. Pay a civil penalty of \$50.00 each, individually and not from commission, county, or other public funds. Such payment shall be made payable to the Office of the Attorney General pursuant to K.S.A. 75-760 on or before April 1, 2021, **provided that** the \$50.00 civil penalty assessed to each commissioner or former commissioner shall be waived if (1) each commissioner or former commissioner participates in at least one hour of KOMA training on or before April 1, 2021, and (2) provides a written certification of attendance within ten days of the training; and
- b. Not engage in any future violations of the KOMA.

11. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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. 75-4320d(c) and amendments thereto.

12. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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.

13. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

14. In consideration of these admissions and agreements by Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution of the KOMA violations set forth herein.

15. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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.

16. Except as provided in paragraphs 11 and 12, this Consent Order shall operate as a complete release of all claims Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Commissioners Lynne Oharah and Jeff Fischer 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. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl 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).

17. Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 75-4320(e) and amendments thereto.

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

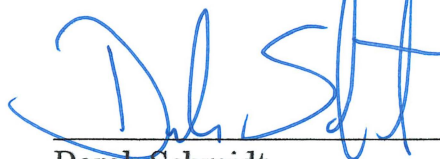
19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

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

WHEREFORE, the Attorney General and Commissioners Lynne Oharah and Jeff Fischer, and former Commissioner Ruhl consent to these provisions.

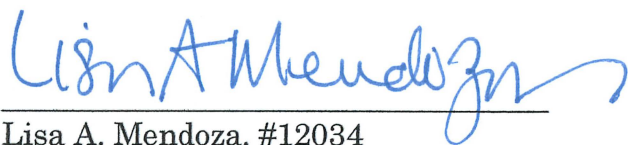
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL



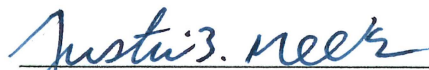
Derek Schmidt
Kansas Attorney General

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:



Justin Meeks
Bourbon County Counselor
221 S. Judson Street
Fort Scott, KS 66701

Bourbon County Commission:


Lynne O'Harah, Commissioner

1-11-2021
Date

Jeff Fischer, Commissioner

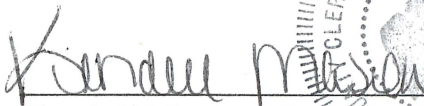
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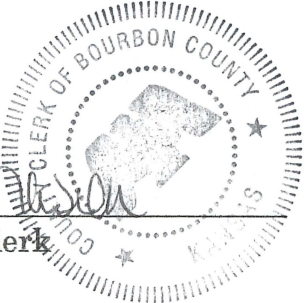
AND


Nick Ruhl, Former Commissioner

1-6-21
Date

ATTEST:


Kendall Mason, Clerk

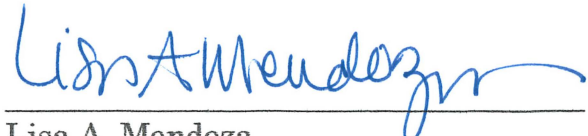


2/2/2021
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2021, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Justin Meeks
Bourbon County Counselor
221 S. Judson Street
Fort Scott, KS 66701
Attorney for Bourbon County Commission


Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

December 31, 2020

Sent via email to jmeeks.meekslaw@yahoo.com

A hard copy of this letter will *not* follow

Justin Meeks
Bourbon County Counselor
221 S. Judson Street
Fort Scott, KS 66701

RE: KOMA Complaint – Bourbon County Commission
Our File Number CV-20-000970

Dear Mr. Meeks:

On June 10, 2020, we received a complaint from Mary Pemberton alleging that the Bourbon County Commission violated the Kansas Open Meetings Act (KOMA).¹ Although we previously resolved portions of her complaint, there are four remaining allegations: failure to comply with the statutory requirements for recessing into executive session; failure to include an attorney in an executive session held for “attorney client privilege”; improperly including a third party in two executive sessions held for consultation with an attorney; and holding an executive session for personnel matters of nonelected personnel that did not pertain to an identifiable employee. As a remedy, Ms. Pemberton would like the commission to receive KOMA training, as well as a fine of \$500.00. She would also like this office to order the commission “to cease and desist violating KOMA and require future compliance as well as proof of compliance.”

The KOMA applies to public bodies and agencies.² It is clear the commission is a public body subject to the KOMA. This office has jurisdiction to review complaints filed pursuant to the KOMA against public bodies and public agencies.³

During the time covered by the complaint, the commission was comprised of Chairman Lynne Oharah, Commissioner Leroy “Nick” Ruhl, and Commissioner Jeff Fischer.⁴

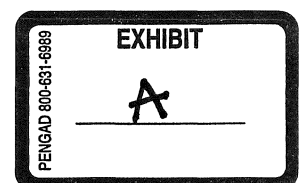
We will address each of Ms. Pemberton’s remaining allegations in turn.

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 75-4318(a).

³ K.S.A. 75-4320(a), 75-4320a(a), 75-4320b, 75-4320d, and 75-4320f.

⁴ On or about August 26, 2020, Commissioner Ruhl resigned his position to accept a position with the Bourbon County Road and Bridge Department. On or about October 2020, Clifton Beth was selected to replace Commissioner Ruhl.



1. *Failure to comply with statutory requirements for executive sessions*

Ms. Pemberton's first concern is that between February 20 and June 9, 2020, the commission failed to comply with the statutory requirements for recessing into executive session.

We reviewed the commission's meeting minutes posted on its website to see how such motions are handled. We also asked you for information on how the commission recessed into executive session, in particular to see if the language used by the commission in making the motion was different from the language recorded in the minutes. The commission conceded that it did not state the place the open meeting will resume "because it is always in the same place as our general meeting." The commission further reported that "[W]e have changed this process and will be changing the language of any executive sessions in the future."

Although there were many executive sessions, just one of the commission's motions demonstrates how most of them are stated.⁵ On April 14, 2020, the commission recessed into executive session to discuss nonelected personnel. As verbally stated in the recording we reviewed, the motion does not refer to the subject to be discussed or the time and place the open meeting will resume.⁶ The motion as recorded in the meeting minutes is as follows: "Lynne made a motion to go into a 7 minute executive session for Personnel matters of individual non-elected personnel, Nick seconded, and all approved, (the session included the Commissioners and Justin MEEKS). No action was taken."

A public body must follow a specific procedure in order to comply with the statutory requirements for recessing into executive session.⁷ First, the motion must include a statement describing the subjects to be discussed. The "subject" refers to an explanation of *what* is to be discussed, without revealing confidential information. A public body must do more than provide 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.⁸ The determination about whether the motion sufficiently describes the

⁵ We selected this motion because it occurred during the relevant time period and the recording of the motion still exists on the county's Facebook page.

⁶ Bourbon County Commission Facebook page, https://www.facebook.com/bourboncountyks/videos/565477910742792/?so=channel_tab&rv=all_videos_card, beginning at the 2:07:21 mark of the recording, accessed December 28, 2020. The language of the verbal motion was "I move we go into executive session for 7 minutes for identifiable personnel to protect their rights." The actual vote was not recorded due to the abrupt end of the recording.

⁷ K.S.A. 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.").

⁸ Attorney General Opinion 2018-1, <http://ksag.washburnlaw.edu/opinions/2018/2018-001.pdf>, accessed December 28, 2020.

subject(s) to be discussed in a specific situation is a fact-sensitive question that must be determined on a case-by-case basis.

Next, the motion must include a justification. A “justification” refers to one of the topics identified in K.S.A. 75-4319(b), such as personnel matters of nonelected personnel.⁹ 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.¹⁰

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 in the meeting minutes. 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. . . .”¹¹

With these rules in mind, and based on our review, it is clear that the motions for executive session and meeting minutes between February 20 and June 9, 2020, fall short of complying with the KOMA.

First, using the April 14, 2020, motion described above as an example, there is no statement describing the subjects to be discussed; the motion does not give an accounting of *what* was to be discussed or any indication of *how* the subject(s) to be discussed related to the justification of nonelected personnel. The verbal motion for executive session mentioned the phrase “to protect their rights,” and the commission’s earlier, brief discussion made clear it was referencing employee privacy rights.¹² The statement of the subject to be discussed must be tailored to the actual subjects to be discussed; it is separate from and cannot be used to satisfy the separate requirement for a justification.¹³

Second, the justification was “Personnel matters of individual non-elected personnel.” While not an exact recitation of the statutory language, the use of this phrase is

⁹ K.S.A. 75-4319(b)(1).

¹⁰ Attorney General Opinion 2018-1.

¹¹ *Id.*

¹² Under a prior version of the law, such a statement might have been adequate. However, given the changes in the law, that is no longer the case.

¹³ We noticed that the commission regularly used the justification for consultation with an attorney for the public body which would be deemed privileged in the attorney-client relationship. We recognize that counsel for a public body must walk a bit of a tightrope when providing a statement describing the subjects to be discussed when using this justification. The danger is that the statement describing the subjects to be discussed may reveal too much. However, the requirements of the KOMA must still be satisfied.

sufficiently clear so that the public knows it is one of the statutorily acceptable topics a public body may use to support its decision to recess into executive session.¹⁴

Third, the motion did not state the time and place the open meeting would resume. The motion did state the length of time of the executive session. If the public knew the time the executive session was to begin, it could “do the math” to determine what time the open session would resume. However, the time was not evident here in that it was not announced, and there was not visible clock on the wall in the Facebook Live recording to permit the public to establish the time.¹⁵ The commission did report that it uses a stopwatch to ensure that it meets the time frame established in the motion. While commendable, this ultimately does not assist the public when it has no frame of reference for the time.

With regard to the meeting minutes, the recorded motion is more of a summary than the “complete motion” required to be recorded. Moreover, the recorded motion and the verbal motion contain different language. The motion to recess into executive session must be recorded in its entirety in the meeting minutes, and the clerk cannot fill in missing language. The motion need not include all extraneous words that a person may say when making a motion for executive session. This is because such extraneous words are not substantive in nature and do not further the public’s right to know about the nature of the executive session.¹⁶ However, the motion itself must be complete, and do more than summarize the three statutory elements, as well as who made the motion, who seconded the motion, and the vote. The April 14, 2020, motion set out above does not even contain all the statutory elements.

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 when/where the open 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 statement describing the subjects to be discussed, justification, and the time/place the open meeting will resume, the public body is reminded of the public policy in the KOMA that discussions in closed or executive sessions are limited in scope and nature.

Accordingly, we find that on 56 occasions between February 20 and June 9, 2020, the commission’s motions for executive session did not comply with the requirements of K.S.A. 75-4319(a), and thus violated the KOMA.¹⁷

¹⁴ K.S.A. 75-4319(b)(1).

¹⁵ According to the commission’s April 14, 2020, Agenda, the public was not permitted to attend the meeting in person due to the pandemic.

¹⁶ See Attorney General Opinion 2018-1, p. 5.

¹⁷ We note that during this time frame the commission was negotiating wind farm contracts, as well as responding to a pandemic and a number of related personnel issues. With this in mind, the number of executive sessions does not appear to be unreasonable as Ms. Pemberton suggests.

Although it is clear the commission violated the KOMA, that is not the end of our inquiry. We must consider whether this is a technical violation of the KOMA.¹⁸

The commission's longstanding pattern of deficient motions certainly merits consideration as an aggravating factor. However, in mitigation, the commission substantially complied with the statutory requirements, even though its motions were technically deficient. Additionally, the commission recorded the motions in its meeting minutes, even though they were not "complete" as required. By making the motions, the public was aware that the commission was recessing into executive session, the justification for the session and length of time it would take. The complainant specifically raised this issue in her complaint, and argued that the commission was "repeatedly, intentionally and systematically abus[ing] the KOMA in an effort to prevent public awareness of their actions." At the same time, the complainant acknowledged that the commission was making and recording the executive session motions even if deficient, and did not identify any specific prejudice to the public's right to know, such as that the matters would otherwise have been required to be discussed in open meeting. Likewise, although there is a pattern of deficient motions, we have no evidence that the commission'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 substantiated complaints raising the failure of the commission's executive session motions or meeting minutes to meet the statutory requirements.

We must note that we originally notified you of this complaint on October 30, 2020, and provided a reference to Attorney General Opinion 2018-1, which contains clear guidance on what is required to recess into executive session. Following that date, there were at least 25 executive sessions. Despite advising you about the requirements and of available guidance,¹⁹ none of these motions met all the statutory requirements for recessing into executive session, even though we can see an effort was made to comply. The commission has added some language regarding the place the executive session will be held and where the open meeting will resume. The motions regularly state the length of the executive session, but only a few of the motions state the time the open meeting will resume.²⁰ These motions contain a justification, but do not include a statement describing the subjects to be discussed. It appears that the commission still uses the

¹⁸ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986) ("Technical violation' is a term of art adopted by courts in discussing KOMA violations. In a recent opinion of this court in a KOMA case, it is stated that '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. *Stevens v. Board of Reno County Comm'rs*, 10 Kan.App.2d 523, 526, 710 P.2d 698 (1985), citing *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan. 546, 539 P.2d 1 (1975); *Coggins v. Public Employee Relations Board*, 2 Kan.App.2d 416, 581 P.2d 817, *rev. denied* 225 Kan. 843 (1978).

¹⁹ Mendoza Letter to Meeks, October 30, 2020, p. 3.

²⁰ See e.g. Bourbon County Commission meeting minutes, December 8, 2020 ("Jeff made a motion to go into a 10 minute executive session for personnel matters of individual non-elected personnel in another office and reconvene at the Commission room, Clifton seconded and all approved, (the session included the Commissioners and Patty Love). After the session, Lynne said they would have further discussion on the topic later today. . . .").

statement describing the subjects to be discussed and justification interchangeably. Additionally, the meeting minutes do not appear to record the “complete” motion.

In light of the foregoing, we conclude that the failure to comply with the statutory requirements for recessing into executive session violated the KOMA, it is a technical violation. Notwithstanding our conclusion that the deficient motions for executive session and failure to record the complete motion in the meeting minutes are technical violations of the KOMA, we believe the well-established pattern of deficient motions and incomplete recording of the motions in the meeting minutes requires remedial action.

2. *Executive session for “attorney client privilege” did not include an attorney*

Ms. Pemberton’s next concern is that during a special meeting on March 3, 2020, you, as the county counselor, were not present in some way during an executive session held for “attorney client privilege.”

On March 3, 2020, the commission had a special meeting during which it held two executive sessions for “consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship.” Although held for the purpose of consultation with an attorney, the motions did not identify the specific attorney that would be present. From this, Ms. Pemberton inferred that no attorney was present, making the executive sessions improper, since such motions by the commission typically state that you are present in your capacity as county counselor.

We asked the commission whether an attorney was present during these two executive sessions, and if so, the identity of the attorney, how the attorney participated, and the subject of the executive session. According to Chairman Oharah, Bradley C. Nielson of Franke, Schultz & Mullen was present on the phone during the executive sessions. The subject of the executive sessions was “obtain[ing] a second opinion regarding the legal issues of the contract agreements. . . .”²¹ Only the attorney and the commission were present.

The KOMA authorizes a public body to recess into executive session for the purpose of “consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship.”²² However, the term “consultation” necessarily implies the presence of an attorney.²³ Members of a public body cannot recess into an executive session for consultation with an attorney without their attorney being present. The KOMA does not require that a motion for consultation with an attorney identify who the attorney is or how the attorney will participate in the executive session.

²¹ The contracts related to the Jayhawk Wind project. Jayhawk Wind granted the commission permission to share certain confidential and proprietary information with this attorney so that it could obtain legal advice.

²² K.S.A. 75-4319(b)(2).

²³ *Id.*

Here, based on Commissioner Oharah's statement, an attorney was present by telephone for these two executive sessions. Because an attorney was present, the commission did not violate the KOMA.

Although the commission did not violate the KOMA, it would have aided the public's understanding if its motions and the meeting minutes had identified the attorney who would be participating in the executive sessions. Executive sessions held later that day during the commission's regular meeting listed who would be participating in the executive sessions for consultation with an attorney, including you as the attorney. We encourage the commission to take these concerns into consideration when making its motions.

Because the commission did not violate the KOMA on this occasion, no further enforcement action is warranted. We now consider this portion of Ms. Pemberton's complaint closed.

3. *Third party present during executive sessions held for consultation with an attorney*

Ms. Pemberton's next concern is that a third party, Alan Anderson, was present during executive sessions held on March 3 (one session) and March 10, 2020 (two sessions) for consultation with an attorney. Mr. Anderson is an attorney with Polsinelli PC and represents Jayhawk Wind.

We reviewed the commission's meeting minutes for these specific executive sessions, and consulted with you to gain an understanding of what occurred on these three occasions. You advised that Mr. Anderson

. . . attended segments of [these] executive sessions to communicate information Jayhawk Wind considers proprietary and confidential . . . The Commission and myself posed questions to Mr. Anderson, and Mr. Anderson responded with the intent that his answer could include confidential information. These sub-sessions qualify as executive sessions under K.S.A. 75-4319(b)(4).²⁴ Other segments of the executive sessions did not include Mr. Anderson, and were held to discuss privileged matters between the Commission and myself, relating to the legal obligations of the County connected to the Jayhawk Wind development and to discuss the proprietary information shared by Mr. Anderson. Mr. Anderson was not in the Commission room for these conversations and the privileged information discussed was not shared with Mr. Anderson. These sub-sessions qualify as executive sessions under K.S.A. 75-4319(b)(2). Periods where Mr. Anderson entered and exited the room are reflected in the

²⁴ "(b) Justifications for recess to a closed or executive meeting may only include the following, the need: . . . (4) to discuss data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships. . . ."

meeting minutes but the meeting minutes do not divide the executive session into the sub-sessions held to discuss proprietary information with Mr. Anderson and the sub-sessions held to discuss privileged information without Mr. Anderson. . . .

You further explained that you “had to be present in [the executive sessions with Mr. Anderson] because Mr. Anderson knew that the Commission was represented by an attorney. We had a lot of legal information and details to work out between the Commission and Jayhawk Wind that were proprietary. . . .” You also advised that you consulted with both Mr. Anderson and another local attorney, Robert Farmer (who has represented municipalities for over 40 years) when considering how to conduct the executive sessions on these occasions. Additionally, you reviewed the relevant portions of the KOMA, including K.S.A. 75-4319(b)(2) and (4). Finally, you argued that if the executive sessions including Mr. Anderson were not proper under the provisions of K.S.A. 75-4319(b)(2) concerning consultation with an attorney, they would have been proper under K.S.A. 75-4319(b)(4) concerning financial data and trade secrets. You argue that these efforts show the commission’s good faith efforts to comply with the KOMA.

You submitted a letter from Mr. Anderson as a part of your response. Mr. Anderson conceded that he could not have been, and was not, present during any portion of any executive session used to provide your client, the commission, with legal advice. However, he emphasized that the information Jayhawk Wind submitted to the commission “involved confidential financial affairs and trade secrets and it was our expectation that discussions involving that information would be appropriately protected,” and thus was protected by K.S.A. 75-4319(b)(4).²⁵ Mr. Anderson concluded that “to the extent that the Commission did not specifically cite to subparagraph (b)(4) as the justification for going into executive session[s] in which I was present, it is a forgivable ‘technical violation’ . . . since subparagraph (b)(4) is a proper justification for the executive sessions held with me present, the public did not have a right to hear those sessions, so ‘the public right to know has not been effectively denied.’”

As we explained above, under the KOMA, 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.²⁶ Here, we agree that K.S.A. 75-4319(b)(4) provided an alternative basis on which to recess into executive session to include Mr. Anderson. The difficulty is that the executive session motions never mentioned this alternative basis. Moreover, only one justification may be utilized for each executive session; the KOMA does not recognize executive session “sub-sessions.” Each executive session must comply with the statutory requirements and

²⁵ This included “information regarding the financial affairs of [Jayhawk’s] wind project, proprietary development, management and operations information, turbine locations related to ongoing land acquisition, and other trade secrets,” information that is not known outside of Jayhawk, its affiliates or agents, but that is integral to how they all operate.

²⁶ Attorney General Opinion 2018-1.

stand on its own merits. This means that the commission was required to hold a separate executive session each time it needed to communicate with or receive financial data or trade secret information from Mr. Anderson, and then hold a separate executive session to consult with you as its attorney.

We appreciate that what we describe may result in a somewhat cumbersome process when recessing into executive session. However, the KOMA's requirements are designed to meet the ultimate public policy goal of ensuring an informed electorate by holding meetings for the conduct of governmental affairs and the transaction of government business that are open to the public.²⁷

In light of the foregoing, we conclude that the commission violated the KOMA when it recessed into executive session on March 3, 2020 (one session) and March 10, 2020 (two sessions) using the justification for consultation with an attorney and included Mr. Anderson in those executive sessions.

Although the commission violated the KOMA, we must also consider whether these were so-called "technical violations," as both you and Mr. Anderson suggest. As we noted in our previous discussion of executive sessions, Kansas courts look to the spirit of the law, and overlook "mere technical violations" where the public body has made a good faith effort to comply, is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied.

Here, the commission made executive session motions on these occasions that are recorded in its minutes, even if the motions failed to comply with all the statutory requirements, and cited the wrong justification; ultimately, there was a basis for the executive sessions that included Mr. Anderson. The motions, and your efforts in advance of the executive sessions, show a good faith effort to comply with the KOMA by ensuring that the public knew some discussions would take place outside of public view and who would participate in the executive sessions. We also take Mr. Anderson's point that arguably the public was not prejudiced by using the wrong justification for the sessions he attended because in any event, the public did not have a right to hear what was discussed during those executive sessions.

However, you suggested that the "segments" of executive sessions Mr. Anderson attended were merely "sub-sessions" of the original executive session. This is not a concept recognized by the KOMA, and demonstrates a fundamental misunderstanding of the executive session process. Moreover, by failing to use the proper justification, the public was ultimately not aware of the reason for the executive sessions.

In light of the foregoing, we conclude that the failure to identify the applicable justification and hold separate executive sessions to include Mr. Anderson on these

²⁷ See K.S.A. 75-4317(a).

three occasions was more than a technical violation. Because of this, remedial action is required.

4. *Executive session for nonelected personnel did not pertain to a specific employee*

Ms. Pemberton's final concern is that a May 19, 2020, executive session held to discuss personnel matters of nonelected personnel that included you, the commissioners, and the county treasurer was not justified because it did not pertain to a particular identifiable employee.

On May 19, 2020, the commission held an executive session: "Jeff [Fisher] made a motion to go into a 7 minute executive session for personnel matters of individual non-elected personnel, Nick seconded and all approved, (the session included the Commissioners, Justin Meeks and Treasurer Patty Love). . . ."

We asked the commission to explain what was discussed during this executive session and to provide the name(s) of any individual employee(s) that was discussed. According to Commissioner Oharah, the executive session was held to discuss work situations involving two separate employees in the Treasurer's Office. Without revealing too much information, the employee matters discussed generally involved their office work assignments, as well as the work assignments and duties of other individual office employees.

Having reviewed Commissioner Oharah's explanation, which included the names of the two employees and specific details about each individual situation, we are satisfied the executive session properly used the nonelected personnel justification set out in K.S.A. 75-4319(b)(1). Because the commission's use of this justification was proper, it did not violate the KOMA.²⁸

Because the commission did not violate the KOMA on this occasion, no further enforcement action is warranted. We now consider this portion of Ms. Pemberton's complaint closed.

Conclusion

In light of the foregoing, we conclude by a preponderance of the evidence that between February 20 and June 9, 2020, the commission violated the KOMA when it failed to comply with the statutory requirements for recessing into executive session on 56 separate occasions, but that these are technical violations because the motions substantially complied with the KOMA. We further conclude that on March 3 (one motion) and March 10, 2020 (two motions) the commission violated the KOMA by

²⁸ Although the justification was proper, the commission's motion still did not satisfy the statutory requirements for recessing into executive session for the reasons we previously described.

recessing into executive session using the justification for consultation with an attorney and including Mr. Anderson in those executive sessions, and that by failing to use the proper justification, the public was ultimately not aware of the reason for the executive sessions.²⁹ We further conclude that remedial action is required to resolve these violations.

The commission has no prior KOMA violations. In its response, the commission detailed its efforts to comply with the KOMA during the pandemic, and has made some adjustments to its operations, including broadcasting its meetings on Facebook Live. It also expressed that it was open to formal KOMA training, especially to help its new commissioners, but that it might be difficult to arrange training due to the pandemic. However, we note that even after the failure to comply with the requirements of K.S.A. 75-4319(a) was brought to its attention, its motions for executive session do not consistently comply with the statutory requirements.

After due consideration of the facts, we believe remedial action is required to ensure compliance with the KOMA. We have concluded the imposition of a civil penalty³⁰ as authorized by the KOMA is warranted. However, we have determined not to impose the maximum amount permitted by law. This is due in part to the commission's recognition that it needs KOMA training. However, we believe the imposition of a civil penalty is an important reminder to the commission of the significance of the KOMA and its obligations under the Act.

Therefore, we are seeking the commission's voluntary compliance through the means of a Consent Order as provided for by the KOMA.³¹

We have enclosed the Consent Order for the commission's review. The Consent Order requires the commission to acknowledge the KOMA violations. It also requires Commissioner Oharah, Commissioner Fischer and former Commissioner Ruhl to pay a civil penalty in the amount of \$50.00 each; this amount is to be paid individually and not from commission or county funds. The commission also agrees to comply with the KOMA. The \$50.00 civil penalty assessed to the commissioners and former commissioner will be waived if they receive KOMA training on or before April 1, 2021, and provide written proof of attendance within ten days of the training.

Given recent election results, it appears that in the near future, the composition of the commission will change.³² Commissioner Oharah will be the only member remaining on the commission who was present when the KOMA violations described above occurred. However, the need for training will remain. Because of this, we also encourage the newly

²⁹ See K.S.A. 75-4320(a) and 75-4320d(a).

³⁰ K.S.A. 75-4320(d)(a)(1)(A)(ii).

³¹ K.S.A. 75-4320d(a)(1).

³² It appears on or about the second Monday in January 2021, there will be another new commissioner. In District 2, Jim Harris will replace Commissioner Fischer; in District 3, Commissioner Beth has already replaced former Commissioner Ruhl. See K.S.A. 19-219.

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elected and appointed commissioners, the clerk, staff and others who provide support to the commission to participate in the training.

Our offer of a Consent Order as authorized by K.S.A. 75-4320d(a)(1) is effective up to **5:00 p.m. on Monday, January 11, 2021**. We recognize that this is a short deadline. However, because of the upcoming change in the composition of the commission, we believe this is necessary. Because it meets regularly, we still believe this will offer the commission sufficient time to review this matter. If additional time is needed to discuss this matter, the commission may wish to call a special meeting.

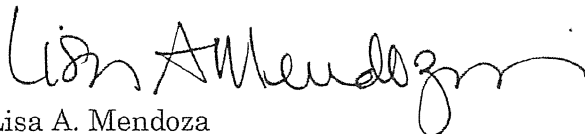
If the Consent Order is approved, please have Commissioners Oharah and Fischer, and former Commissioner Ruhl sign where indicated and return the Order to me. I will obtain the necessary signatures from our office and provide you with a copy for the commission's files. You do not need to complete the 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.

We note that this office periodically offers training on the KOMA. You may find more information about upcoming training on our website: <https://ag.ks.gov/open-government/upcoming-training>. The Kansas Association of Counties also offers KOMA training, and has been offering virtual sessions during the pandemic.

We thank you and the commission in advance for your continuing cooperation. 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)