

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 County Commissioners,)
Leavenworth County, Kansas.)

Case No. 2016-OG-0002

CONSENT ORDER

NOW on this 15th day of September, 2016, this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2015 Supp. 75-4320d(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. 75-3417 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about April 20, 2016, the Attorney General's Office received a complaint alleging the Board of County Commissioners of Leavenworth County, Kansas ("the Board") violated the KOMA. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the Board took binding action in executive session in violation of K.S.A. 2015 Supp. 74-4319(c), which prohibits binding acting during executive sessions.

2. The Board is a public body that is subject to the requirements of the KOMA, and any executive sessions held by the Board must comply with the KOMA.

3. Investigation and/or admissions by Commissioners Robert Holland, Clyde Graeber and Dennis Bixby, County Counselor David Van Parys, and Human Resources Director Tamara Copeland, as described in a letter dated August 17, 2016, to Leavenworth County Counselor David Van Parys, 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 April 14, and April 18, 2016, Commissioners Holland, Graeber and Bixby recessed into executive session a total of twelve (12) times. The motions for executive session did not comply with the requirements set forth in K.S.A. 2015 Supp. 75-4319(a). The motions were missing the justification for closure and the time and place at which the open meeting shall resume.

- b. During the April 14, 2016, executive sessions for personnel matters of non-elected personnel, the Board reached a consensus in executive session concerning two separate matters, including the termination of an employee, and did not hold a public vote on the matters when they returned to open meeting.
- c. On April 14 and April 18, 2016, the motion for each executive session listed the subject matter as personnel matters of nonelected personnel. However, the discussion during the executive sessions was not limited to this single subject matter. During one or more of these executive sessions, the Board also received legal advice from the county counselor.

4. Based upon the above information and admissions, Commissioners Robert Holland, Clyde Graeber and Dennis Bixby individually admit and agree that they violated the KOMA set out in paragraph 3 above.

5. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby agree that they now fully understand and agree that for each executive session they intend to comply with the requirements set forth in K.S.A. 2015 Supp. 75-4319(a), (b) and (c).

6. The Attorney General and Commissioners Robert Holland, Clyde Graeber and Dennis Bixby mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby 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. 2015 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

8. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby understand and acknowledge that Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, does not apply to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open public meetings (the 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 Robert Holland, Clyde Graeber and Dennis Bixby.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that Commissioners Robert Holland, Clyde Graeber and Dennis Bixby be subject to this Order based on the provisions of K.S.A. 2015 Supp. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body or agency for violation of the KOMA in a Consent Order;

AND WHEREAS the Attorney General and Commissioners Robert Holland, Clyde Graeber and Dennis Bixby mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Commissioners Robert Holland, Clyde Graeber and Dennis Bixby consent to the following terms and conditions, and the Attorney General orders that:

10. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby agree to and shall:

- a. Obtain 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 date of this Consent Order;
- b. Provide the Attorney General's Office with a written statement confirming each has obtained the required KOMA training;
- c. Pay the cost of training individually, and not from public or city moneys, if there is any charge to obtain the required training; and
- d. Not engage in any future violations of the KOMA.

11. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby 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. 2015 Supp. 75-4320d(c) and amendments thereto.

12. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby understand and agree that if they engage in any future violation of the KOMA, the facts and admissions contained herein may be considered in determining the appropriate enforcement action and remedy.

13. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby agree and understand that this Consent Order does not apply to future and/or currently unknown 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. 2015 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2015 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

14. In consideration of these admissions and agreements by Commissioners Robert Holland, Clyde Graeber and Dennis Bixby, and the above-agreed remedies, the Attorney General agrees to forgo prosecution for the violations of the KOMA set forth herein.

15. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby 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 Agreement shall operate as a complete release of all claims the parties may have against each other and arising out of the investigation of this matter. Commissioners Robert Holland, Clyde Graeber and Dennis Bixby 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 Robert Holland, Clyde Graeber and Dennis Bixby 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 Robert Holland, Clyde Graeber and Dennis Bixby understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2015 Supp. 75-432d(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, Commissioners Robert Holland, Clyde Graeber and Dennis Bixby consent to these provisions.

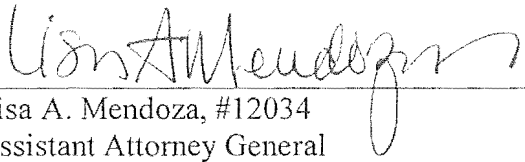
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL

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

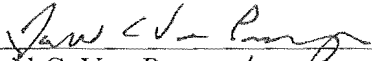
Derek Schmidt
Kansas Attorney General

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
Topeka, KS 66612-1597

Approved By:



David C. Van Parys #11683
300 Walnut
Leavenworth, KS 66048
Leavenworth County Counselor

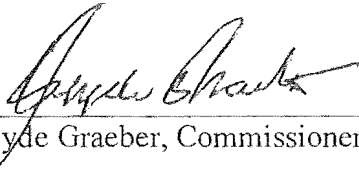
The Leavenworth County Board of County Commissioners, by each individual involved in a violation of the KOMA:



Robert Holland, Commissioner

9-8-16

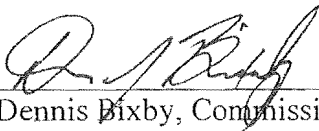
Date



Clyde Graeber, Commissioner

9-8-16

Date



Dennis Bixby, Commissioner

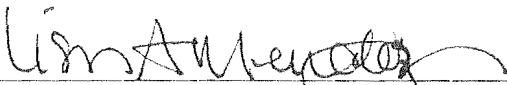
9/8/16

Date

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2016, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

David C. Van Parys
300 Walnut
Leavenworth, KS 66048
Leavenworth County Counselor



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
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(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

August 17, 2016

David C. Van Parys
Leavenworth County Counselor
300 Walnut
Leavenworth, KS 66048

RE: KOMA Complaint – Board of County Commissioners, Leavenworth County

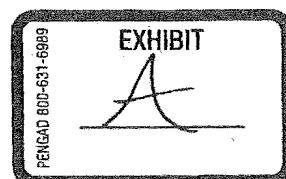
Dear Mr. Van Parys:

On April 20, 2016, we received two complaints from Col. Clayton W. Cobb, USA, Retired, alleging that the Board of County Commissioners of Leavenworth County (“the Board”) violated the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, by taking binding action in executive session. As a remedy, Col. Cobb requested that the actions be voided; additionally, he requested the penalties set out in the KOMA.¹ He also requested that we “investigate the background and circumstances for this termination as it is purely without merit and based on personal vendetta on the part of one or more Commissioners and would seem to constitute an abuse of power for personal gain/interest.”

After clarifying certain matters with Col. Cobb, on May 10, 2016, we requested a response from the Board concerning the allegations in the complaint by June 24, 2016. On June 22, 2016, we granted your request for an extension of time so that you could review the response with the Board during its meeting on June 27, 2016. On June 27, 2016, you advised there would be a delay in sending the response of one commissioner due to an unfortunate family matter. On June 30, 2016, we received the signed responses from two commissioners, and we received the third response on July 7, 2016. On July 25, 2016, we requested additional information in order to clarify certain matters. On August 4, 2016, you provided additional information in response to our follow up questions.

The purpose of this letter is to inform you of the results of our review. We relied on the complaint, the Board’s response, recordings of the relevant Board meetings, information you provided in response to our follow up questions, and information from Leavenworth County’s website in reviewing this matter. Additionally, we relied on contemporaneous news accounts, as well as the provisions of the KOMA, relevant Attorney General Opinions and caselaw.

¹ See K.S.A. 2015 Supp. 75-4320(a).



Following our review, it is clear that the Board is a public body or agency subject to the KOMA,² and thus this office has jurisdiction to review any complaint that the KOMA has been violated.³

For the reasons set forth in this letter, we have determined by a preponderance of the evidence that the Board violated the KOMA on April 14 and April 18, 2016, as further described below.

To assist the understanding of the parties, we describe the facts in some detail, and then discuss our conclusions. We also note that each of the three (3) commissioners were present at the April 14 and April 18, 2016, meetings.

Preliminary Matters

As a preliminary matter, we address the complainant's request that we "investigate the background and circumstances for this termination as it is purely without merit and based on personal vendetta on the part of one or more Commissioners and would seem to constitute an abuse of power for personal gain/interest."

The purpose of the KOMA is to ensure that government business is conducted "in the sunshine." It guarantees the public's right to observe governmental policy makers, such as school boards, city councils, and county commissions, making decisions that affect Kansas citizens on a daily basis. As stated by the Legislature: "In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public."⁴

There are two main requirements of the KOMA. First, if a public body or agency is subject to the KOMA, its meetings must be open, subject to certain exceptions.⁵ Second, the public body or agency must provide notice of meetings to those requesting notice.⁶ Any member of a public body or agency subject to the KOMA who knowingly violates any of the provisions of the KOMA or who intentionally fails to furnish information as required by K.S.A. 2015 Supp. 75-4318(b) is subject to the penalty provisions of the KOMA. Enforcement of the KOMA focuses on the failure to conduct the public's business in the open or give notice, as opposed to the enforcement of individual employment or other rights. In enforcing the KOMA, the Attorney General does not act as a complainant's private attorney.

With this in mind, it is clear that investigation of the reasons for the termination of a particular individual is outside the scope of the KOMA. For these reasons, we decline to investigate "the background and circumstances for this termination."

² K.S.A. 2015 Supp. 75-4318(a).

³ See K.S.A. 2015 Supp. 75-4320(a), 75-4320b and 75-4320d.

⁴ K.S.A. 2015 Supp. 75-4317(a).

⁵ See K.S.A. 2015 Supp. 75-4318(a) and 75-4319(a) and (b).

⁶ K.S.A. 2015 Supp. 75-4318(b).

Binding action taken in executive session

A public body's meetings must be open to the public,⁷ but the public body may hold a "closed or executive meetings."⁸ Such closed or executive meetings are also referred to as "executive sessions." An executive session may be held for the reasons identified in the statute. These reasons include the discussion of "personnel matters of non-elected personnel" and "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship."⁹ "No 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 this act."¹⁰ There is no exception to this provision, thus a majority of the Board must take formal binding action in an open meeting.¹¹

A further discussion of each complaint is necessary to the understanding of our conclusions.

A. Complaint No. 1

The first complaint, filed on April 20, 2016, at 2:17 p.m., describes the following situation:

Additionally in one of these [executive] sessions an unknown Commissioner (or Commissioners) directed the Director of Human Resources to 'terminate Stephanie Cobb and repost the position'. An action which the HR Director immediately carried out without sufficient cause and as an act of retribution on the part of one or more Commissioners. The board returned after each executive session and failed to take a vote or discuss any actions taken. . . .[sic]

(Emphasis added).

Attached to Complaint No. 1 is a document titled "Leavenworth County PERSONNEL ACTION." (Emphasis in the original). This form concerns employee Stephanie Cobb.¹² In the "Nature of the Action" section of this form, a box titled "Separation" is checked. The effective date of the personnel action form is April 14, 2016. Another section on the form states: "Indicate reason for separation and attach letter of resignation: Termination is in the best interest of the county due to policy violations." The final section contains the following statements:

⁷ K.S.A. 2015 Supp. 75-4318(a).

⁸ K.S.A. 2015 Supp. 75-4319(b)(1).

⁹ K.S.A. 2015 Supp. 75-4319(b).

¹⁰ K.S.A. 2015 Supp. 75-4319(c).

¹¹ K.S.A. 2015 Supp. 75-4318(a) and 75-4319(c). See also Attorney General Opinion (AGO) No. 1993-055, <http://ksag.washburnlaw.edu/opinions/1993/1993-055.htm>, accessed August 4, 2016.

¹² The employee is identified in the complaint, as well as in published news accounts. See John Richmeier, *Commissioners terminate public works director, other employee*, www.leavenworthtimes.com, posted April 18, 2016, <http://www.leavenworthtimes.com/article/20160418/news/160419455> (last visited Aug 5, 2016); see also John Richmeier, *Husband of terminated employee lodges complaint*, www.leavenworthtimes.com, posted April 22, 2016, <http://www.leavenworthtimes.com/article/20160422/NEWS/160429746> (last visited August 5, 2016).

- Action approved based upon Board Motion (Minutes are attached)
- Action approved by County Administrator (Authorization attached)
- Action approved according to established policy
- Other authorized approval _____.

The check box in front of the statement, “[A]ction approved based upon Board Motion (Minutes are attached)” is marked with a handwritten “X.” Immediately to the right of this typed statement is the following handwritten notation:

Done in executive session
Commissioners directed the
HR Director to terminate
Stephanie Cobb and
repost the position.

Immediately under this notation is the signature of Tamara Copeland and the date 4/15/16. To the left of this signature is the handwritten signature of Patrick Hurley with the date of 4/15/16. Ms. Copeland is the County Human Resources Director (“HR Director”). Mr. Hurley is the County Administrator for Leavenworth County.

The Board’s initial written response indicates the “annotation is with respect to a *consensus* reached by the board in executive session on April 14, 2016, and to be formally acted upon through the submission of personnel actions to be presented to the board for formal adoption/ratification on April 18, 2016, which was done on the 18th.” (Emphasis added). The Board concluded its April 14, 2016, meeting without taking any formal action on its consensus.

In response to our follow up inquiries, you state that both Ms. Copeland and Mr. Hurley are “technically authorized” to take employment action. Notwithstanding this, the Board reached a consensus to terminate the employee during one of the April 14, 2016, executive sessions. Ms. Copeland’s annotation reflects the consensus in executive session was the Board’s directive to terminate the employee. The Board did not hold a public vote to formalize their consensus ON April 14, 2016. Ms. Copeland reports that on April 14, 2016, the employee “was called to my office and I told her she was being terminated.” Following this meeting, the employee’s direct supervisor escorted the employee out.

In your response, you discuss two Kansas cases concerning situations where a public body reached a consensus in executive session. The first case is *O’Hair v. U.S.D. No. 300*.¹³ The second case is *City of Topeka v. Watertower Place Development Group*.¹⁴ Although you do not state it clearly, your argument appears to be as follows: because the Board’s consensus in executive session on April 14, 2016, was intended “to be formally acted upon through the submission of personnel actions to be presented to the board for formal adoption/ratification on April 18, 2016,” and because the Board did ultimately vote during an open meeting to terminate

¹³ 15 Kan.App.2d 52, 805 P.2d 40, 65 Ed. Law Rep. 895 (1990).

¹⁴ 265 Kan. 148, 959 P.2d 894 (1998).

the employee, there was no binding action in executive session and thus no violation of the KOMA.

O'Hair v. U.S.D. No. 300 involved a situation where a board of education reached a consensus in executive session, but voted in open meeting to non-renew a tenured teacher's contract. It appears the public vote occurred immediately after the board returned to open meeting at the conclusion of the executive session. Unlike the present case, there was no intervening action to carry out the board's consensus *before the public vote*, and no delay in the public vote. Thus, the court found no violation of the KOMA.

City of Topeka v. Watertower Place Development Group involved a contract termination. In *Watertower Place*, the city attorney informed the city council in an executive session that Watertower "had breached the contract and he would terminate the contract unless one of the council members directed him not to. No council member objected. The city attorney sent the termination notice by letter the next day." There was never a vote by the city council terminating the contract in an open meeting. The court found that "the termination decision did occur during an executive session in violation of the KOMA."

Although the facts set forth in the complaint are not identical to *Watertower Place*, they are sufficiently similar to warrant further discussion. As in *Watertower Place*, the Board discussed a matter in executive session. Unlike *Watertower Place* where the city council essentially stood silent, the Board here discussed the matter and *reached a consensus* to terminate the employee. The HR Director, who was present when the consensus was reached, terminated the employee the same day. Unlike *Watertower Place* where there was no public vote, the Board here held a vote four (4) days later in an open meeting. This vote was ultimately only a ratification of their consensus and the action taken by the HR Director, since the employee *had already been terminated*.

The Board's statements suggest that they did not intend for the employee to be terminated on April 14, 2016. Whether or not they intended the termination to occur on April 14, 2016, the HR Director complied with the Board's consensus as she understood it, and terminated the employee that same day. Both her annotation on the Personnel Action form and later statement confirm that she understood she was to terminate the employee. Thus, notwithstanding the Board's eventual ratification of the employee's termination on April 18, 2016, the consensus they reached during executive session became binding action in executive session on April 14, 2016, because the HR Director immediately carried out their "consensus." This is a violation of the KOMA.

Although we believe the Board violated the KOMA by taking binding action in executive session as described above, our analysis does not end there. We must consider whether this is more than a technical violation¹⁵ 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

¹⁵ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted].”¹⁶

According to the Board’s response, although they reached a consensus in executive session, they intended to vote in open meeting to terminate the employee. For unknown reasons, they did not vote immediately after reaching their consensus. Following their consensus, the HR Director terminated the employee. The termination occurred *before* the Board voted publicly. The complainant does not directly address whether there was any prejudice arising from action taken in executive session, apart from alleging harm that may have resulted from an employee’s termination. However, under the KOMA, the harm is to the public, especially considering the stated public policy that the transaction of governmental business be open to the public. While the public may not be entitled to know all the details leading to the termination of an individual’s employment, under the KOMA, the public does have a right to know about the transaction of governmental business, such as the termination of county employees. This right to know was effectively denied when the Board reached a consensus in executive session and then failed to follow up with a prompt vote when they returned to the open meeting.

In mitigation, we note that the Board ultimately voted during an open meeting to terminate the employee. Additionally, we have no evidence that the Board routinely takes binding action in executive session. Likewise, we have no evidence that the Board’s actions were meant as a subterfuge to avoid the transaction of business in the public eye. Finally, the Board has been cooperative and forthcoming in its responses to each of our inquiries.

After considering the totality of the circumstances, we find that taking binding action in executive session impinges on the public right to know. Thus, we believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

B. Complaint No. 2

The second complaint was filed on April 20, 2016, at 3:29 p.m. It includes a reference to the incident discussed above. It further describes a second allegation of binding action in executive session:

In this same or another Executive Session the board also met with the Director of Public Works and discussed some form of personnel action regarding his future and directed their attorney, Mr. David Van Parys, to prepare a document to that end. It apparently was intended to dismiss him from Director of Public Works position but retaining him as the County Engineer or some other capacity for a period of time. The board returned after each executive session and failed to take a vote or discuss any actions taken. . . . [sic]

(Emphasis added).

¹⁶ *Id.*

Complaint No. 2 concerns a directive you received in your capacity as county counselor concerning another county employee. You received this directive during one of the eight (8) executive sessions you were present for on April 14, 2016. In response to our follow up inquiries, you advised that the Board “authorized [you] to effect a settlement agreement with another county employee,” this was “more or less a consensus” of the Board, and that this agreement was to be ratified during the April 18, 2016, board meeting. During the Board’s April 18, 2016, meeting you further described your actions as follows:

. . . Van Parys: Mr. Chairman and members of the commission, pursuant to what I believe to be a directive I received to pursue a matter in executive session regarding non-elected personnel, I did meet with the individual addressed and have entered into an Agreement captioned “Agreement for Services and Release. I have executed it, the employee has executed it. I would ask that the Board ratify that action. . . .

[unknown commissioner]: I’d like to

Van Parys: I have signed it based upon the directives I received, and I would ask the Board ratify that, that action. . . .¹⁷

. . .

Commissioner Graeber: There’s a draft of a document prepared under our instructions by Mr. Van Parys. It sets forth certain terms and conditions that we basically agreed to and said we would honor. I would move that be moved forward and approved.

[period of silence]

[Unknown commissioner]: Died for lack of second¹⁸

You further advised us as follows: “I will affirm that the agreement was signed on April 14, 2016, both by myself and Mr. Spickelmier based upon what I believe to be a consensus of the board as to the terms with the understanding that the board would, on April 18, 2016, formally consider the matter for ratification/adoption in open session.”

The Board concluded its April 14, 2016, meeting without voting to direct you to take action in accordance with the directives received during an executive session. As indicated in your public explanation, the Agreement was more than a draft. Based on the Board’s direction, you reduced the terms to writing, negotiated with the employee, and “entered into an Agreement.” You further stated that “I have executed it, the employee has executed it [sic],” and asked the Board

¹⁷ Audio recording of April 18, 2016, Board meeting, from the 9:23:45 a.m. to 9:25:59 a.m. mark on the recording.

¹⁸ Audio recording of April 18, 2016, Board meeting, from the 9:48:47 a.m. to 9:49:14 a.m. mark on the recording.

to ratify the Agreement. Ultimately, you advise that the Board did not ratify this Agreement, and voted to terminate the employee.

As with the personnel action taken by the HR Director, on April 14, 2016, the Board reached a consensus in executive session and directed you to take action. You took prompt action that involved negotiating and executing an agreement on the Board's behalf with a county employee. You entered into an Agreement with the employee based on the Board's directive. The Board did not vote in open meeting to authorize you to carry out their consensus directive. Thus, the Board violated the KOMA when it reached a consensus during the executive session on the action it wished to take, and then failed to return to an open meeting to vote to approve their action. In this instance, there was never a public vote.

Although we believe the Board violated the KOMA by taking binding action in executive session as described above, our analysis does not end there. We must consider whether this is more than a technical violation of the KOMA. According to the Board's response, although they reached a consensus in executive session, they intended to vote publicly on this Agreement. However, a lack of clarity in their consensus or directive(s) resulted in you negotiating and executing the agreement on behalf of the Board *before* it voted publicly. Clearly, the complainant raised these violations in his complaint. The complainant does not directly address whether there was any prejudice arising from action taken in executive session. However, under the KOMA, the harm is to public. While the public may not be entitled to know all the details leading to the negotiation of an agreement, under the KOMA, the public does have a right to know about the transaction of governmental business, such as the termination of employees and the execution of legal documents. This right to know was effectively denied when the Board reached a consensus in executive session and then failed to follow up with a prompt vote when they returned to the open meeting. In fact, the Board never voted on this Agreement.

In mitigation, we have no evidence that the Board routinely takes binding action in executive session. Likewise, we have no evidence that the Board's action on this occasion was meant as a subterfuge to avoid the transaction of business in the public eye. Finally, as indicated previously, the Board has been cooperative and forthcoming in its responses to each of our inquiries.

After considering the totality of the circumstances, we find that taking binding action in executive session impinges on the public right to know. Thus, we believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

Matters not identified in the complaint

We identified two additional matters during our review that merit discussion.

A. Motions for executive session

The complaint identifies a series of executive sessions the Board held on April 14 and April 18, 2016. The primary focus of the complaint(s) is whether the Board took binding action in executive session. However, the use of these sessions, as well as a review of the audio

recordings of these meetings, and the official meeting minutes, prompted us to review the process the Board used to recess into executive session.

At the risk of repetition, meetings for the conduct of government affairs and the transaction of governmental business must be open to the public.¹⁹ A public body may, but is not required to, hold an executive session. If the public body decides to recess into executive session, the public body must follow a specific procedure in order to comply with certain statutory requirements.²⁰ “Upon formal motion made, seconded and carried, all public bodies and agencies subject to [the KOMA] may recess but not adjourn, open meetings for closed or executive meetings. Any motion for [executive session] shall include a statement of (1) the justification for closure, (2) the subjects to be discussed during the closed or executive meeting and (3) the time and place at which the open meeting shall resume.”²¹ The public body must record the motion and the required statement in the minutes.²²

During our review, we noted a clear problem with the Board’s motions for executive session. A discussion of one of the motions illustrates the problem:

Commissioner Holland: Ok, I’d like to call an executive session of the Leavenworth County Commission, uh, those present, three commissioners and Pat Hurley, uh, do you want Mike [inaudible whispering]?

Commissioner Bixby: Probably not initially. How long?

Commissioner Holland: Uhhh, for [pause] 15 minutes.

Commissioner Graeber: The subject matter?

Commissioner Holland: Pardon?

Commissioner Graeber: Subject matter.

Commissioner Holland: Subject matter is, uh, non-elected personnel.

[period of silence]

Commissioner Bixby: Second.

Commissioner Holland: Voting.

Commissioner Graeber: Aye.

¹⁹ K.S.A. 2015 Supp. 75-4317(a).

²⁰ See K.S.A. 2015 Supp. 75-4319(a).

²¹ *Id.*

²² *Id.*

Commissioner Bixby: Aye.

Commissioner Holland: Aye.²³

The formally adopted meeting minutes are a bit more succinct:

A motion made by Commissioner Holland and seconded by Commissioner Bixby to go into Executive Session for 15 minutes to discuss non-elected personnel. Present: The three Commissioners and Pat Hurley. Executive session began at 9:58 a.m.

Motion passed, 3-0.

Commission returned from executive session at 10:13 a.m., no official action was taken.²⁴

(Emphasis in the original).

In this instance, the motion for executive session does state the subject matter of non-elected personnel as required by K.S.A. 2015 Supp. 75-4319(b).²⁵ However, it fails to include the justification for the executive session, such as to protect the privacy of the employee(s) to be discussed. It also fails to state the time and place the open meeting shall resume. This executive session was called for a period of 15 minutes. Assuming the meeting minutes correctly state the executive session began at 9:58 a.m., and that this start time was clear to those in attendance at this open meeting, by “doing the math,” it is possible to determine that the open meeting was to resume at 10:13 a.m. Additionally, you advise us that all executive sessions are held in the regular Board meeting room and that staff and members of the public leave the room each time an executive session is called. Thus, the Board has fallen into the practice of eliminating this element from its motion since local practice is clear. Nevertheless, it is clear that this motion falls short of meeting the statutorily required elements.

One element that the Board has added to its motion is the inclusion of the names of those individuals who will be present during the executive session in addition to the three commissioners. Although not required by the KOMA, this is a helpful addition, and lets the public know with whom the Board is consulting during an executive session.

Each of the remaining motions for executive sessions on April 14, 2016, and the two (2) executive sessions held on April 18, 2016, are missing the justification and place the open meeting will resume. In each recorded motion, the time the open meeting was to resume is not plainly stated, but again, by “doing the math,” and assuming each executive session started at the time indicated and continued for the length of time indicated, it is possible to determine what time the open meeting was to resume.

²³ Audio recording of April 14, 2016, Board meeting, from the 9:57:55 a.m. to 9:58:48 a.m. mark on the recording.

²⁴ Board Meeting Minutes, April 14, 2016, p. 2.

²⁵ “(b) No subjects shall be discussed at any closed or executive meeting, except the following: (1) Personnel matters of nonelected personnel”

In reviewing the available meeting minutes for executive sessions held by the Board during 2015 and 2016 (through the date of the complaint), we noted they are all written in a similar fashion.

Since the time we brought this issue to the attention of the Board, they have taken steps to comply with the requirements of K.S.A. 2015 Supp. 75-4319(a). For example, on June 16, 2016, the Board made the following motion for executive session:

A motion was made by Commissioner Graeber seconded by Commissioner Holland to enter into Executive Session for 10 minutes for the purpose to protect economic interest of the County with regards to the possible acquisition of real estate to reconvene at 9:34 a.m. in the office of the Leavenworth County Commission. Present: The two Commissioners, David Van Parys and Pat Hurley.

Motion passed 2-0.

The Commission returned at 9:34 a.m. No official action taken.²⁶

(Emphasis in the original).

This motion meets the statutory requirements. The justification is “to protect economic interest of the county.” The subject matter is “possible acquisition of real estate.” Although the motion does not use the exact statutory language for the subject matter,²⁷ it still clearly related to the subject matter such that the public is aware of the purpose for the executive session. Moreover, while it may be better practice to adhere strictly to the statutory language, the KOMA contains no requirement that public bodies use the exact statutory phrasing of a subject matter when recessing into executive session. Finally, the time and place at which the open meeting shall resume are also stated: “to reconvene at 9:34 a.m. in the office of the Leavenworth County Commission.”

In your response, you state, “it is admitted that the board did not strictly comply with the three distinct step process of convening an executive session.” You further state in explanation that, “[T]he fault in that non-compliance is strictly mine as I was present for all but one of the executive sessions in question and should have advised the board to strictly follow the three step procedure to include the statement of justification, the topic and statutory authority and the time and place in which the board would reconvene in open session rather that the procedure followed. Nonetheless, there was no intention on the part of the board to circumvent the KOMA and if any error occurred on the part of the board it was through the un-mindful advice of counsel.”

Although we appreciate your statement concerning the “un-mindful advice of counsel” in explaining the Board’s failure to follow the statutory requirements of the KOMA for recessing

²⁶Board Meeting Minutes, June 16, 2016, pp. 1-2.

²⁷ See K.S.A. 2015 Supp. 75-4319(b)(b). The subject matter as stated in the statute is “preliminary discussions relating to the acquisition of real property.”

into executive session, the ultimate responsibility for following the KOMA falls on the members of the public body. This is because as elected officials, they are the ones authorized by law to take action.²⁸ Thus, because it is clear that on twelve (12) occasions over the course of the April 14 and April 18, 2016, meetings, the Board failed to comply with the requirements of K.S.A. 2015 Supp. 75-4319(a) when making the motion(s) for executive session, we find that the Board violated the KOMA.

However, that is not the end of our inquiry on this issue. The Board substantially complied with the statutory requirements even though their motions were technically deficient. Additionally, they recorded the motions in the minutes as required. By making the motions, the public was aware that the Board was recessing into executive session. The complaint does not specifically raise this issue. Rather, we identified this issue during the course of our review of these meetings. Because of this, we have no evidence of prejudice resulting from these actions, or that the public's right to know was effectively denied. Likewise, we have no evidence that the Board's failure to meet the required elements for recessing into executive session was an effort to circumvent or thwart the purposes of the KOMA. Finally, the Board has taken prompt corrective action with regard to its motions for executive session, even before the issuance of this report.

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

B. Discussion during executive session limited to subjects stated in the motion

During our review of this matter, it became clear that during the executive sessions held to discuss personnel matters of non-elected personnel, you also provided legal advice to the Board during one or more of the sessions. In other words, there was a consultation with any attorney for the public body or agency on matters that would be deemed privileged in the attorney-client relationship. You confirmed this when we contacted you for additional information concerning this complaint.

K.S.A. 75-4319(a) provides that discussion during executive session is limited to those subjects stated in the motion. The purpose of the personnel matters provision of the KOMA is "to protect the privacy rights of employees, save personal reputations, and encourage qualified people to seek government employment."²⁹ It seems implicit that when inviting an attorney into an executive session held to discuss personnel matters of non-elected personnel, the attorney will provide legal advice. This is because the discussion of personnel matters is often closely intertwined with the provision of legal advice, including whether there is a legal basis to take action, what are the legal consequences of taking action, will the public agency have any liability if they do, or do not, take personnel action, etc. However, this is not contemplated by the

²⁸ See, e.g., K.S.A. 19-103, and 19-201 *et seq.* (concerning county commissioners).

²⁹ *Walker v Board of Educ.*, U.S.D. No. 499, 21 Kan.App.2d 341, 344, 900 P.2d 850, *rev. denied*, 257 Kan. 1097 (1995). See also *Hinsdale v. City of Liberal*, Kan. 981 F. Supp. 1378, 1380 (1997).

“personnel matters of non-elected personnel” provision. This conclusion is supported by the fact that the KOMA provides a separate subject matter to cover “consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship.”³⁰ This makes it clear that the “personnel matters of non-elected personnel” subject matter set out in K.S.A. 2015 Supp. 75-4319(b)(1) does not explicitly or implicitly include the provision of legal advice.

Thus, by discussing or providing legal advice during one or more executive sessions held solely for personnel matters of non-elected personnel, the Board violated the KOMA.

Although we believe this is a violation of the KOMA, our analysis does not end there. It is clear that a public body can discuss both of these subjects in executive session, and many times, these two topics are intertwined. Additionally, while we identified this issue during our review, it was not raised in the complaint(s). We have no evidence of prejudice resulting from the discussion of more than one subject in executive session, or that the public’s right to know was effectively denied, especially where the attorney’s participation in the executive session was announced beforehand. Likewise, we have no evidence that the failure to specifically include the subject matter of consultation with an attorney was an effort to circumvent or thwart the purposes of the KOMA. In mitigation, you promptly acknowledged you provided legal advice during some of the executive sessions.

After considering the totality of the circumstances, we conclude that this is a technical violation of the KOMA.

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the KOMA.³¹ Additionally, completion of training concerning the requirements of the KOMA may also be required.³² Any member of a public body or agency subject to the KOMA who knowingly violates any provisions of the act or intentionally fails to furnish information as required by K.S.A. 2015 Supp. 75-4318(b) concerning notice may be subject to these penalties.

The number of identified violations in this case suggests the Board has been, at the very least, careless in its observance of the KOMA. The Board’s well-established pattern of failure to observe the requirements for recessing into executive session suggests a deliberate and purposeful disregard of the KOMA. However, in mitigation, we note that the Board has already taken corrective action concerning its motions for executive session. Additionally, in its response, the Board promptly acknowledged its failure to comply with the requirements of the KOMA when recessing into executive session, and requested KOMA training to ensure “strict compliance” with the KOMA. We have not identified any prior substantiated violations of the KOMA by the Board. You conceded that what occurred on April 14 and April 18, 2016, “was

³⁰ K.S.A. 2015 Supp. 75-4319(b)(2).

³¹ K.S.A. 2015 Supp. 75-4320(a).

³² K.S.A. 2015 Supp. 75-4320a(a).

not textbook.” However, the fact that binding action was taken during executive session cannot be ignored.

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the Board violated the KOMA.

After due consideration of all the available facts, we decline to pursue the complainant’s suggested remedy to void the binding action taken in executive session. Although the request to void the action was timely filed, the Board ultimately voted publicly to terminate the two employees.

As indicated earlier, we believe remedial action is required to ensure the Board’s compliance with the KOMA. On the facts of this case, including the Board’s prompt acknowledgment that they fell short of complying with the KOMA in at least some regards, we have determined not to impose a civil penalty³³ as authorized by the KOMA. However, we are seeking the Board’s voluntary compliance through the means of a consent order as provided for by the KOMA.³⁴

We have enclosed the Consent Order for the Board’s review. The Consent Order requires the Board to acknowledge the KOMA violations, and agree to comply with the KOMA in the future. Additionally, because we strongly believe that the Board would benefit from KOMA training, it requires attendance of at least one (1) hour of KOMA training.

Our offer of a Consent Order as authorized by K.S.A. 2015 Supp. 75-4320d(a)(1), is effective up to **5:00 p.m. on Friday, September 9, 2016**. Because the Board meets regularly, we believe this will offer you sufficient time to confer with them 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.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, September 9, 2016**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2015 Supp. 75-4320a, 75-4320d and/or 75-4320f.

We note that our office is sponsoring training on both the KOMA and the KORA during the month of August. This training is free to the public. You may find more information about the training here: <https://ag.ks.gov/open-government/upcoming-training>. Attending this training would meet the training requirement set out in the Consent Order.

³³ K.S.A. 2015 Supp. 75-4320d(a)(1)(A)(ii).

³⁴ K.S.A. 2015 Supp. 75-4320d(a)(1).

Letter to David Van Parys

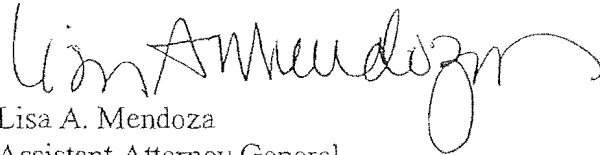
August 17, 2016

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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

A handwritten signature in black ink, appearing to read "Lisa A. Mendoza". The signature is fluid and cursive, with a large loop at the end of the last name.

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

Enclosure (Consent Order)