

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)
Marshall County)
Board of County)
Commissioners.)

Case No. 2018-OG-0001

CONSENT ORDER

NOW on this 30th day of May, 2018 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2017 Supp. 75-4320(d)(a)(1), which grants the Attorney General authority to enter into consent orders.

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

1. On or about February 21, 2018, the Attorney General's Office received a referral from the Marshall County Attorney reporting an alleged violation of the KOMA by the Marshall County Board of County Commissioners ("the commission"). Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the commission discussed improperly discussed matter in executive session in violation of K.S.A. 2017 Supp. 75-4319(a) and (b), which require that a public body follow a certain procedure to recess into executive session and limit its discuss during executive session to specific statutory topics.

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

3. Investigation and/or statements provided by or on behalf of the commission, as described in a letter dated April 23, 2018, to the commission's attorney Jason E. Brinegar, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violations of the KOMA by a preponderance of the evidence:

- a. On or about February 5, 2018, the commission recessed into executive session using the justification to discuss personnel matters of nonelected personnel; the statement describing the subjects to be discussed was "to assure

compliance with policies and laws.” The purpose of the executive session was to discuss the bills submitted for the commission’s approval by two court appointed defense counsel and the potential impact payment of the bills might have on the district court clerk’s budget. The commission did not discuss any matters regarding or related to nonelected personnel during the executive session. The commission stipulates to these factual statements. The matters discussed during executive session did not concern nonelected personnel in violation of K.S.A. 2017 Supp. 75-4319(b).

- b. On February 5, 2018, the commission failed to comply with the requirements set forth in K.S.A. 2017 Supp. 75-4319(a) for recessing into executive session when its motion failed to include a sufficiently specific statement describing the subjects to be discussed during the executive session, as well as the place the open meeting would resume. The commission stipulates to this violation.

4. Based upon the above information, David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen, individually admit and agree that they violated the KOMA as set out in paragraphs 3.a. and 3.b. above.

5. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen now fully understand and agree that they fully intend to comply with the requirements of K.S.A. 2017 Supp. 75-4319(a) and (b) concerning executive session.

6. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen now fully understand and agree that for each executive session held they intend to comply with the requirements of K.S.A. 2017 Supp. 75-4319.

7. The Attorney General and David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen, mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

8. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen 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. 2017 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

9. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen waive any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open meetings (KOMA), and subject to an action for civil penalties or enforcement, and thus they do not have a right to appeal under the KJRA.

10. The Attorney General accepts the waivers and stipulations by David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen be subject to this Order based on the provisions of K.S.A. 2017 Supp. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body for violation of the KOMA in a Consent Order;

AND WHEREAS the Attorney General and David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen consent to the following terms and conditions, and the Attorney General orders that:

11. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen agree to and shall:

- a. Ensure that each commission member individually obtains at least one (1.0) hour of training on the provisions of the KOMA to be presented by an attorney experienced in dealing with open meetings issues, within three (3) months of the effective date of this Consent Order;
- b. Provide the Attorney General's Office with a written statement confirming that each commission member has obtained the required KOMA training within ten (10) days of receiving the training; and
- c. Not engage in any future violations of the KOMA.

12. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen 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. 2017 Supp. 75-4320d(c) and amendments thereto.

13. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen understand and agree that if they engage in any future violation of the KOMA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

14. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen 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. 2017 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2017 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

15. In consideration of these admissions and agreements by David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KOMA set forth herein.

16. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen agree that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

17. Except as provided in paragraphs 12 and 13, this Consent Order shall operate as a complete release of all claims David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen 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. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen agree that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

18. David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen understand that this Consent Order shall be maintained and

made available for public inspection pursuant to the provisions of K.S.A. 2017 Supp. 75-4320d(e) and amendments thereto.

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

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

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

WHEREFORE, the Attorney General and David E. Baier, chairman, and commission members Robert S. Connell and Lynn Feldhausen consent to these provisions.

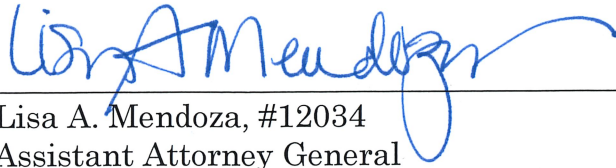
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL

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

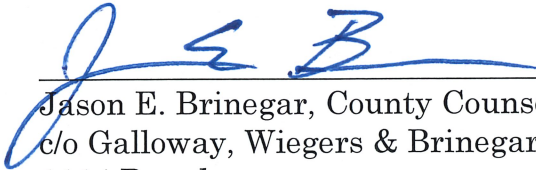
Derek Schmidt
Kansas Attorney General

Prepared By:



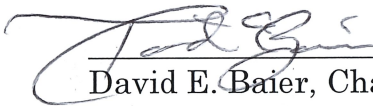
Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597
Phone: (785) 296-2215

Approved By:



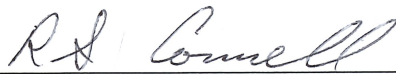
Jason E. Brinegar, County Counselor, #19795
c/o Galloway, Wieggers & Brinegar, P.A.
1114 Broadway
PO Box 468
Marysville, KS 66508
Phone: (785) 562-2375
Attorney for the Marshall County Board of County Commissioners

Marshall County Board of County Commissioners



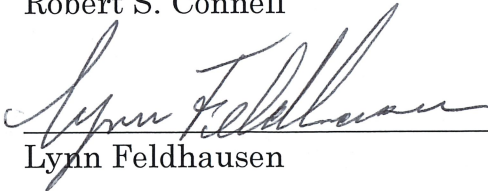
David E. Baier, Chairman

5-16-18
Date



Robert S. Connell

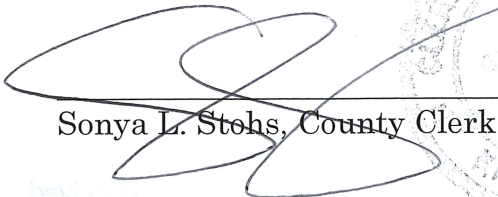
5-17-18
Date



Lynn Feldhausen

5-21-18
Date

ATTEST:



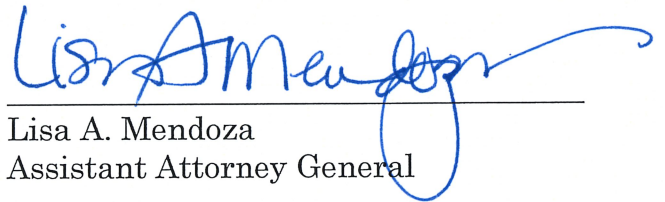
Sonya L. Stohs, County Clerk

5-21-18
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2018, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Jason E. Brinegar, County Counselor
c/o Galloway, Wieggers & Brinegar, P.A.
1114 Broadway
PO Box 468
Marysville, KS 66508
Attorney for the Marshall County Board of County Commissioners



Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
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April 23, 2018

Jason E. Brinegar, County Counselor
c/o Galloway, Wieggers & Brinegar, P.A.
1114 Broadway
PO Box 468
Marysville, KS 66508

Re: KOMA Complaint / Referral – Marshall County Board of County Commissioners

Dear Mr. Brinegar:

On February 21, 2018, this office received a referral from the Marshall County Attorney concerning a possible violation of the Kansas Open Meetings Act (KOMA)¹, by the Marshall County Board of County Commissioners (“the commission”). The county attorney requested that this office assume jurisdiction of this matter since until very recently, the county attorney and county counselor functions were combined and performed by the county attorney. The referral raised a concern about the justification used for an executive session.

Following our review, it is clear that the commission 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 During our review, we identified one issue that warrants further discussion.

Executive sessions

At the time we received this referral, the commission was comprised of the following:

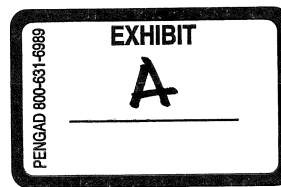
- David E. Baier, chairman
- Robert S. Connell, commission member, and
- Lynn Feldhausen, commission member.

The facts here are relatively straightforward. On February 5, 2018, the commission recessed into executive session. The motion was recorded in the minutes:

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 2017 Supp. 75-4318(a).

³ See K.S.A. 2017 Supp. 75-4320(a), 75-4320b and 75-4320d.



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Robert S. Connell moved, seconded by Lynn Feldhausen to go into executive session for ten minutes at 9:15 a.m. to discuss matters of nonelected personnel to assure compliance with policies and laws with County Clerk Sonya L. Stohs present. Unanimous. Clerk of the District Court Clerk Nancy Koch was requested by the Board to be present for two minutes to clarify a question. . . .⁴

The commissioners and the county clerk are elected officials. Ms. Koch is not a county employee. The minutes report that “[n]o action was taken as a result of the executive session.”

The purpose of the executive session was to discuss recent bills submitted for approval by two court appointed defense counsel. The commission further explains the reason for the executive session:

. . . During the process of changing county counselors the contracts for two different attorneys providing representation to indigent defendants expired. Rather than continuing under the expired contract until a new one could be prepared, these two attorneys billed their time at \$80.00 per hour. The discussion that was held in the executive session was to determine whether these bills should be paid at the hourly rate and how it compared to the former contract rate. Nancy Koch⁵ was brought in to provide information relative to the impact the bills would have on her budget. The Commissioners did not want the bills that were sent by these attorneys to be publicly available without a complete understanding of the amount of the bills as compared to the contract rate and whether the contract rate should still be applied. There was no action taken in the executive session. The bills submitted by these attorneys were subsequently discussed and approved in open session and paid. . . .

The commission’s meeting minutes confirm that the bill submitted by at least one contract attorney was approved for payment at the February 5, 2018, meeting.⁶

In its response, the commission concedes that “[t]he situation that arose on February 5, 2018 was not a matter of non-elected [sic] personnel.”

The commissioners state that they “are dedicated to open government and believe that great efforts are taken to make sure that all meetings are in compliance with the KOMA. However, it appears that this situation was not handled as well as it could have been and that a violation may have occurred. If that is the case, the Marshall County Commissioners are prepared to accept the consequences. . . .” When we spoke to the county attorney about this referral, she indicated that if this office concluded there was a KOMA violation, she believed the commissioners would be very amenable to receiving guidance and training.

⁴ February 5, 2018, commission meeting minutes.

⁵ The Marshall County District Court Clerk.

⁶ February 5, 2018, commission meeting minutes (“. . . Robert S. Connell moved, seconded by Lynn Feldhausen to approve the following purchase orders. Unanimous.

Steven A. Kraushaar, Attorney, Marysville, KS
for January 2018 Court Appointed Attorney
\$3,946.20-General (District Court) fund-P.O. # 5510. . . .”).

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No member of the commission has ever been found to be in violation of the KOMA. Only Commissioner Baier has somewhat recently attended KOMA training, in January of 2017.

In its response, the commission stated that it “relies upon The Kansas Association of Counties County Desk Book, specifically pages 70 through 74 of the 2017 edition. . . .” It further stated that it relies on previous statements of the prior county counselor concerning executive sessions.

It is the public policy of Kansas that meetings for the conduct of government affairs and the transaction of governmental business must be open to the public.⁷ 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.⁸ The motion must include a statement describing the subjects to be discussed, and a justification as listed in the statute.⁹ The presence of other individuals during the executive session is permissible if they will assist with the executive session discussion.¹⁰

Under the current law, “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.¹¹ The determination about whether the motion sufficiently describes the subject(s) to be discussed in a specific situation is a fact-sensitive question that must be determined on a case-by-case basis.

A “justification” refers to one of the topics identified in K.S.A. 2017 Supp. 75-4319(b), such as personnel matters of nonelected personnel.¹² 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.¹³

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

⁷ K.S.A. 2017 Supp. 75-4317(a).

⁸ K.S.A. 2017 Supp. 75-4319(a) (“Upon formal motion made, seconded and carried, all public bodies and agencies subject to [the KOMA] may recess but not adjourn, open meetings for closed or executive meetings. Any motion for [executive session] shall include: (1) A statement describing the subjects to be discussed during the closed or executive meeting; (2) the justification listed in subsection (b) for closing the meeting; and (3) the time and place at which the open meeting shall resume. The complete motion shall be recorded in the minutes of the meeting and shall be maintained as part of the permanent records of the public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.”).

⁹ *Id.*

¹⁰ Attorney General Opinion 92-56, <http://ksag.washburnlaw.edu/opinions/1992/1992-056.pdf>, accessed April 13, 2018. The one exception to this general rule is when the executive session is held for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship.

¹¹ Attorney General Opinion 2018-1, <http://ksag.washburnlaw.edu/opinions/2018/2018-001.pdf>, accessed April 13, 2018.

¹² K.S.A. 2017 Supp. 75-4319(b)(1).

¹³ Attorney General Opinion 2018-1.

announcement of place is required even when the public body does not recess to another location to hold its executive session.

The KOMA also establishes certain requirements for the recording of the motion for executive session. The recording of the motion “is not ‘complete’ if it merely summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion. . . .”¹⁴

Because the commission essentially concedes that its statement describing the subjects to be discussed and the justification it used were improper in light of the existing facts, we need not engage in an in-depth review of the February 5, 2018, executive session. However, we would be remiss if we did not briefly describe how the executive session and the motion itself fell short of complying with the KOMA.

Substantively, the justification “to discuss personnel matters of nonelected personnel” is one of the statutory reasons a public body may recess into executive session. Here, however, the commission’s executive session failed to comply with the KOMA because it used a justification to discuss matters that did not actually involve nonelected personnel.¹⁵ Instead, the commission discussed bills submitted by contract attorneys. The “personnel matters” justification pertains to *employees* of public agencies. Independent contractors hired by public bodies are not employees.¹⁶

In its response, the commission suggests that it might properly have used the statutory justification involving “the need . . . to discuss data relating to financial affairs . . . of corporations, partnerships, trusts, and individual proprietorships”¹⁷ to recess into executive session. Essentially, the commission appears to argue that it simply selected the wrong justification, but could still have discussed the payment of the contract attorneys’ bills and the impact of such payments on the district court clerk’s budget in executive session if it had simply selected the correct justification. However, we do not believe the justification involving “data relating to financial affairs” would have applied. This is because the commissioners were merely discussing the rate at which to pay the bills that were submitted—essentially invoices—and not the financial accounts, balance sheets, receipts and expenditures, budget, payroll, etc., of the contract attorneys. This justification certainly would not have covered any discussion of the district court clerk’s budget.

The commission conceded that its executive session discussion “was not a matter of non-elected [sic] personnel.” Thus, it is clear that the executive session, although called for a proper justification recognized by the KOMA, was ultimately improper when the commission used it to discuss both the payment of bills submitted by contract attorneys and the impact on the

¹⁴ *Id.*

¹⁵ Although the clerk and the district court clerk are not nonelected personnel within the meaning of the KOMA, their presence during the executive session is not a concern under the facts presented, as it appears their presence was requested to aid the commission.

¹⁶ See Attorney General Opinion 87-169, <http://ksag.washburnlaw.edu/opinions/1987/1987-169.pdf>, accessed April 13, 2018.

¹⁷ K.S.A. 2017 Supp. 75-4319(b)(4).

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district court clerk's budget. In so doing, the commission completed the slide down the slippery slope¹⁸ to a KOMA violation.

Although not the primary focus of the complaint / referral, the motion in this instance also fell short of compliance with the statutory requirements. First, the motion as set forth in the minutes appears to be more of a summary than the "complete motion" required to be recorded. Second, while the commission did have a statement describing the subjects to be discussed—"to assure compliance with policies and laws"—it was sufficiently vague and generic such that it did not meet the requirements of the KOMA. This is because it did not give an accounting of *what* was to be discussed or any indication of *how* the subjects to be discussed related to the justification of nonelected personnel. Third, the motion did set out a justification identified in the statute, even though ultimately it was not a proper justification to use under the circumstances. Fourth, although the motion did not state the time the open meeting was to resume, it did state the length of the executive session (ten minutes) and the time that it was going to recess into executive session. By "doing the math," the public could easily determine the time the open meeting was to resume. Finally, the motion did not include the place where the open meeting was to resume.

Based on the foregoing, the commission's motion for executive session did not comply with the requirements set forth in K.S.A. 2017 Supp. 75-4319(a), and thus violated the KOMA.

Although we conclude that the commission violated the KOMA, our analysis does not end there. We must consider whether this is more than a technical violation¹⁹ of the KOMA. "Technical violation" is a term of art adopted by courts in discussing KOMA violations. "Our courts will look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted]."²⁰

The procedural and substantive requirements for executive session help ensure that the public's right to know is not harmed or impaired. The motion itself promotes the policy and purpose of the KOMA by ensuring the public knows the reason given by the public body for holding any discussions outside of public view, how long those closed discussions will last, and where the open meeting will resume. It is also a reminder to the public body that the KOMA stands for more than mere procedural requirements. By being required to set forth the justification in the motion, the public body is reminded of the public policy in the KOMA that discussions in closed or executive sessions are limited to certain authorized topics.

With these considerations in mind, it is clear that the commission's action of discussing payment of contract attorney bills and the impact of such expenditures on the district court clerk's budget during executive session harmed the spirit and intention of the KOMA. These are matters that should have been discussed during the commission's open meeting.

¹⁸ Attorney General Opinion 2000-64, <http://ksag.washburnlaw.edu/opinions/2000/2000-064.htm>, accessed April 13, 2018.

¹⁹ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

²⁰ *Id.*

There were red flags that should have warned the commission it was using an improper justification to recess into executive session. These red flags included the matters they intended to discuss (the rate of payment for the contract attorneys and the impact on the district court clerk's budget), and the fact that none of the individuals included in or to be discussed during the executive session were nonelected personnel within the meaning of the KOMA. The commission also relied on a phrase provided by the former county counselor for use when recessing into executive session to discuss nonelected personnel: "to discuss matters of nonelected personnel to assure compliance with policies and law." However, the statement describing the subjects to be discussed during an executive session is not a "one size fits all" kind of proposition.²¹ Each statement of the subject to be discussed must be tailored to the actual subjects to be discussed. It appears that the commission's reliance on what worked in the past, especially in light of the 2017 change in the law concerning executive sessions, led it down an unacceptable path to a KOMA violation. This cannot be ignored.

In mitigation, the commission later approved the bill of at least one of the contract attorneys in an open meeting. We have no evidence to suggest that the commission routinely uses improper justifications to recess into executive session.²² The commission did not hesitate to take responsibility for the violation and is prepared to accept the consequences. Finally, the commission has been engaged, cooperative and forthcoming in its responses to our inquiries.

Ultimately, we must be mindful of the KOMA's procedural and substantive safeguards, which are designed to ensure that the public's business is discussed in public. "The thrust of the KOMA is openness in the cluster of concepts that flavor the democratic process: discussion, analysis, and decision-making among members of a governing body."²³ Except under limited circumstances, the legislature did not intend for discussion, analysis and decision-making by a public body to occur outside of public view, especially where the expenditure of public monies is involved. Therefore, we cannot condone the discussion of such matters in executive session. "Public bodies cannot be allowed to do indirectly what the legislature has forbidden."²⁴

The KOMA exists to protect the public. The public's right to know is protected when the transaction of governmental business, including the review and approval of contract attorney bills and consideration of the impact of such expenditures on the district court clerk's budget, is carried out in an open meeting. After considering the totality of the circumstances, we find

²¹ 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. The commission's reliance on outdated guidance in the form the County Desk Book published by the Kansas Association of Counties was also problematic, as the law changed in the interval between publication and the date this complaint arose.

²² We point out that this office is aware of some evidence that the commission may have recently used this same justification and statement describing the subjects to be discussed to recess into another executive session on a subsequent occasion. See February 26, 2018, commission meeting minutes ("Robert S. Connell moved, seconded by David E. Baier to go into executive session for ten minutes at 10:09 a.m. to discuss matters of nonelected personnel to assure compliance with policies and laws with Register of Deeds Martha Roesch, Appraiser Francine Crome, Extension Agent Anastasia Johnson, Public Works Administrator Mike Craig, Emergency Management Director William Schwindamann Jr., County Treasurer Jami Ellenbecker, and County Clerk Sonya L. Stohs present. Motion carried. No action was taken. . . .").

²³ *State ex rel. Stephan v. Board of County Com'rs of Seward County*, 254 Kan. 446, 452, 866 P.2d 1024, 22 Media L. Rep. 1430 (1994).

²⁴ *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

that the commission's actions impinged on the public's right to know and undermined the public policy embodied in the KOMA. We believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.²⁵ Additionally, completion of training concerning the requirements of the KOMA may be required.²⁶ Any member of a public body subject to the KOMA who knowingly violates any provisions of the act, or intentionally fails to furnish information as required by K.S.A. 2017 Supp. 75-4318(b) concerning notice, may be subject to these penalties. "To 'knowingly' violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific intent to violate the law."²⁷ In other words, the violation need not be willful or intentional. Rather, if the KOMA prohibits the action or conduct, and the public body engages in the conduct, that is a knowing violation of the law.²⁸ "Ignorance of the law is no excuse."²⁹

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the Marshall County Board of County Commissioners knowingly violated the KOMA when it recessed into executive session using an improper justification and a vague statement that did not describe the subjects to be discussed. We also find that remedial action is required to ensure compliance with the KOMA.

Based on the facts of this case, we have determined that the imposition of a civil penalty³⁰ as authorized by the KOMA is not warranted. This is due in large part to the commission's prompt acknowledgment that the justification it used was improper, and recognition that its statement describing the subjects to be discussed during executive session was inadequate. We have also considered the commission's ready willingness to accept the consequences of its actions. The commission has no prior violations, and we have no evidence that its actions were a subterfuge to defeat the purposes of the KOMA.

When referring this matter to our attention, the county attorney indicated that the commissioners would be very amenable to receiving guidance and training. We believe training is a reasonable requirement that will help ensure the commission understands the significance of its obligations under the KOMA.

²⁵ K.S.A. 2017 Supp. 75-4320(a).

²⁶ See K.S.A. 2017 Supp. 75-4320a(a); see also K.S.A. 2017 Supp. 75-4320d(a)(1)(A)(ii); and see K.S.A. 2017 Supp. 75-4320f(b).

²⁷ K.S.A. 2017 Supp. 75-4320(a); see also *State el rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091 (1982).

²⁸ *Id.*, 231 Kan. 536-37.

²⁹ *Id.*, 231 Kan. 536.

³⁰ K.S.A. 2017 Supp. 75-4320d(a)(1)(A)(ii).

Letter to Jason E. Brinegar
April 23, 2018
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For the above reasons, 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 violation of the KOMA and to attend at least one hour of training on the provisions of the KOMA presented by an attorney experienced in dealing with open meetings issues within 90 days. Although not required, we strongly urge the commission to require its staff and the clerk to attend training as well to help ensure the commission complies with the KOMA.

Our offer of a Consent Order as authorized by K.S.A. 2017 Supp. 75-4320d(a)(1) is effective up to **5:00 p.m. on Friday, May 18, 2018**. Because it meets regularly, we believe this will offer you sufficient time to confer with the commission about 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 secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files. You do not need to complete the dates on the first page or the certificate of service on the last page. We will insert the dates when the Attorney General executes the Consent Order.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, May 18, 2018**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2017 Supp. 75-4320a, 75-4320d, and/or 75-4320f.

We note that this office periodically offers KOMA training. This training is free and open to the public. You may find more information about any upcoming training on our website: <http://ag.ks.gov/open-government/upcoming-training>. The Kansas Association of Counties also offers KOMA training.

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

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT



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

Enclosure (Consent Order)

³¹ K.S.A. 2017 Supp. 75-4320d(a)(1).