Governmental Business in Secrecy in Kansas

Alan L. Cowles, M.D., Ph.D.

February 26, 2016

Summary: The Kansas *Open Meetings Act* [K.S.A. 75-4317 through 75-4320] specifies that in closing an open meeting, any governmental body subject to the *Act* must pass a formal motion in which is stated (1) the justification for closing the meeting, (2) the subjects to be discussed during the closed meeting and (3) the time and place at which the open meeting is to resume. The motion must be recorded in the minutes of the meeting and maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting is to be limited to those subjects stated in the motion. The purpose of these requirements is to enable Kansas citizens to know enough about what their elected officials are doing so that they may respond appropriately.

To serve their purpose, the required motions need to give citizens *meaningful* information about the subjects being discussed. Meaningful information is information that would allow a member of the public to identify the issues that are to be discussed in the closed meeting.

To serve their purpose motions to close meetings need to give citizens meaningful information about the subjects being discussed. Meaningful information is information that would allow a member of the public to identify the issues that are to be discussed in the closed meeting.

Examination of the 2014 minutes of the governing bodies of the 10 most populous counties and the 10 most populous cities of Kansas revealed that 631 closed sessions were held for a total of at least 240 hours. All of the governing bodies except for the Manhattan City Commission closed meetings at times without disclosing *any* meaningful information about the subjects they discussed. In doing this, they conducted at least 200 hours of governmental business in complete secrecy. In determining whether or not the secrecy was justified, I followed the principle that in closing a meeting a governmental body is not expected to disclose information that would defeat the purpose of a legitimately-closed meeting and, where partial information was provided gave the benefit of the doubt to the governmental body.

The intent of the governing bodies in conducting business in secrecy is unknown and probably varied widely, depending on the situation. Determinations with regard to secrecy are *not*

determinations as to whether or not the law has been violated.

An example of the mischief such secrecy can lead to is that of the Lawrence-Douglas County Health Board, the Douglas County Commission and the Lawrence City Commission. In 2012 and 2013 they successfully hid their discussions and settlement of a $750,000 lawsuit and other unknown matters for almost a year and a half by closing meetings to discuss "personnel matters" or "privileged matters" or equivalents.

During 2014 the amount of business conducted in secrecy varied widely, led by the Saline County Board of Commissioners (41 hours) and followed by the Salina City Commission (31 hrs.), the Shawnee County Commission (25 hrs.) and the Riley County Commissioners (20 hrs.).

The Manhattan City Commission conducted no governmental business in secrecy. Other governmental bodies that conducted little business in secrecy were the Overland Park City Council (0.2 hours in 2014), the Olathe City Council (0.5 hours), the Shawnee City Council (0.5 hours) and the Douglas County Commission (1.2 hours).

The subjects to be discussed during closed sessions were most commonly described as "personnel matters" or an equivalent or "privileged communications." Rarely in these cases was an informative subject disclosed (such as "a situation in which an employee may have misused a County credit card" or a specific lawsuit identified). In 88% of closed sessions and for 83% of closed session time, governmental business was conducted in secrecy.

Some governmental bodies closed their open meetings routinely with motions that suggested little or no planning of what they were going to discuss. For example, the Shawnee County Commission commonly "resolved [sic] into executive session for <a specified period of time> for non-elected personnel, attorney client privilege, employer/employee negotiations and discussions relating to the acquisition of real property" or some permutation of the same.

By conducting a substantial portion of their business in complete secrecy, governmental bodies have acted in opposition to the clearly-stated purpose of the Kansas *Open Meetings Act*, that *"the conduct of governmental affairs and the transaction of governmental business be open to the public."* Their actions are inconsistent with the respect most citizens of Kansas want shown for open government. Most of the instances of closed sessions were not mere technical violations because, in not specifying the subjects of their discussions in meaningful ways, a significant public right to know was denied.

Much of the difficulty has come from the interpretation of the word *subjects* in the *Open Meetings Act* (K.S.A. 75-4319(a)(2)). There are at least two interpretations, one consistent with the purpose of the *Act* and one very <u>in</u>consistent with the purpose of the *Act*. The interpretation that is consistent with the purpose of the *Act*, requires that meaningful subjects be stated in closing meetings. The one that is <u>in</u>consistent with the purpose of the *Act* allows

essentially meaningless subjects, such as "personnel matters" and "privileged communications" to be stated in closing meetings. That interpretation, promoted by a 1987 Salina Ninth Judicial District Court decision, has led to an enormous amount of governmental business in secrecy.

Although the *Open Meetings Act* requires that the times and places at which open meetings are to resume be stated in the motions closing meetings, 5 governing bodies never or rarely stated the times at which open meetings were to resume and 15 never stated the places at which their open meetings were to resume. Although some used the phrases "not before <a certain time> or "not after <a certain time> those phrases do not comply with the requirements of the *Act* to state the specific times when open meetings were to resume. Although many presumably resumed meetings in the same places at which the open meetings were closed that practice does not comply with the requirements of the *Act* to state the places where open meetings were to resume.

Although the Kansas *Open Meetings Act* requires that any binding action be taken in open sessions, at times governmental bodies passed meaningless motions in open sessions, thereby subverting this requirement.

Motions to close meetings have become a meaningless ritual that give the public no chance to know what business is being conducted. Prior to the enactment of the *Open Meetings Act*, governmental bodies conducted business in secrecy at will. Now almost all of the governing bodies of the largest cities and counties in Kansas pass meaningless motions and then conduct governmental business in complete secrecy. As long as governing bodies close meetings at will to do business in secrecy, there seems to be little value in having an *Open Meetings Act* in Kansas.

Motions to close meetings have become meaningless rituals that give the public no chance to know what business is being conducted.

The Kansas *Open Meetings Act* should be amended to require that when closing an open meeting, a governmental body state the subjects to be discussed in sufficient detail to allow members of the public to identify the specific issues that the governmental body intends to discuss in the closed meeting. This can be done easily while protecting the interests of the governmental entities involved. Included in the text are recommended practices for closing meetings. These can help governmental bodies avoid business in secrecy while complying with other requirements of the *Open Meetings Act*, without harming the interests of the governmental bodies involved.

Prior to the enactment of the Open Meetings Act, governmental bodies conducted governmental business in secrecy at will. Now almost all of the governing bodies of the largest cities and counties in Kansas pass meaningless motions and then conduct governmental business in complete secrecy. The Act should be amended to require that when closing an open meeting, a governmental body state the specific subjects to be discussed in sufficient detail to allow members of the public to identify the specific issues that the governing body intends to discuss in the closed session.

INTRODUCTION

Knowing that the Kansas *Open Meetings Act* states that "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,"[1] and knowing that the Kansas Supreme Court has stated that "where a statute is designed to protect the public, the language must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out,"[2,3] it comes as a surprise to find that a substantial portion of the business of government in Kansas has been and continues to be done in complete secrecy. A notable example of business in secrecy was the filing and settlement over a period of about 15 months of a lawsuit in Lawrence (Douglas County) Kansas, with the Health Board, the City and the County as defendants, claiming $750,000 in damages with no mention in open meetings or the local newspaper and with the knowledge of almost none of the citizens of the City or the County. The following is a report of governmental business in complete secrecy in Kansas, with recommendations for reforming the Kansas *Open Meetings Act* to eliminate governmental business in secrecy and recommended practices for closing meetings.

STUDY OF CURRENT PRACTICES FOR CLOSING MEETINGS IN KANSAS

In order to determine the degree of compliance with the Kansas *Open Meetings Act*, I reviewed the 2014 minutes (almost 10,000 pages) of the governing bodies of the ten most populous cities and the ten most populous counties in Kansas.[4] For each governmental entity and for each closed session the following were tallied: (a) the reason or reasons given for closing the open meeting, (2) whether or not the subject or subjects of discussion were stated, (3) whether or not the time at which the open meeting was to resume was stated (4) whether or not the place at which the open meeting was to resume was stated, and (5) the time spent in the closed session. A determination was made as to whether or not each closed session constituted governmental business in secrecy. Where more than one reason was given for a closed meeting, such as to discuss personnel matters and the acquisition of real property, the total time was attributed equally to each of the reasons.

Secrecy and justification: The definition of secrecy used here is simple: If a meeting was closed without giving the public *any* meaningful information about the subject(s) being discussed, the governmental entity was considered to be conducting business in complete secrecy. *Meaningful information* is information that would allow a member of the public to identify the issue or issues

---

[1] K.S.A. 75-4317

[2] *Johnson V. Killion* 178 Kan. 154, 283 P.2d 433 (1955);

[3] *State, ex rel. Londerholm, v. Anderson*, 195 Kan. 649, Syl. 3, 408 P.2d 864 (1965)

[4] Populations were determined from 2010 census data and projected 2014 census data. One-half of the times and counts for the Kansas City Kansas and Wyandott County Unified Government Commission were attributed to Kansas City Kansas and one-half to Wayndott County.

that prompted the governmental entity to close the meeting. The intent of the governing bodies in conducting business in secrecy is unknown and probably varied widely, depending on the situation. Determinations with regard to secrecy are *not* determinations as to whether or not the law has been violated.

In determining whether or not a closed session was conducted in secrecy, I respected the principle that in closing a meeting a governmental body is not expected to disclose information that would defeat the purpose of a legitimately-closed meeting, giving the benefit of the doubt in debatable cases to the city or county. The amount and kind of information that can be disclosed without defeating the purpose of the closed meeting varies with the purpose of the meeting. For example, since discussions of personnel matters are carried out in closed sessions to protect the privacy of individual employees, save personal reputations and to encourage qualified individuals to select and remain in the employ of government,[5] the employee(s) to be discussed are not usually identified but the issue(s) prompting the closure of the meeting can and should be stated. Secrecy was determined using the rules given in Appendix A.

Several reasons for closing meetings included in the *Open Meetings Act, K.S.A. 75-4319(b)*, such as matters relating to students, patients or residents of public institutions[6] or or parimutuel racing[7] or tribal gaming[8] were never given as subjects of discussion.

Time at which the open meeting will resume: The *Open Meetings Act* requires that the time at which the open meeting is to resume be included in the motion closing the meeting.[9] For each closed session, compliance with this requirement of the *Act* was noted. Since specifying the length of the closed session allows a member of the public to calculate the time at which the open meeting will resume, specifying the length is equivalent to specifying the time. Specifying "not before <a specific time>" or "not after <a specific time>" gives a partial indication of the time at which the open meeting will resume but does not comply with the requirements of the *Act*. Resuming an open meeting and then extending a closed meeting until a specified time or for a specified duration was common and considered justified. Closed sessions that were extended were classified as single sessions.

Place at which the open meeting will resume: The *Open Meetings Act* requires that the place at which the open meeting is to resume be included in the motion closing the meeting.[9] For each closed session, compliance this requirement of the *Act* was noted.

---

[5] Stephan, Robert T.: Attorney General Opinion No. 86-33, March 7, 1986

[6] K.S.A. 75-4319(b)(5)

[7] K.S.A. 75-4319(b)(7)

[8] K.S.A. 75-4319(b)(12)

[9] K.S.A. 75-4319(a)(3)

Length of closed sessions: For most closed sessions, the length of the session in minutes was calculated. Although the minutes of the Wichita City Council did not record the starting and ending times of sessions (or the lengths), the Wichita City Clerk, estimated that the closed sessions were "30 to 45 minutes" in length. I adopted the average of these times, 38 minutes, for the length of the closed sessions of the Wichita City Council.

For Kansas City Kansas and Wyandott County, one-half of the times and counts for the Kansas City Kansas and Wyandott County Unified Government Commission was attributed to each.

RESULTS FOR THE CALENDAR YEAR 2014

The time spent by City and County governments in closed meetings varied widely, from 1.0 hour per year (for the Manhattan City Commission) to 40.5 hours (for the Saline County Board of Commissioners). The time spent by these groups doing business in secrecy also varied widely, from none (for the Manhattan City Commission) to 40.5 hours (for the Saline County Board of Commissioners). 95% of the groups closed meetings at one time or another without giving *any* information about the subjects they were discussing. 83% of the total time spent in closed sessions was spent doing business in secrecy.

For the governmental bodies of the ten largest (most populous) *cities* in Kansas:

NAME	TIME IN CLSD SESSIONS	TIME BUS IN SECRECY	RTN TIME STATED	PLACE STATED
Kansas City	9.8	8.3	100%	0%
Lawrence	8.1	7.6	100%	75%
Lenexa	3.5	3.5	100%	0%
Manhattan	1.0	0.0	100%	0%
Olathe	14.8	0.5	100%	0%
Overland Park	3.5	0.2	100%	50%
Salina	31.3	31.3	100%	0%
Shawnee	1.4	0.5	67%	0%
Topeka	9.8	7.8	9%	0%
Wichita	13.9	12.5	0%	97%
All cities	96.0	72.3	68%	25%

Note: TIME CLSD SESSIONS = time (hours) spent in closed sessions during calendar year 2014; TIME BUS IN SECRECY = time (hours) spent doing governmental business in secrecy; RTN TIME STATED = percent of the times the time at which the governmental body was to return to open meeting was stated; PLACE STATED = percent of the times the place at which the open meeting was to resume was stated. One-half of the times and counts for the Kansas City Kansas and Wyandott County Unified Government Commission were attributed to Kansas City Kansas.

For the governmental bodies of the ten largest (most populous) *counties* in Kansas:

NAME	TIME IN CLSD SESSIONS	TIME BUS IN SECRECY	RTN TIME STATED	PLACE STATED
Butler	3.8	3.8	100%	0%
Douglas	1.4	1.2	100%	0%
Johnson	9.5	9.2	100%	0%
Leavenworth	13.1	10.9	90%	0%
Reno	6.6	6.6	80%	0%
Riley	31.7	19.8	100%	100%
Saline	40.5	40.5	0%	0%
Sedgwick	2.8	2.8	8%	100%
Shawnee	24.7	24.6	0%	0%
Wyandott	9.8	8.3	100%	0%
All counties	143.9	127.7	41%	20%

Note: Column headings are as above. Half of the times and counts for the Kansas City Kansas and Wyandott County Unified Government Commission were attributed to Wyandotte County.

The reasons given for closing meetings were to discuss:

personnel matters:	44%
legal matters:	37%
the acquisition or real property:	9%
labor negotiations:	5%
trade secrets:	2%
security matters:	2%

Motions Closing Meetings

Motions most commonly took the form,

> MOTION: made by <person 1>, seconded by <person 2> that the Commission recess to Executive Session for <length of time> for the discussion of personnel matters of non-elected personnel. Motion carried.

or an equivalent. Motions specified that legal matters were to be discussed commonly took the form,

> MOTION: made by <person 1>, seconded by <person 2> that the Commission recess to Executive Session for <length of time> for consultation with the Commission's attorney which would be deemed privileged in the attorney-client relationship. Motion carried.

Specific votes were commonly recorded, although not required by the *Act*. The times at which open meetings were to resume were stated in 48% of cases, and groups usually were noted to have resumed open meetings at the times planned. The places at which open meetings were to resume were stated in 22% of cases.[10] The fact that no action was taken in the close session was commonly recorded, although not required by the *Act*.

An Example of the Mischief Caused by Business in Secrecy

Examination of the minutes of the Lawrence-Douglas County Health Board, the Lawrence City Commission and the Douglas County Commission in light of recent events raises additional concerns. In May 2011, the Kansas Human Rights Commission found probable cause that a former employee had been discriminated against (fired) in part because of his age. After negotiations seeking a settlement failed, the former employee filed two lawsuits, on December 7, 2011 and April 9, 2012, naming the Lawrence-Douglas County Health Board, the City of Lawrence, the Board of Commissioners of Douglas County and Dan Partridge, individually, as defendants and seeking $749,744.88 in damages.[11] The two lawsuits were consolidated for the purpose of disposition and a settlement agreement was reportedly reached in 2013.

Examination of the minutes of the Health Board, the Lawrence City Commission and the Douglas County Commission from January 2009 through June 2014 shows no record of any discus-

---

[10] Resuming an open meeting in the same place at which the previous open meeting was closed, without explicitly stating the place at which the open meeting is to resume, is a technical error but does not deprive observers of a significant right to know.

[11] *McDaniel vs. Lawrence-Douglas County Health Board et al.* Cases No. 2011CV709 and 2012CV201, District Court of Douglas County, Kansas

sion of the findings of the Kansas Human Rights Commission or of either of the lawsuits except that on June 18, 2012 the Health Board had a closed session "for the purpose of discussing a personnel matter and legal counsel related to pending litigation." The number of closed sessions held for other than routine business by the Health Board increased from 2 for 2009 and 1 for 2010 to 7 for 2011. No meaningful information was given to the public about any of these. One person who is a position to know about the Health Board's closed sessions has confirmed that the Board discussed the lawsuit on several occasions.[12] In motions creating the closed sessions, the lawsuit appears to have been called a "personnel matter."

DISCUSSION

The *Kansas Open Meetings Act* can be found in the Kansas Statutes at K.S.A. 75-4317 through K.S.A. 75-4320(c). Since its enactment in 1972, interpretation of the *Act* has been the subject of court decisions and the opinions of Kansas Attorneys General. Although a few learning aids and summaries have been published[13, 14] the court decisions and Attorney General opinions need to be studied in order to get a thorough understanding of the *Act* as it functions. Many of the opinions can be found on a Washburn University School of Law web site.[15] Those not yet posted can be obtained through the office of the Attorney General.[16]

The purpose of the Kansas *Open Meetings Act* is clear:

> 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.[17]

The *Act* has wide applicability:

> All meetings for the conduct of the affairs of, and transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils,

---

[12] Since the Board should have stated that it was going to discuss the *McDaniel* lawsuit in its motions closing their meetings, this person was only complying with one of the requirements of the *Open Meetings Act* in revealing that the *McDaniel* lawsuit had been discussed.

[13] Smith, Michael J., Assistant Attorney General: *Kansas Open Meetings Act (KOMA)*, revised August 2009.

[14] Kansas Legislative Research Department, Martha Dorsey, Principal Analyst: *Kansas Legislator Briefing Book 2009, Kansas Open Meetings Act*.

[15] http://ksag.washburnlaw.edu/. Last checked January 30, 2016.

[16] 120 SW 10th Ave., 2nd Floor, Topeka, Kansas 66612-1597 (785) 296-2215.

[17] K.S.A. 75-4317

> committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot.[18]

This includes all the governmental bodies within Kansas that are the subject of this report.

K.S.A. 75-4319 specifies the conditions for closing an open meeting: (In two cases, I have italicized the word *subjects* to facilitate the discussion that follows.)

> (a) Upon formal motion made, seconded and carried, all bodies and agencies subject to the open meetings act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include a statement of
>
> (1) the justification for closing the meeting,
>
> (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.
>
> Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.
>
> (b) No *subjects* shall be discussed at any closed or executive meeting, except the following:
>
> (1) Personnel matters of nonelected personnel;
>
> (2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;
>
> (3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency;
>
> (4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

[18] K.S.A. 75-4318(a)

> (5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if requested by the person;
>
> (6) preliminary discussions relating to the acquisition of real property
>
> (13) matters relating to security issues ...
>
> and nine other subjects, not listed here.

The nine subjects not listed above relate to matters that rarely affect city and county governments such as parimutuel racing[19] and tribal gaming.[20]

The motion to go into closed session is more than a mere formality, because it provides safe-guards against abuse of the closed or executive session.[21] The exceptions are to be interpreted narrowly - that is to allow closed sessions only for the limited subjects and purposes specified by the *Act*.[22,23,24]

Two Interpretations of the *Open Meetings Act*

Difficulty arises from the interpretation of the word *subjects* in K.S.A. 75-4319(a)(2). There are at least two interpretations, one consistent with the purpose of the *Open Meetings Act* and one very inconsistent with the purpose of the *Act*.

First Interpretation: The first interpretation (*consistent* with the purpose of the *Act*) is that the motion to enter a closed session should state the topics (subjects) to be discussed in sufficient detail that a member of the public can identify the issue or issues that caused the governmental body to go into the closed session. The *justification* for closing the meeting is then one of the items listed under K.S.A. 75-4319(b), such as for the discussion of an employee personnel matter or to get confidential legal advice from the board or commission's attorney. Thus an adequate motion to enter a closed session might be the following:

---

[19] K.S.A. 75-4319(b)(7)

[20] K.S.A. 75-4319(b)(12)

[21] Stephan, Robert T.: Attorney General Opinion No. 91-78, July 15, 1991.

[22] Stephan, Robert T.: Attorney General Opinions 87-10, January 16, 1987, 87-169, November 23, 1987, and 88-25, February 24, 1988.

[23] *State ex rel. Murray v. Palmgren*, 321 Kan. 524 (1982)

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

> <specified person> made a motion that the Commission enter an executive session to discuss a situation in which an employee may have violated the City's policy on <specific subject>. The justification for the executive session is to protect the privacy of the employee's personnel records. The open meeting is to resume in this room at <specified time>.

or

> <specified person> made a motion that the Commission enter an executive session to discuss the lawsuit *Jones v. the City of Lawrence*[25] with the City's attorney. The justification for the executive session is to get the confidential advice of the City's attorney. The open meeting is to resume in this room at <specified time>.

Second interpretation: The second interpretation (*in*consistent with the purpose of the *Act*) is that the motion only needs to state as the subject of discussion one of the items listed under K.S.A. 75-4319(b). This leaves *justification* completely undefined. Using this interpretation, a legally-adequate motion to enter a closed session might be the following:

> <specified person> made a motion that the Commission enter an executive session to discuss privileged matters with the Commission's attorney. The justification for the executive session is to to get the confidential advice of the City's attorney. The open meeting is to resume in this room at <specified time>.

or, if the group can't afford an attorney or the attorney is not available,

> <specified person> made a motion that the Commission enter an executive session to discuss personnel matters of nonelected employees.[26] The justification for the executive session is to discuss personnel matters confidentially. The open meeting is to resume in this room at <specified time>.

These motions, and equivalents, allow governmental bodies to do business in complete secrecy. No useful information is provided to the public about the subject(s) being discussed in the closed session or the issue(s) that prompted the group to close the session. This is the interpretation of the *Open Meetings Act* frequently used by the boards and commissions noted above to do business in complete secrecy in Kansas.

Although the intent of the 1972 Kansas Legislature seems to have been specified in K.S.A. 75-4317 (to have an "informed electorate"), we cannot be sure that the Legislature did not intend have an open meetings act that would allow governmental bodies to do business in secrecy while promoting the impression that the Legislature favored open government. In any case, the *Open*

---

[25] *Jones v. the City of Lawrence* is fictitious.

[26] Almost anything a branch of government in Kansas engages in is, to some extent, a "personnel matter."

Meetings Act, as it stands, is a legislative Trojan horse, and governmental bodies in Kansas regularly have taken advantage of its ambiguity, with the full support of their attorneys, to do business in secrecy.

Opinions Supporting the First Interpretation

All of the opinions of the Kansas Attorneys General that consider this issue, and all of the court opinions except one (see below) support the first interpretation (consistent with the purpose of the *Act*).

Attorney General Opinions 86-33 and 91-78 state that a public body adjourning to closed session must do more than cite the justification for closing the meeting. Not mentioning the subject matter "would render a portion of the statute meaningless, a result which in construing statutes is to be avoided."[27,28]

The subject must be stated with "a reasonable degree of specificity," so as to make the subject clear to members of the public,[29] The *Open Meetings Act* does not require the motion to be so detailed that it defeats the purpose of having a closed session. For example, it is not necessary to disclose the results of a performance review of a non-elected employee, or reports mandated to be confidential under the risk management and peer review laws, or individual patient protected health information, or another subject closed by statute.[30]

Statutory Construction

To determine the meaning of the word "subjects" in K.S.A. 75-4319(a)(2), we can apply a set of traditional rules that are commonly used to determine the meaning of laws. These are *rules of statutory construction*.[31]

The plain meaning rule: The first rule is the plain meaning rule which holds that absent contrary definitions within the statute, words should be given their plain meanings. "Absent an indication to the contrary, words in a statue are assumed to bear their ordinary, contemporary com-

---

[27] Stephan, Robert T.: Attorney General Opinions 86-33, March 7, 1986 and 91-78, July 15, 1991

[28] *American Fidelity Insurance Co. v. Employers Mutual Casualty Co.*, 3 Kan.App.2d 245 (1979)

[29] Stephan, Robert T.: Attorney General Opinion 86-33, March 7, 1986.

[30] Stephan, Robert T.: Attorney General Opinion 89-42, April 10, 1989, and Michael J. Smith: Attorney General Opinion 08-22, September 29, 2008. Note however that a general discussion of quality of care or staffing issues would not be allowed in executive session unless the topic concerned an individual staff member, patient, or another subject allowed by statute to be discussed in closed session.

[31] There are many rules of statutory construction. Only the three rules which are most relevant and significant to this discussion are cited here. See also Singer, N.J.: *Statutes and Statutory Construction*, multiple volumes, 6th edition, 2002 revision, The West Group, 2002.

mon meanings."[32] The plain meaning of "the subjects to be discussed" is "the topics to be discussed." Typical subjects (topics) might be for example,

> *Johnson v. Stull Medical Center*[33]

or

> "an incident in which a patient alleges injury due to negligence."

Since the legislature did not limit the use of the word "subjects" in K.S.A. 75-4319(a)(2) to the list under K.S.A. 75-4319(b), we are not entitled to make that limitation and therefore "subjects" should be given its plain meaning: topics.

The mischief rule: The second rule is the mischief rule which holds that the meaning given to statutes should be consistent with eliminating the defect ("mischief") which the legislature intended to eliminate in passing the statute. The stated intent of the *Open Meetings Act* is to have "an informed electorate" and the "mischief" which the *Act* is intended to eliminate is the operation of governmental bodies in secrecy, at the expense of the citizens.

The Kansas *Open Meetings Act*, K.S.A. 75-4317 et seq. was enacted for the public benefit and is therefore construed broadly in favor of the public to give effect to its specific purpose and we must give effect to the entire statute if it is reasonably possible to do so.[34,35,36,37]

Since the motions of the boards and commissions discussed above have allowed those groups to conduct business in secrecy, without stating so much as the topics of discussion, they are contrary to the stated intent of the *Open Meetings Act* and have allowed those boards and commissions to engage in the "mischief" which the *Act* was intended to eliminate.

Unreasonable results rule: The third rule holds that the words of a statute should be interpreted so as to avoid absurd or unreasonable results. To state that the subject of its closed meetings is one of the items in K.S.A. 75-4319(b) and also the justification for closing its meetings is the same is to assume that the legislature intended that the single subject/justification be stated twice. Such an assumption makes no sense at all. "The justification should be more than a reiteration of the subject" and "A contrary reading (i.e. that no mention of the subject matter is needed) would render a portion of the statute meaningless, a result which in construing statutes is to be

---

[32] 73 *American Jurisprudence* 2d Statutes §115, The West Group, Thompson Reuters, 2012

[33] *Johnson v. Stull Medical Center* is fictitious.

[34] *Johnson V. Killion* 178 Kan. 154, 283 P.2d 433 (1955)

[35] *State, ex rel. Londerholm, v. Anderson*, 195 Kan. 649, Syl. 3, 408 P.2d 864 (1965)

[36] Stephan, Robert T.: Attorney General Opinion 86-33, March 7, 1986

[37] *American Fidelity Insurance Co. v. Employers Mutual Casualty Co.*, 3 Kan.App.2d 245 (1979)

avoided."[38],[39]

All three rules of statutory construction lead to a conclusion that a group entering a closed session should state the topics to be discussed and with a reasonable degree of specificity so that a member of the public can identify and understand the issues that prompted the board or commission to enter the closed session.

State of Kansas v. United School District No. 305

State of Kansas v. United School District No. 305, Saline County, 13 Kan.App.2d 117, 121 (1988) is commonly cited to justify using the motions cited under "First interpretation" (above). That decision was based on a Saline County District Court case[40] that, for the most part, was concerned with whether or not United School District No. 305, after properly closing an open meeting to consider whether or not four employees had mishandled bids for asbestos removal, had gone beyond the proper scope of the closed session by continuing in closed session to select a committee for further investigation of the matter. District Court Judge Carl B. Anderson, Jr. found that, in this particular case, committee selection was proper because it was impractical to separate it from the details of the employee evaluation. Most of the case was concerned with the scope of School Board's discussion. At the end of his opinion, Judge Anderson took up the question of the adequacy of the School Board's motion to enter a closed session. In doing so, he failed to consider the purpose of the *Open Meetings Act*, or the possible interpretations of *subject* in K.S.A. 75-4319(a)(2) of the *Open Meetings Act* (or even that more than his one interpretation was possible) and assumed that *subjects* in K.S.A. 75-4319(a)(2) was the same as *subjects* in K.S.A. 75-4319(b). In adopting Judge Anderson's interpretation, the Appeals Court gave no additional thought to the possible meanings of *subject*, stating "Little need be said about this issue."[41] It was sloppy work on the part of both Judge Anderson and the Appeals Court. Nevertheless, those decisions have been used to justify closing meetings without providing significant information about the subject(s) to be discussed. By allowing governmental business in complete secrecy, *State of Kansas v. United School District No. 305, Saline County* has done enormous damage to the Kansas *Open Meetings Act*.

BINDING ACTION DURING CLOSED SESSIONS

With regard to binding action, the *Open Meetings Act* is emphatic. K.S.A. 75-4318(a) states that

---

[38] Stephan, Robert T.: Attorney General Opinions 86-33, March 7, 1986 and Opinion 91-78, July 15, 1991

[39] *American Fidelity Insurance Co. v. Employers Mutual Casualty Co.*, 3 Kan.App.2d 245 (1979)

[40] *State of Kansas vs. Board of Education of Unified School District No. 305, et al.* Saline County District Court, Case No. 87 C-169, November 17, 1987.

[41] *State of Kansas v. United School District No. 305, Saline County*, 13 Kan.App.2d 117, 121 (1988)

> all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and *no binding action by such bodies shall be by secret ballot*. [italics added]

and K.S.A. 75-4319(c) states that

> *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. [italics added]

K.S.A. 75-4318(a) and K.S.A. 75-4319(c) prohibit governmental bodies from taking action in closed sessions. However some governmental bodies pass meaningless, or almost meaningless, motions after returning to open meetings. Examples are:

from the Olathe City Council on May 6, 2014,

> Mayor Copeland announced the city's sign ordinance was discussed in executive session and staff is directed to move forward.

from the Lenexa City Council on March 18, 2014,

> Motion to authorize the City's legal counsel to proceed as discussed in Executive Session was made by Council Member Huckaba and seconded by Council Member Lemons and approved.

from the Leavenworth Board of County Commissioners on March 13, 2014,

> A motion was made by Graeber and seconded by Bixby to execute an easement release and necessary road right-of-way. Motion passed, 3-0.

from the Board of Riley County Commissioners on February 3, 2014,

> Lewis moved for counsel to take initiative as was discussed in the executive session. Wells seconded. Carried 3-0.

from the Board of Riley County Commissioners on February 20, 2014, two motions,

> 9.42 Lewis moved for staff to take action as directed in the executive session. Wells seconded. Carried 3-0.

> 9.52 Lewis moved for staff to take action as directed in the executive session. Wells seconded. Carried 3-0.

From the Board of Riley County Commissioners on December 4, 2014,

> Move to direct Counsel to take action as directed in executive session. Result: Adopted [unanimous]

The purpose of K.S.A. 75-4318(a) and K.S.A. 75-4319(c) is to enable the public to know what actions are being taken as a result of executive sessions and how individual commissioners or board members voted. The meaningless motions above clearly defeat the purpose of the law, with meaningless action taken in open sessions and the significant action taken in closed sessions. This subterfuge should not be used.

The Kansas Open Meetings Act should be amended to require that when closing an open meeting, a governmental body identify the issue or issues that are to be discussed in the closed meeting and separately state the justification(s) for closing the meeting. This can be done easily while protecting the interests of the governmental entities involved.

AMENDING THE KANSAS *OPEN MEETINGS ACT*

Elected officials should remember that they are, at all times, responsible to the citizens. In order to enable citizens to know enough to respond appropriately to the actions of their elected officials, the meaningless rituals currently in use to close meetings need to stop. To accomplish this, the Kansas *Open Meetings Act* should be amended to require that when closing an open meeting, a governmental body state the specific subjects to be discussed in sufficient detail to allow members of the public to identify the specific issues that the governing body intends to discuss in the closed session.

In addition, K.S.A. 75-4319(b)(1) should be broadened to recognize the widely-accepted practice of extending confidentiality of personnel records to applicants for nonelective employment. K.S.A. 75-4319(b)(2) should be reworded to eliminate the practice of closing meetings at any time some legal issue can be envisioned to be connected to an issue to be discussed.

The following are the amended K.S.A. 75-4319(a) and (b) sections of the amended Kansas *Open Meetings Act*:

(a) Upon formal motion made, seconded and carried, all public bodies and agencies subject to the open meetings act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include:

(1) a statement describing the specific 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.

Such motion shall be recorded in its entirety in the minutes of the meeting and shall be maintained as a 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.

(b) Justifications for recess to a closed or executive meeting may only include the following:

(1) the need to discuss the personnel matters of nonelected personnel or of applicants for nonelective employment;

(2) the need to consult with an attorney for the public body or agency, participating in the closed or executive meeting, regarding a pending or imminent legal action to which the body or agency is, or is expected to become, a party, and which would be deemed privileged in the attorney-client relationship;

(3) the need to discuss employer-employee negotiations whether or not in consultation with the representative or representatives of the public body or agency;

(4) the need to discuss data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

(5) the need to discuss matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if requested by the person;

(6) the need for preliminary discussions relating to the acquisition of real property;

(7) the need to discuss matters related to parimutuel racing permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 74-8804, and amendments thereto;

(8) the need to discuss matters relating to the care of children permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 38-2212(d)(1), and amendments thereto, or K.S.A. 38-2213(e), and amendments thereto;

(9) the need to discuss matters related to district coroners permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 22a-243(j), and amendments thereto;

(10) the need to discuss matters relating to patients and providers permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 39-7,119(g), and amendments thereto;

(11) the need to discuss matters required to be discussed in a closed or executive meeting pursuant to a tribal-state gaming compact;

(12) the need to discuss matters relating to security measures, if the discussion of such matters at an open meeting would jeopardize such security measures, that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; (B) transportation and sewer or wastewater treatment systems, facilities or equipment; (C) a public body or agency, public building or facility or the information system of a public body or agency; or (D) private property or persons, if the matter is submitted to the public body or agency for purposes of this paragraph. For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments;

(13) the need to discuss matters relating to maternity centers and child care facilities permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 65-525(f) (d), and amendments thereto; and

(14) the need to discuss matters related to the Kansas health policy authority permitted to be discussed in a closed or executive meeting pursuant to K.S.A. 2015 Supp. 75-7427, and amendments thereto; and

(c) 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.

(d) Any confidential records or information relating to security measures provided or received under the provisions of subsection (b)(12), shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action.

The original K.S.A. 75-4319(b)(10), K.S.A. 75-4319(b)(16) and K.S.A. 75-4319(d)(2)(A) and (B) have been deleted because the sections to which they refer are no longer in force.

Recommended practices for closing meetings can help groups to avoid doing governmental business in secrecy. Recommended templates (forms) for motions closing meetings can enable governmental entities to comply with the provisions of the Open Meetings Act with ease.

RECOMMENDED PRACTICES - EXAMPLES

Recommended practices for closing meetings under the present law can help groups to avoid doing governmental business in secrecy. Recommended templates (forms) for motions closing meetings can enable governmental entities to comply with the provisions of the *Open Meetings Act* with ease. Here are examples of recommended practices:

The Personnel Exemption (K.S.A. 75-4319(b)(1))

The personnel exemption (K.S.A. 75-4319(b)(1)) allows the discussion of "personnel matters of nonelected personnel" in closed sessions. The purpose of the "personnel matters" exception to the Kansas *Open Meetings Act* is to protect the privacy of employees, save personal reputations and encourage qualified people to select and remain the employ of government."[42,43,44] Although there is no requirement in the *Open Meetings Act* that the discussion of an employee's actions or performance be carried out in a closed session, common expectations of privacy should be considered carefully before discussing an employee's performance in an open meeting.

---

[42] Stephan, Robert T. Attorney General Opinion No. 86-33, March 7, 1986

[43] Smoot & Clothier, 20 *Washburn Law Journal* 241-288, page 275 (1981)

[44] Stephan, Robert T.: Attorney General Opinion 87-10, November 23, 1987

The personnel exemption does not include discussion of other "personnel matters." Among the other subjects that may NOT be discussed in closed meetings are

- personnel policy[45]
- personnel reorganization,[46]
- the addition or elimination of job functions or positions, etc.,[43]
- salaries and benefits applying to job categories, except that negotiations with labor organizations may be discussed in closed sessions under K.S.A. 75-4319(b)(3)[47]
- any other personnel matter which is not specified by the Act, narrowly construed.

Motions Closing Meetings to Discuss Personnel Matters

A motion closing a meeting under the personnel exemption (K.S.A. 75-4319(b)(1)) should provide sufficient information about the subject(s) of the proposed discussion to enable members of the public to identify the issue(s) that prompt the governing body to close the meeting. For example,

> I move that the Commission enter an executive session to discuss a situation where an employee may have violated the City's policy on <specific subject>. The justification for the executive session is to protect the privacy of the employee's personnel matters. The open meeting is to resume in this room at <specified time>.

Specific subjects (above) might be "the use of City credit cards" or the "the use of City automobiles" or "racial discrimination."

The governmental body using this form need not be concerned about incurring liability with such a motion because three essential elements of libel or slander are missing. No individual is identified. No statement is made indicating that any individual did something wrong. And nothing untrue is said.

Motions closing meetings for a required periodic evaluation of the employee may disclose the identity of the individual being evaluated. For example,

> I move that the Commission enter an executive session for the <specified position holder's> annual evaluation. The justification for the executive session is to protect the privacy of the <specified position holder's> personnel re-

---

[45] Six, Steve and Smith, M.J.: Attorney General Opinion No. 09-21, September 23, 2009.

[46] Stephan, Robert T.: Attorney General Opinion No. 88-25, February 24, 1988.

[47] Stephan, Robert T.: Attorney General Opinion 81-39, February 10, 1981

> cords. The open meeting is to resume in this room at <specified time>.

If, for example, specified position holder is the City Manager, the motion would say, "for the City Manager's annual evaluation." Although the identity of the person in the specified position may be determined easily, the motion is acceptable because it implies nothing positive or negative about the person's actual performance. Since the motion reassures the public that the governing body is fulfilling a periodic obligation, this form is preferred over a motion stating only that the governing body is to discuss "an employee's performance."

Consultation with an Attorney (K.S.A. 75-4319(b)(2))

The purpose of K.S.A. 75-4319(b)(2) is to allow a governmental body to seek and obtain legal advice without compromising its position in a pending or threatened lawsuit. Attorney General Opinion 92-56 is helpful:[48]

> K.S.A. 75-4319(b)(2) ... permits executive sessions for the purpose of "consultation with an attorney which would be deemed privileged in the attorney-client relationship." Thus, this specific exception contemplates the presence of a non-board member; the attorney for the body. The elements required to establish the existence of the attorney-client privilege include: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance for their client. … It is not necessary that litigation be threatened or pending. … In order to utilize this executive session authority, the attorney must represent the public body in question and must be present during the executive session held by that body. … Staff for the attorney may also be present without destroying the privileged nature of the communication. … There must be a consultation; the mere presence of an attorney does not, in itself, make the communication privileged. … Not all communications between counsel and client are privileged. To be privileged, communication must relate to the business or transaction for which the attorney has been retained or consulted. … Under Kansas law, the term "communication" is a statement transmitting information between a lawyer and a client. … Such communication must be of a legal nature, but may include facts or questions from the client to the attorney or advice, questions or legal statements from the attorney to the client. The communication must be regarded by the client as confidential in nature. … The presence of any non-client third party who is not an employee or official of [the governing body] will destroy the privileged nature of a communication with an attorney. … Non-client third parties may not be included in executive sessions called pursuant to K.S.A. 75-4319(b)(2). [underlining present in the original]

Even though a letter from an attorney to his client containing advice may be a privileged com-

---

[48] Stephan, Robert T. Attorney General Opinion 92-56, April 23, 1992.

munication, members of a public body cannot recess into an executive session to review and discuss among themselves a letter from their attorney. The attorney must be present.[49]

Consultation with an attorney for the agency, as specified by K.S.A. 75-4319(b)(2) applies only to communications between the attorney and members of the governing body. These include members giving the attorney information and asking him or her questions and the attorney providing advice and perhaps asking additional questions. They do not include discussion members of the governing body, except for the specific purpose of obtaining legal advice. To allow discussion of any subject among members merely because an attorney is present is contrary to the purpose of the *Open Meetings Act*. Consider the Court's findings in *Hinsdale v. City of Liberal Kansas*[50]

> The mere attendance of an attorney at a meeting does not render everything done or said at that meeting privileged. For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services. … The party seeking to assert the privilege must show that the particular communication was part of a request for advice or part of the advice, and that the communication was intended to be and was kept confidential. … The mere fact that a closed meeting was held does not automatically render all conversations in the closed session protected by the attorney-client privilege. … the privilege does not protect discussions *among* commission members or the opinions, impressions, and conclusions of commission members based on events occurring during the closed session. [italics added]

With members of the public unable to attend closed sessions, the attorneys for boards and commissions have a special ethical obligation to inform their board and commission members of the distinction between privileged communications and those that are not privileged and to avoid non-privileged communications in sessions closed under K.S.A. 75-4319(b)(2). Board members are still allowed to discuss other subjects specified by the *Act* under K.S.A. 75-4319(b), such as the evaluation of an employee's performance, as long as those subjects and the justifications are specified in the motion closing the meeting.

Motions Closing Meetings for Consultation with an Attorney

Where open meetings are closed for consultation with an attorney regarding a specific lawsuit the motion closing the meeting should identify the lawsuit to be discussed. For example,

> I move that the Commission enter an executive session for consultation with

---

[49] Stephan, Robert T.: Attorney General Opinion 86-162, November 20, 1986.

[50] *Daniel D. Hinsdale v. City of Liberal Kansas*, 961 F.Supp. 1490 (1997)

> the Commission's attorney regarding *Jones v. the City of Salina*.[51] The justification for the executive session is to obtain legal advice without compromising the Commission's position in the lawsuit. The open meeting is to resume in this room at <specified time>.

Where open meetings are closed for consultation with an attorney regarding a threatened lawsuit the following form may be used. For example,

> I move that the Commission enter an executive session for consultation with the Commission's attorney regarding a <issue or situation> that the Commission believes may result in a lawsuit. The justification for the executive session is to to obtain legal advice without compromising the Commission's position in the event a lawsuit ensues. The open meeting is to resume in this room at <specified time>.

In the motion, the <issue or situation> would be described in general terms. For example, "an injury on City property" or "a citizen who feels the City Police have mishandled his or her complaint."

Discussion of loss prevention in general with an attorney should be carried out in open meetings. Information about loss prevention in general cannot be privileged communication because the principles involved are already in the public domain (described in publicly-available documents).

Discussion of Employer-Employee Negotiations (K.S.A. 75-4319(b)(3))

The Kansas Legislature has declared that "the people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees"

> it is the purpose of this act to obligate public agencies, public employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law.[52]

The purpose of the *Open Meetings Act* exemption for discussion of employer-employee negotiations under K.S.A. 75-4319(b)(3) is to enable employers and employees (or their representatives) to negotiate labor contracts without the posturing and grandstanding that many would feel compelled to engage in if the negotiation were public.

---

[51] *Jones v. the City of Salina* is fictitious.

[52] K.S.A. 75-4321(a)(1) and K.S.A. 75-4321(b)

Also,

> A [governing body] may recess an open public meeting and go into closed or executive session to consult with its representative in employer-employee negotiations. During such consultation, the [governing body] and its representative may discuss any facet of such negotiations. However, when the terms of a complete contract have been tentatively agreed upon by the representative of both the employer and the employees, and said contract is submitted to the [governing body] for ratification, the vote on such ratification must be made during an open public meeting.[53]

Motions Closing Meetings for the Discussion of Employer-Employee Negotiations:

For motions closing meetings for employer-employee negotiations, the following form can be used:

> <specified person> made a motion that the Commission enter an executive session for employer-employee negotiations <regarding or with> <named person or union>. The justification for the executive session is to facilitate said negotiations. The open meeting is to resume in this room at <specified time>.

The person or labor organization should always be named.

Discussion of Confidential Data Relating to the Financial Affairs or Trade Secrets of Corporations, Partnerships, Trusts, and Individual Proprietorships (K.S.A. 75-4319(b)(4))

Discussion in closed sessions under the authority of K.S.A. 75-4319(b)(4)) is applicable only if the information to be discussed is confidential and relates to the financial affairs or a trade secrets of a corporation, partnership, trust or individual proprietorship (business entity). These discussions should not be conducted in private simply because the governmental body is transacting business with a business entity. As a general rule, governmental bodies should determine in advance of closed sessions whether or not the business requests a closed session and whether or not the information to be discussed is confidential.[54,55]

The *Kansas Uniform Trade Secrets Act* defines “trade secrets”

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value,

---

[53] Stephan, Robert T.: Attorney General Opinion 79-125, June 26, 1979.

[54] Smoot & Clothier, 20 *Washburn Law Journal* 241-288, page 277 (1981)

[55] Stephan, Robert T.: Attorney General Opinion 88-148, October 13, 1988.

> actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[56]

The Kansas Supreme Court has held that

> Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[57]

The Court of Appeals of Kansas has recommended a two-step process in determining whether or not information which a party contends is a trade secret is actually a trade secret:

> We hold that, when deciding whether to publicly disclose information which the Commission has found to be relevant and necessary for its proceedings and which a party contends to be in the nature of a trade secret of confidential research, development or commercial information, the Commission should proceed as follows: First, it should determine whether the information is a trade secret or confidential commercial information. In considering this matter, the burden is on the party seeking to prevent disclosure. Secondly, the Commission should weigh the competing interests. In doing so, it should consider, *inter alia*, the financial or competitive harm to the party seeking to prevent disclosure; whether disclosure will aid the Commission in its duties; whether disclosure serves or might harm the public interest; and whether alternatives to full disclosure exist.[58]

The name of the business entity should always be disclosed.

Motions Closing Meetings for the Discussion of Confidential Data Relating to the Financial Affairs or Trade Secrets of businesses:

After determining that the business entity considers its information to be confidential, and requests discussion in closed sessions, and after the governmental body has determined that the

---

[56] K.S.A. 60-3320(4).

[57] Mann v. Tatge Chemical Co., Inc., 201 Kan. 326 (1968). See also the Restatement of Torts § 757 (1939) and *Koch Engineering Co. v. Faulconer*, 227 Kan. 813, Syl 2,3 ¶¶ (1980).

[58] *Southwestern Bell Tel. Co. v. Kansas Corporation Commission*. 6 Kan. App. 2d 444 (1981) 629 P.2d 1174 opinion filed June 12, 1981. See also Stephan, Robert T. Attorney General Opinion 86-48, April 3, 1986.

information *is* confidential, motions closing meetings for the discussion of confidential data relating to the financial affairs or trade secrets of businesses may take the following form:

> I move that the Commission enter an executive session for discussion of the discussion of the financial affairs and trade secrets of <named business entity>. The justification for the executive session is to maintain the confidentiality of the financial affairs and trade secrets of <named business entity>. The open meeting is to resume in this room at <specified time>.

If only the financial affairs of the business are to be discussed, "financial affairs" should be substituted for "financial affairs and trade secrets" in the above motion. If only the trade secrets of the business are to be discussed, "trade secrets" should be substituted for "financial affairs and trade secrets."

Discussion in the closed session must be limited to financial affairs and/or trade secrets of the named business entity.

Discussion of the Acquisition of Real Property (K.S.A. 75-4319(b)(6))

The purpose of allowing "preliminary discussions relating to the acquisition of real property" is to protect governmental bodies from the adverse effects of publicity when public knowledge of a governmental land purchase would increase the price of the property at the taxpayer's detriment.[59]

However, the *sale* of real property is not to be discussed in closed sessions. According to Attorney General Opinion 87-91,

> It is our opinion that a public body may not go into an executive session to discuss the sale of publicly owned property. The exceptions to the KOMA are to be strictly construed. Had the legislature intended to allow public bodies to discuss the sale of realty in private, it would have so provided.[60]

Motions Closing Meetings for the Discussion of the Acquisition of Real Property

Since the intent of the *Act* is to protect the public it is to be interpreted broadly in order to effec-

---

[59] Smoot and Clothier, *Open Meetings Profile: The Prosecutor's View,* 20 Washburn Law Journal 241, page 278 (1981)

[60] Stephan, Robert T.: Attorney General Opinion 87-91, June 19, 1987.

tuate its purpose,[61] motions closing meetings for the discussion of the acquisition of real property should identify the property being acquired to the extent that public knowledge will not increase the cost of the property for the taxpayer.

For motions closing meetings for the acquisition of real property where the seller already knows that the property will be acquired by the governing body (example: where property is being acquired for the announced widening of a specific roadway), the following form can be used:

> I move that the Commission enter an executive session for discussion of the acquisition of property for <specific purpose>. The justification for the executive session is to determine the terms of sale. The open meeting is to resume in this room at <specified time>.

For motions closing meetings for the acquisition of real property where the public already knows that some property will be acquired by the governing body (as for a specific project) but the location has not been determined the following form can be used:

> I move that the Commission enter an executive session for discussion of the acquisition of property for <specific project (location unknown)>. The justification for the executive session is to determine the terms of sale. The open meeting is to resume in this room at <specified time>.

Discussions of the acquisition or sale of real property in general, without concern for any particular real property or purpose, are not proper subjects for closed meetings.

Motions Closing Meetings to Discuss Security (K.S.A. 75-4319(b)(13))

The purpose of the *Open Meetings Act* exception for the discussion of security is to allow the governing body to discuss a security weakness without encouraging persons to take advantage of the specific weakness. Not much can be said in motions closing meetings for discussion of security weaknesses without aggravating the security weakness. Where possible, the governing body should state that the issue to be discussed is a "personnel security issue" or a "property security issue."

[61] *Johnson V. Killion* 178 Kan. 154, 283 P.2d 433 (1955); *State, ex rel. Londerholm, v. Anderson*, 195 Kan. 649, Syl. 3, 408 P.2d 864 (1965)

Appendix A - Rules for Determining Secrecy

Rule 1: For a meeting closed to discuss *personnel matters of nonelected personnel* under K.S.A. 75-4319(b)(1) (44% of closed sessions) the closed session was classified as secret if the subject being discussed was given simply as "personnel matters" or an equivalent. If the issue or issues prompting the group to close the meeting were identified (such as "a situation in which an employee may have violated a specific governmental policy or a specific employee's annual evaluation[62]) the meeting was classified as not in secrecy. If partial information was given, the governmental body was given the benefit of the doubt and the meeting was classified as not in secrecy.

Rationale: The reason for the personnel matters exemption is to protect the personal privacy of employees, save personal reputations and encourage qualified people to select and remain in the employ of government.[63] Because all functions of city and county governments are, in some way, "personnel matters," stating that a meeting is being closed to discuss a "personnel matter" gives the public no meaningful information about the subject(s) actually being discussed. Because the issue prompting the group to close the meeting can be identified in the motion closing the meeting in such a way that the interests of neither the governmental body nor the person(s) being discussed is compromised, the secrecy is not justified. If the issue that prompted the closing of the meeting was identified, the discussion was not in secrecy. If partial information was given, the governmental body was given the benefit of the doubt and the meeting was classified as not in secrecy.

Rule 2: For a meeting closed for *consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship* under K.S.A. 75-4319(b)(2) (37% of closed sessions) the closed session was classified as secret if the subject was given as "privileged communications" or as "privileged matters" or as "pending litigation" or "potential litigation." The session was classified as not secret, giving the benefit of the doubt to the governmental entity, if limited information about the subject was given (e.g. "to discuss a workers compensation claim") or if a specific lawsuit was named.

Rationale: Specifying "privileged matters" or "privileged communications" as the subject of discussion provides the public no meaningful information about the subject(s) actually being discussed. Because the issue or issues prompting the group to close the meeting can be identified in such as way that the interests of the governmental body is not compromised, the secrecy is not justified. Providing limited information does allow members of the public to know something

---

[62] Although identifying the employee by title (e.g. "the City Manager's annual evaluation") identifies the person being discussed, this is proper because nothing positive or negative is implied about the individual's performance in this context.

[63] Stephan, Robert T. Attorney General Opinion No. 86-33, March 7, 1986. See also Smoot & Clothier, 20 *Washburn Law Journal* 241-288, page 275 (1981), and Stephan, Robert T.: Attorney General Opinion 87-10, November 23, 1987

about the subject being discussed. Identifying a particular lawsuit allows the public to identify the issue that prompted closing the meeting, in which case, secrecy is "none."

Rule 3: For a meeting closed to discuss *matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency* under K.S.A. 75-4319(b)(3) (5% of closed sessions), the closed session was classified as secret if the subject was given as "employee negotiations" or "labor negotiations." Because the specific union(s) or individual(s) with whom the governmental body is presumably negotiating can be identified without compromising the bargaining position of the governmental body, the union or the individual, such secrecy is not justified. Secrecy was classified as "none" if a specific labor union or person was identified. If partial information was given, the governmental body was given the benefit of the doubt and the meeting was classified as not in secrecy.

Rationale: The purpose of the labor negotiations exemption is to promote the harmonious resolution of labor disputes.[64] The terms "employee negotiations" and "labor negotiations" are so vague as to be meaningless. If a specific union or person is identified, the issue prompting the closing of the meeting is identified and there is no secrecy.

Rule 4: For a meeting closed to discuss *confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships* under K.S.A. 75-4319(b)(4) (3% of closed sessions), the closed session was classified as secret if the subject was given as "confidential information" or an equivalent. Since the name of the business entity can be given without compromising the interests of the governmental body or the business entity, the secrecy is not justified. Secrecy was classified as "none" if a specific corporation, partnership, trust or individual proprietorship was identified.

Rationale: The term "confidential information" and "confidential business information" are so vague as to be essentially meaningless. Since the name of the corporation, partnership or other business entity can be specified without harm, the secrecy is not justified. If a specific business entity is identified, the issue prompting the closing of the meeting is specified and therefore secrecy is "none."

Rule 5: For a meeting closed for *preliminary discussions relating to the acquisition of real property* under K.S.A. 75-4319(b)(6) (9% of closed sessions), secrecy was classified as "complete" if the subject was given as "the acquisition of real property" or an equivalent. Since the purpose of the acquisition or, in some cases, the specific piece of property can be specified without compromising the interests of the governmental body, the secrecy is not justified. Secrecy was classified as "none" if a specific project or piece of property was identified. If partial information was given, the governmental body was given the benefit of the doubt and the meeting was classified as not in secrecy.

---

[64] K.S.A. 75-4321(a)(1) and K.S.A. 75-4321(b)

Rationale: The purpose of the exemption for preliminary discussions of the acquisition of real property is "to protect against the adverse effects of publicity when public knowledge of a governmental land purchase would increase prices to the taxpayer's detriment.[65] When a specific project has already been initiated for which specific land is needed (such as the widening of a specific roadway), the project or land can be identified without compromising the position of the governmental entity. When the location of the land to be purchased has not been determined (as for a particular project such as a new city or county building), the identity of the project can be disclosed without compromising the position of the governmental entity. When the project or specific piece of land was specified, the meeting was classified as not in secrecy.

6. *Rule:* For a meeting closed to discuss *security* under K.S.A. 75-4319(b)(13) (2% of closed sessions), secrecy was considered to be justified in all cases.

Rationale: Little or nothing can be disclosed about a security issue without drawing attention to and aggravating the security problem. Therefore specific details of a security issue need not be disclosed. In all cases, the governmental entity was given the benefit of the doubt and the closed session was considered not in secrecy.

[65] Smoot and Clothier, *Open Meetings Profile: The Prosecutor's View,* 20 Washburn Law Journal 241, page 278 (1981)