

## **KSBN BOARD MEMBER TRAINING**

### **Kansas Tort Claims Act Kansas Open Meetings Act Kansas Open Records Act**

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### **THE KANSAS TORT CLAIMS ACT**

The Kansas Tort Claims Act (KTCA) generally governs the liability of the State of Kansas, and its agencies and employees. An employee includes a member of a board or committee of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." K.S.A. 2016 Supp. 75-6102(d)(A). The basic rule of the KTCA is vicarious liability for any actionable wrongful act or omissions of government employees within the course and scope of their employment, subject to affirmative grants of immunity that may exist on a case-by-case basis.

If you are sued for an act that occurred within the scope of your duties as a board member, you are entitled to have the Attorney General's Office defend you at no cost. To obtain representation by the Attorney General's Office, you must (1) submit a written request to the Attorney General within 15 days after service of a process (include a copy of the petition and summons) and (2) cooperate in your defense. The State may choose not to defend you if you (1) acted with actual fraud or malice or (2) failed to make a timely request for representation.

The general rule is that the State will pay for any judgment rendered against you unless (1) the judgment is for an act or omission that occurred outside the scope of your duties as a board member; (2) you failed to cooperate in your defense; or (3) you acted with actual fraud or malice.

Things to remember if you are sued:

1. File a timely written request for representation by the Attorney General and attach a copy of the petition and summons;
2. Do not sign anything; and
3. Do not say anything.

### **THE KANSAS OPEN MEETINGS ACT (KOMA)**

The Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, allows the public to observe governmental entities making decisions. Meetings shall be open to the public because "a representative government is dependent upon an informed electorate." K.S.A. 2016 Supp. 75-4317(a). Because the purpose of KOMA is to benefit the public, it is

interpreted liberally and exceptions are applied narrowly to carry out its purpose.

KOMA applies to “all meetings for the conduct of the affairs of, and the transaction of business of all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds. K.S.A. 2016 Supp. 75-4318. KOMA does not define the term “subordinate groups,” but if created by a covered entity or the group has become an extension of a covered entity, most likely the subordinate group is subject to KOMA.

KOMA does not apply to an otherwise covered entity when lawfully authorized “to exercise quasi-judicial functions when deliberating matters related to a decision involving such quasi-judicial functions,” K.S.A. 2016 Supp. 75-4318(g)(1), or to conduct a proceeding or hearing under the Kansas Administrative Procedures Act (KAPA). K.S.A. 2016 Supp. 77-523(f); K.S.A. 2016 Supp. 75-4318(g). KOMA also does not apply to the judiciary, private organizations, and staff meetings of a covered entity.

A meeting is defined as:

- Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of an agency or public body subject to the act
- For the purpose of discussing the business or affairs of the public body or agency  
K.S.A. 2016 Supp. 75-4317a.

Meetings may be conducted by telephone or other medium (video, Skype) if the board complies with all KOMA requirements. A meeting includes informal discussions before or after the public meeting, or during a recess of a public meeting and all gatherings at all stages of the decision-making process. The name of the gathering is irrelevant; thus, "work sessions" and "retreats" are subject to KOMA. The majority of the membership for a meeting is calculated by the next whole number greater than one-half the total number of members—including vacant positions and absent members. A majority can be different than a quorum.

A "discussion" does not require binding action or voting. A discussion can occur at social gatherings, retreats and meetings held in private, education conferences/seminars. Thus, when traveling to such meetings, members of the board should avoid discussing business or affairs of the agency.

The presiding officer has a duty to provide notice of the meeting, but this duty may be delegated. K.S.A. 2016 Supp. 75-4318(c). Contrary to popular belief, KOMA does not require notice of meetings to be published in a paper or on a website. An individual must request notice of meetings. There are no formalities to requesting notice – it can be verbal or written. The notice must provide date, time, and location where body will meet to the person requesting notice a “reasonable time” before meeting. A request is valid for one fiscal year. The board must notify a requester of expiration before terminating notice to

that requester.

Other than prohibiting a vote by secret ballots, KOMA does not address meeting procedures; thus, a board is not required to follow Roberts Rules of Order or any similar formal rules of procedure. KOMA also does not require a board to create an agenda, but if one exists, it must be made available to everyone. An agenda does not have to be mailed out in advance of the meeting. The person may record meeting as long as doing so is not disruptive. The public does not have the right to speak, but only to listen and observe.

A board policy may require minutes to be kept, but KOMA does not require the board to have minutes *unless* there is a motion to go into executive session. An executive session permits discussion of certain enumerated matters outside of public view. To take an executive session, the board must first convene an open meeting. The board cannot take binding actions in an executive session, but a consensus is allowed. If a consensus is achieved, the board must reconvene the open meeting and take a formal vote in open session.

Executive sessions are governed by statute and those requirements must be met. Those requirements are:

- (1) A formal motion must be seconded and carried;
- (2) The motion for executive session must contain:
  - (a) Justification for closure (brief description of topic to be discussed)
  - (b) Subject matter (from the statute) and
  - (c) Time/place open meeting will resume; and
- (3) The motion must be recorded in the minutes. K.S.A. 2016 Supp. 75-4319(a).

The two most common subject matters used by licensing boards are personnel matters of non-elected personnel and consultation with the board's attorney. Executive sessions for personnel matters of non-elected personnel are used to protect the privacy interests of the employee. It can also be used to discuss applicants for employment with the Board. Executive sessions under this subject matter do *not* include contractors or appointments to boards or commissions. See K.S.A. 2016 Supp. 4319(b)(1). Executive sessions for consultation with legal counsel requires the board's legal counsel to be present and the communication to be privileged, *i.e.*, confidential. No third parties may be present as that breaks the privilege. See K.S.A. 2016 Supp. 75-4319(b)(2).

The most common complaints raised by the public include:

- Executive sessions
- Improper motions for executive sessions
- An executive session for a subject matter, but discussing a different or additional subject matter in session
- Inclusion of non-board members in executive session
- Executive session is extended without reconvening the open meeting, making a motion to extend the executive session, and voting

- Failure to return to open meeting at the stated time/place after an executive session ends
- Revealing information discussed in executive session
- Serial communications
- Failure to give notice when majority of membership of board gathered
- Failure to give notice of meetings

Prosecutions under KOMA are civil, not criminal, actions. Any person, county/district attorney or the attorney general may bring an action in district court. The county/district attorney and attorney general have subpoena power. Enforcement actions take precedence over all other cases and are assigned for trial at the earliest practicable date.

The burden of proof lies with the board to sustain its action. K.S.A. 2016 Supp. 75-4320a(b). The remedies for a KOMA violation include: voiding any action taken if prosecuted by the attorney general or county/district attorney only; an injunction (stopping the action); a mandamus (forcing action); and a declaratory judgment. The penalties for a KOMA violation include: a fine up to \$500 per board member, not the board, for each violation; ouster from office; recall from office; court costs assessed to Board to the person seeking enforcement of KOMA; court costs assessed against plaintiff if maintained action frivolously, not in good faith, or without reasonable basis in law or fact. K.S.A. 2016 Supp. 75-4320; K.S.A. 75-4320a.

New provisions were added to KOMA effective July 1, 2015. Under these provisions, the Attorney General can enter into a consent order or issue a finding of a violation. K.S.A. 2016 Supp. 75-4320d(a). Under either procedure, the burden of proof lies with the board to sustain its action. K.S.A. 2016 Supp. 75-4320a(b). Under the consent order provision, the Attorney General may investigate any time prior to filing an action under K.S.A. 2016 Supp. 75-4320a, use the preponderance of evidence standard, and enter into a consent order with the board member that may:

- Contain admissions of fact;
  - Require completion of training approved by the Attorney General;
  - Impose a civil penalty up to \$250 for each violation;
  - Set forth an agreement to comply with the KOMA; and
  - Require submission of proof consent order requirements met.
- K.S.A. 2016 Supp. 75-4320d.

The consent agreement must also bear the signature of the head of the board found to have violated KOMA and of any other person required by the Attorney General. K.S.A. 2016 Supp. 75-4320d.

Under the provision for finding a violation, the Attorney General may investigate, use the preponderance of evidence standard, and issue a finding of a violation to the board that may:

- Contain findings of fact and conclusions of law;

Require the board to do any or all of the following:  
Cease and desist from further violation;  
Comply with the KOMA;  
Complete training approved by the Attorney General;  
Pay a civil penalty up to \$500 for each violation; and  
Submit proof of compliance with the finding of violation.  
K.S.A. 2016 Supp. 75-4320d(a)(2).

The Attorney General may apply to district court to enforce a consent order or a finding of violation. If it finds that the attorney general did not abuse discretion, then the district court shall:

Enjoin the public body or agency to comply with consent order or finding of violation;  
Impose a civil penalty not less than the one imposed by the Attorney General and not more than \$500 per violation  
Require public body or agency to pay court costs and investigative costs incurred by the Attorney General;  
Impose any other remedy authorized by K.S.A. 75-4320a(a) and amendments thereto.  
K.S.A. 2016 Supp. 75-4320d(c).

The district court may also award the Attorney General reasonable attorney fees; in certain instances, the district court is required to do so. See K.S.A. 2016 Supp. 75-4320d(c)(4).

For further information or registration on the next training session, please view the Attorney General's website at: <http://ag.ks.gov/open-government/resources> Copies of decisions by the Attorney General for KOMA enforcement actions can be viewed at: <http://ag.ks.gov/open-government/enforcement-actions>

### **THE KANSAS OPEN RECORDS ACT (KORA)**

The Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, requires the board to have its records "open for inspection by any person unless otherwise provided;" and KORA "shall be liberally construed and applied to promote such policy." K.S.A. 45-216(a).

A public agency includes the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof or any other entity receiving, expending, or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision. K.S.A. 2016 Supp. 45-217(f)(1). The term "instrumentality" is not defined in KORA. Nevertheless, if created by a covered entity or the group has become an extension of a covered entity, it will most likely be covered. A "public agency" does not include private companies, even if they receive public funds in exchange for goods and services; judges and courts; an individual legislator or member of a governing body; private individuals; or state employees. K.S.A. 2016 Supp. 45-217(f)(2).

A public record includes any recorded information regardless of form or characteristics which is made, maintained, or kept by or is in the possession of any public agency, K.S.A. 2016 Supp. 45-217(g)(1); thus, it includes written records, photographs, computer data, and e-mail. A public record does not include records that are owned by a private person or entity and are not related to functions, activities, programs, or operations funded by public funds. K.S.A. 2016 Supp. 45-217(g)(2). Thus, a public record does not include records not in existence at the time of the request. The board is not required to create a record in order to fulfill a request. See K.S.A. 2016 Supp. 45-217.

Under KORA, the board must:

- Appoint a freedom of information officer to assist with KORA requests
- Display, distribute, or otherwise make available a brochure describe requester rights, agency responsibilities, and procedures for inspecting or obtaining copies of public records
- Include the name/title of a records custodian, fees, and office hours available for anyone to make a request. K.S.A. 45-226 and K.S.A. 45-227.

In Kansas, any person may make a request for records; the person need not be a resident or provide a reason for their request. The board may require the request to be in writing, state name and address of the requestor, provide proof of identification, and sign a written certification that the requester will not use names and addresses obtained from the records to solicit sales or services. Unless closed by law, the board cannot deny a person the right to review its public records. For instance, copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening. If portions of a record are closed, the remainder of the record must be made available to the requestor; this referred to as "redaction." The board is not required to makes copies of a recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations *unless* shown at a public meeting.

The request must be "acted upon" as soon as possible, but not later than the end of third business day following the date the request was received by the board. Three responses are acceptable: (1) the record is provided (in the form requested, if possible); (2) the request is under review and the records if permitted will follow; and (3) the request is denied, with a detailed explanation for the denial.

Under KORA, there is a presumption of openness. As such, the requested public records must be released unless an exemption to disclosure applies. The burden rests on the board to prove the requested records are exempt from disclosure. Exemptions to disclosure may be discretionary or mandatory.

Discretionary closure includes medical, psychiatric, psychological, or alcoholism/drug dependency treatment records pertaining to identifiable patients; personnel records other than an employee's name, positions/titles, salaries or employment contracts; and length of service; information that constitutes a clearly unwarranted invasion of personal privacy if disclosed; records privileged under rules of evidence unless consent is given; records; and

records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure. Mandatory closure includes records that are required to be closed by federal or state statute that are not found in KORA; KORA looks to other statutes first.

The board may recover only actual costs to provide the requested records. These costs include staff time to retrieve and review records, redact information from a record, and copy the record. The fees may be estimated and collected before the records are provided. K.S.A. 45-218(f) and K.S.A. 2016 Supp. 45-219.

KORA is a civil act, not a criminal act. Any person, a county/district attorney, or the Attorney General may bring a civil prosecution. The county/district attorney and Attorney General have subpoena power. Such actions are assigned a trial date at the earliest practicable date. K.S.A. 2016 Supp. 45-222(e). The district court may review the requested records *in camera*. In actions brought by the county/district attorney or Attorney General, fines up to \$500 per violation may be imposed for a knowing violation or an intentional failure to furnish information. Costs and reasonable attorney's fees, including appeals, may be imposed if the board's denial is not made in good faith and without a reasonable basis in fact or law. See K.S.A. 2016 Supp. 45-222 and K.S.A. 2016 Supp. 45-223.

Effective July 1, 2015, new provisions were added to KORA to create graduated enforcement options to encourage resolution of KORA violations in lieu of filing an enforcement action. The Attorney General or a county/district attorney can use a consent judgment in lieu of prosecution. A consent judgment may contain any remedy available to a district court but cannot include an award of reasonable expenses, investigation costs, or attorney fees. The district court must approve a consent judgment and enter judgment. Breach of a consent judgment is a violation of the court order and subject to penalties provided by law. See K.S.A. 2016 Supp. 45-253.

The new KORA provisions also authorize the Attorney General to enter into a consent order or issue a finding of a violation after an investigation showing by a preponderance of the evidence that a violation has occurred. K.S.A. 2016 Supp. 45-251(a). The Attorney General can seek district court enforcement of a consent order or a finding of violation. K.S.A. 2016 Supp. 45-251(c). The district court may review the requested records *in camera*.

Under the consent order provisions, the Attorney General may investigate using the preponderance of evidence standard and enter into a consent order that may:

- Contain admissions of fact;
  - Require completion of training approved by the Attorney General;
  - Impose a civil penalty up to \$250 for each violation;
  - Set forth an agreement to comply with the KORA; and
  - Require submission of proof that consent order requirements met.
- K.S.A. 2016 Supp. 45-251(a)(1)(A).

A consent order with a public agency that is not a governing body must bear the signature of the head of the public agency, any officer found to have violated the KORA and of any other person required by the Attorney General. A consent order with a public agency that is a governing body shall include the signatures of all members. K.S.A. 2016 Supp. 45-21(a)(1)(B).

Under the provisions for finding of a violation, the Attorney General may investigate using the preponderance of evidence standard. The Attorney General issues a finding of violation to a public agency that may contain findings of facts and conclusions of law and require the agency to do any or all of the following:

- Cease and desist from further violation;
- Comply with KORA;
- Complete training approved by the Attorney General;
- Pay a civil penalty up to \$500 for each violation; and
- Submit proof that of compliance with the finding of violation.

K.S.A. 2016 Supp. 45-251(a)(2).

In an enforcement action, if it finds that the attorney general did not abuse discretion, then the district court shall:

- Enjoin the public agency to comply with consent order or finding of violation;
- Impose a civil penalty not less than the one imposed by the Attorney General and not more than \$500 per violation
- Require public agency to pay court costs and investigative costs incurred by the Attorney General; and
- Impose any other remedy authorized by K.S.A. 45-222(a).

K.S.A. 2016 Supp. 45-251(c).

The district court may also award the Attorney General reasonable attorney fees; in certain instances, the district court is required to do so. See K.S.A. 2016 Supp. 45-251 (c)(5).

The most common complaints raised by the public include:

- Calculation and explanation of the "reasonable" fee/actual costs
- Records provided did not meet the requester's expectations
- Requester believes there should be existing public records, but none were found
- Is agency/entity covered by KORA, and if not, why not?
- Failure to respond within three business days
- Failure to provide the requested records
- Access to criminal investigation records

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