



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 162

Thomas A. Krueger
P.O. Box 728
Emporia, Kansas 66801

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Executive Sessions; Consultation with an
Attorney

Synopsis: K.S.A. 75-4319(b) (2) authorizes public bodies subject to the Kansas Open Meetings Act (KOMA) to recess into an executive session for the purpose of "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship" The term "consultation" as used in the KOMA necessarily implies the presence of an attorney. Even though a letter from an attorney to his client containing advice is a privileged communication, we must conclude that members of a public body cannot recess into an executive session to review and discuss among themselves a letter from their attorney. Therefore, it is our opinion that the "consultation with an attorney" exception to the open meetings law cannot be invoked unless the attorney for the body is present. Cited herein: K.S.A. 60-426; 75-4317; K.S.A. 1985 Supp. 75-4318(a); K.S.A. 75-4319.

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Dear Mr. Krueger:

As legal counsel for Unified School District (U.S.D.) No. 252 (Hartford), you request our opinion concerning the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. Many boards of education across the state employ legal counsel located in a city other than the city where the board's office is located. The board office for U.S.D. No. 252 is not located in Emporia, where you practice. You state that, because of the distance involved, it becomes necessary at times for you to communicate with the board by correspondence. Therefore, you ask whether a letter you have written to the board in response to an inquiry would constitute a "consultation with an attorney" to allow the board to recess into an executive session to discuss such written advice or opinions regardless that you are not actually present.

The KOMA provides that meetings of public bodies must be open to the public. K.S.A. 1985 Supp. 75-4318(a). A public body may, however, recess into a closed meeting for the purpose of discussing one of the six subjects listed in the act. K.S.A. 75-4319(b)(2) states that an executive session may be called for "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship"

In Attorney General Opinion No. 82-247, we were asked to give some general guidelines for the use of the "consultation with an attorney" exception to the open meetings law. Relying in part on Attorney General Opinion No. 78-303, we stated that this exception is inapplicable unless the attorney is present for the consultation:

"Members of boards or agencies subject to the Act are simply not allowed to discuss legal issues concerning the body among themselves under the guise of this privilege, unless the attorney is a party to the consultation."

In Attorney General Opinion No. 78-303 we were informed that a board of education recessed into executive session to discuss a pending lawsuit. The board's attorney was not present. However, the superintendent of the district was present and relayed to the board information about the litigation which the attorney had furnished to him. It was concluded that since the board's attorney was not present, the attorney-client privilege could not be relied upon to justify the

closed session as the discussion by the board members among themselves was not a privileged communication.

The situation now presented for our review is distinguished from that of the above opinion in that board members would have a written document furnished by their attorney. K.S.A. 60-426 provides that "communications . . . between [a] lawyer and his or her client in the course of that relationship and in professional confidence, are privileged" A "communication" is defined as follows:

"'[C]ommunication' includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship" K.S.A. 60-426(c) (2).

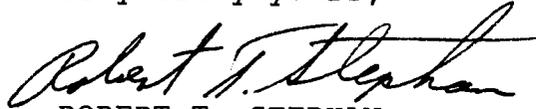
In referring to the above statute, the court in State v. Newman, 235 Kan. 29, 40 (1984), stated that "a communication here means a transmission of information between the attorney and the client." Clearly, a letter from an attorney containing advice to his client is a privileged communication within the meaning of the statute. It is your contention that such a letter would allow the board to recess into an executive session for purposes of having a "consultation with an attorney" to discuss the written communication even without the actual presence of the board's attorney.

To give effect to the policy of openness in government, the KOMA is interpreted liberally and its exceptions narrowly construed. K.S.A. 75-4319(b) (2) provides that an executive session may be held for consultation with an attorney which would be deemed privileged. The word "consultation" is defined generally as "the act of consulting or conferring; deliberation of two or more persons on some matter." Webster's Third New International Dictionary 490. Black's Law Dictionary 286 (rev. 5th ed. 1979) defines the term as the "[a]ct of consulting or conferring Deliberation of persons on some subject." Consultation, then, necessarily implies the presence of an attorney. In discussing among themselves the contents of a letter from their attorney, board members would not be conferring with an attorney. While an attorney's letter giving advice to his client is a privileged communication, it is not a "consultation" within the meaning of the KOMA. It is

important to note that not all consultations with an attorney will justify a closed meeting; such consultation must also be privileged.

In summary, K.S.A. 75-4319(b)(2) authorizes public bodies subject to the Kansas Open Meetings Act to recess into an executive session for the purpose of "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship" The term "consultation" as used in the KOMA necessarily implies the presence of an attorney. Even though a letter from an attorney to his client containing advice is a privileged communication, we must conclude that members of a public body cannot recess into an executive session to review and discuss among themselves a letter from their attorney. Therefore, it is our opinion that the "consultation with an attorney" exception to the open meetings law cannot be invoked unless the attorney for the body is present.

Very truly yours,



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Rita L. Noll
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