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ATTORNEY GENERAL OPINION NO. 88-148

Steven L. Opat
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Courthouse
Junction City, Kansas 66441

Re: State Departments; Public Officers and Employees --
Public Officers and Employees -- Open Public
Meetings; Executive Sessions; Confidential Data
Relating to Financial Affairs or Trade Secrets

Synopsis: Pursuant to K.S.A. 75-4319(b)(4), a public body may
recess into executive session to discuss
confidential financial data or trade secrets. The
open meetings act is to be interpreted broadly to
give effect to the legislative intent that meetings
of public bodies be accessible to the public;
exceptions to the act must be construed narrowly.
Thus, public bodies must take care to recess into
executive session on the basis of K.S.A.
75-4319(b)(4) only when the topic of conversation
clearly involves confidential financial data, or
"trade secrets" as that term has been defined by
Kansas courts. Cited herein: K.S.A. 60-3320;
75-4317; K.S.A. 1987 Supp. 75-4318; K.S.A. 75-4319,
as amended by L. 1988, ch. 315, § 4.

* * *

Dear Mr. Opat:

As Geary County Attorney, you ask our interpretation of a
provision contained in the Kansas open meetings act (KOMA),
K.S.A. 75-4317 et seq. Specifically, your question

concerns K.S.A. 75-4319(b)(4), which provides that "confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships" may be discussed in executive session.

The Geary County Economic Development Commission (Commission) is a body created by the Geary county board of county commissioners and the city commission of Junction City. The city and county jointly fund the Commission and appoint its members. The Commission is subject to the KOMA. See K.S.A. 1987 Supp. 75-4318(a); Attorney General Opinion No. 86-48. You state that the Commission would like to construe K.S.A. 75-4319(b)(4) to allow it to discuss in executive session

"offers from out-of-town businesses which might have an interest in re-locating or establishing themselves in the Junction City-Geary County area. Items to be discussed would obviously pertain to the acquisition of land for business sites, financial incentives which might be arranged between the city or county and the business, and local salary structures, among others. Some of the discussion would also obviously entail the financial positions of the interested business."

The reasons the Commission wishes to discuss these topics in executive sessions include: The protection of an interested business from competition; prevention of potential sellers of land to be used for business purposes from inflating the prices of real estate; and maintenance of trust and confidentiality between local government and the business. You question what matters the Commission may discuss in private under K.S.A. 75-4319(b)(4).

K.S.A. 75-4317(a) provides 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." The Kansas Supreme Court has discussed this statute as follows:

"Obviously, the intent behind the statute [K.S.A. 75-4317(a)] is to protect the public. In Johnson v. Killion, 178 Kan. 154, 158-59, 283 P.2d 433 (1955), this court stated: 'It is fundamental

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.' See also Smith v. Marshall, 225 Kan. 70, 75, 587 P.2d 320 (1978)." State ex rel. Murray v. Palmgren, 321 Kan. 524, appeal dismissed 459 U.S. 1081, 103 S.Ct. 562, 74 L.Ed.2d 927 reh. denied 459 U.S. 1229, 103 S.Ct. 1238, 75 L.Ed.2d 471 (1982).

In Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663, 669 (1986), the court said:

"The KOMA is remedial in nature and therefore subject to broad construction in order to carry out the stated legislative intent."

Therefore, the presumption of the KOMA is in favor of openness and exceptions to the KOMA are narrowly construed. See Tacha, The Kansas Open Meetings Act: Sunshine on the Sunflower State?, 25 U. Kan. L. Rev. 169, 175 (1977). The exceptions to the KOMA permitting certain subjects to be discussed behind closed doors were enacted on the basis that in certain instances the interests involved in preserving confidentiality outweigh the public's right to know. See Smoot and Clothier, Open Meetings Profile: The Prosecutors's View, 20 Washburn L.J. 241, 274 (1981).

The Kansas courts have not had occasion to determine what matters may be discussed under the "confidential data relating to financial affairs or trade secrets" exception. Smoot and Clothier commented as follows:

"This exception is applicable only if the information discussed is 'confidential' or a 'trade secret.' These discussions should not be conducted in private simply because the governmental entity is transacting business with a private concern. . . . As a general rule, governmental bodies should determine whether private firms desire closed meetings and ascertain in advance of any

executive session whether the information to be discussed is of a confidential nature. The exception is designed to protect the private interests of business and there is little reason for secrecy if it is not requested by the firm." Smoot and Clothier, supra at 277.

"Trade secret" is defined in the Uniform Trade Secrets Act:

"'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, 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." K.S.A. 60-3320(4).

The Kansas Supreme Court has established criteria to determine whether information constitutes trade secrets:

"An exact definition of a trade secret may not be possible, but factors to be considered in recognizing a trade secret are: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."
Koch Engineering Co. v. Faulconer,
227 Kan. 813, Syl. ¶¶ 2,3 (1980).

See Southwestern Bell Tel. Co. v. Kansas Corporation Commission, 6 Kan. App. 2d 444, 457 (1980), rev. denied 230 Kan. 819 (1981).

K.S.A. 75-4319(b)(4) allows a public body to privately discuss (1) confidential data relating to financial affairs and (2) trade secrets. Since the exceptions to the KOMA are narrowly construed, only those items which fall under these two categories may be discussed in executive session. It would appear that matters regarding the "financial position of the business" could take place behind closed doors insofar as the discussion concerns such confidential data as the business' profits.

You state that the Commission would like to discuss under this exception the acquisition of land for business sites. We note that K.S.A. 75-4319(b)(6), as amended, allows executive sessions for "preliminary discussions relating to the acquisition of real property." However, this exception applies only when the public body is acquiring land. See Attorney General Opinion No. 87-91. We are of the opinion that discussion by the Commission concerning land for business sites cannot be held under exception (4), unless the discussion would reveal confidential financial data or a trade secret of a specific business.

The Commission also wishes to discuss financial incentives and local salary structures behind closed doors. We believe these items do not qualify under the exception. Certain aspects of the broad topic "financial incentives" may also involve a business' confidential financial data. To this extent private discussion may be had on the basis of K.S.A. 75-4319(b)(4). All other discussion, however, will not qualify under this exception and must take place in an open meeting.

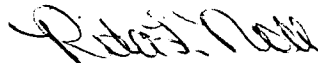
A public body may recess into executive session on the basis of K.S.A. 75-4319(b)(4) to discuss only confidential financial data or trade secrets. It is impossible to anticipate the various topics that the Commission or other similar body may

wish to discuss concerning economic development. Therefore, we must say that the general rule is that discussions which do not focus on confidential financial data or trade secrets do not fall under the exception. This determination must be made on a case by case basis. When in doubt, members of the Commission should remember that exceptions to the open meetings law are interpreted narrowly. In addition, if the business does not request that the matter be privately discussed, discussion should be held in an open meeting as the exception was designed to protect private business, not the public body.

Very truly yours,



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