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ATTORNEY GENERAL OPINION NO. 89- 42

C.E. Russell  
City Attorney  
317 South Washington  
Wellington, Kansas 67152

Re: State Departments; Public Officers and Employees --  
Public Officers and Employees; Open Public Meetings  
-- Discussions Regarding Peer Review and Risk  
Management Reports

Public Health -- Health Care Providers; Health Care  
and Peer Review -- Peer Review Committee Reports;  
Confidentiality and the Open Meetings Requirements

Synopsis: Discussions by the governing body of a public  
hospital concerning records and reports mandated to  
be confidential under the risk management and peer  
review laws are not required to be discussed in an  
open meeting. Cited herein: K.S.A. 1988 Supp.  
65-4915; 65-4922; 65-4923; 65-4925; 74-8705;  
74-8804; 75-37,102; K.S.A. 75-4317; K.S.A. 1988  
Supp. 75-4318; 75-4319; K.A.R. 1987 Supp. 28-52-1;  
42 C.F.R. § 482.21.

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Dear Mr. Russell:

As attorney for St. Luke's Hospital, a city-owned hospital in Wellington, Kansas, you have requested our opinion regarding the Kansas Open Meetings Act. Specifically, your question concerns the requirements of the open meetings law and the

privileges granted reports and other records pursuant to the health care provider peer review and risk management laws.

In 1984 the Kansas legislature adopted the health care provider peer review law, K.S.A. 1988 Supp. 65-4915. Federal government regulations require the governing body of a hospital to have quality assurance and peer review programs to participate in the federal Medicare program. 42 C.F.R. § 482.21. "Peer review" is defined in K.S.A. 1988 Supp. 65-4915(a) (3) to include the following functions:

"(A) Evaluate and improve the quality of health care services rendered by health care providers;

(B) determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care;

(C) determine that the cost of health care rendered was considered reasonable by the providers of professional health services in this area;

(D) evaluate the qualifications, competence and performance of the providers of health care or to act upon matters relating to the discipline of any individual provider of health care;

(E) reduce morbidity or mortality;

(F) establish and enforce guidelines designed to keep within reasonable bounds the cost of health care;

(G) conduct of research;

(H) determine if a hospital's facilities are being properly utilized;

(I) supervise, discipline, admit, determine privileges or control members of a hospital's medical staff;

(J) review the professional qualifications or activities of health care providers;

(K) evaluate the quantity, quality and timeliness of health care services rendered to patients in the facility;

(L) evaluate, review or improve methods, procedures or treatments being utilized by the medical care facility or by health care providers in a facility rendering health care."

The statute also provides for the confidentiality of peer review reports:

"Except as provided by K.S.A. 60-437 and amendments thereto and by subsections (c) and (d), the reports, statements, memoranda, proceedings, findings and other records of peer review committees or officers shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity or be admissible in evidence in any judicial or administrative proceeding. Information contained in such records shall not be discoverable or admissible at trial in the form of testimony by an individual who participated in the peer review process. This privilege may be claimed by the legal entity creating the peer review committee or officer, or by the commissioner of issuance for any records or proceedings of the board of governors." K.S.A. 1988 Supp. 65-4915(b). (Emphasis added).

In addition, K.S.A. 1988 Supp. 65-4915(e) provides as follows:

"A peer review committee or officer may report to and discuss its activities, information and findings to other peer review committees or officers or to a board of directors or an administrative officer of a health care provider without waiver of the privilege provided by

subsection (b) and the records of all such committees or officers relating to such report shall be privileged as provided by subsection (b)." (Emphasis added).

As part of the comprehensive medical malpractice legislation enacted by the legislature in 1986, all medical care facilities are required to establish and maintain an internal risk management plan. K.S.A. 1988 Supp. 65-4922. Each year the governing body of the facility is required to review its plan. K.A.R. 1987 Supp. 28-52-1. In general, risk management consists of mandatory reporting, investigation, and analysis of reportable incidents. See K.S.A. 1988 Supp. 65-4923. All risk management reports and records are mandated by K.S.A. 1988 Supp. 65-4925(a) to be "confidential and privileged." In addition, the statute provides that no persons in attendance at any risk management meeting

"shall be compelled to testify in any civil, criminal or administrative action, other than a disciplinary proceeding by the appropriate licensing agency, as to any committee discussions or proceedings." K.S.A. 65-4925(b).

The Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq., provides as follows:

"Except as otherwise provided by state . . . law . . . 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. . . ." K.S.A. 1988 Supp. 75-4318(a).

The board of directors of a city hospital is subject to the provisions of the KOMA and is required to hold open public meetings. Only those subjects listed in K.S.A. 1988 Supp. 75-4319(b) may be discussed privately in executive session. The question presented is whether the governing body of a city

hospital is required by the KOMA to discuss peer review and risk management reports in an open meeting.


Several exceptions to the KOMA may be applicable to permit the board of directors to recess into executive session to discuss peer review and risk management reports: K.S.A. 1988 Supp. 75-4319(b)(1), personnel matters of hospital employees; K.S.A. 1988 Supp. 75-4319(b)(2), consultation with the Board's attorney which would be deemed privileged in the attorney-client relationship; and K.S.A. 1988 Supp. 75-4319(b)(5), matters relating to actions adversely or favorably affecting a patient of the hospital. However, as you pointed out in your letter, discussions of the records and reports in question may not fall under one of the specific listed exceptions. For example, if a report concerns a physician granted hospital privileges, the "personnel matters" exception would not apply as the physician is not a hospital employee. See Attorney General Opinion No. 87-10. However, we do not believe these discussions which do not fall under one of the listed exceptions must be held in open meeting.

K.S.A. 1988 Supp. 75-4318(a) states that "[e]xcept as otherwise provided by law," meetings must be open to the public. Several Kansas statutes specifically exempt particular meetings from the KOMA requirements. See, e.g., K.S.A. 1988 Supp. 74-8705 ("meetings conducted by procurement negotiating committee" of the lottery commission "shall be exempt from the provisions" of the KOMA); K.S.A. 1988 Supp. 74-8804(n), (o) (the racing commission "may recess for a closed or executive session" to discuss criminal history record information relating to criminal and background investigations as necessary to determine qualifications of licensees and applicants for licensure, and to negotiate with licensees and applicants regarding such information); K.S.A. 1988 Supp. 75-37,102 (meetings by the procurement negotiating committee of the Department of Administration to conduct negotiations are not subject to the KOMA).

The language of K.S.A. 1988 Supp. 65-4915 and K.S.A. 1988 Supp. 65-4925 do not specifically exempt board discussions of peer review and risk management reports from the KOMA. However, given the language of these statutes, we believe it was the intent of the legislature that such discussions be exempt. Both statutes impose strict confidentiality requirements on the information contained in the reports. Requiring such information to be discussed in open meeting would thwart the purpose and intent of the risk management and peer review laws. Therefore, we conclude that discussions by

a governing body of a public hospital concerning peer review and risk management reports are not required to be held in an open meeting pursuant to the KOMA, as such discussions by the Board are "otherwise provided by law" to be kept confidential. We note that before such private discussions can begin, the public body must first meet in open session. The private discussions cannot exceed the scope of K.S.A. 1988 Supp. 65-4915 and K.S.A. 1988 Supp. 65-4925.

Very truly yours,

  
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