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ATTORNEY GENERAL OPINION NO. 89-92

Wilson E. Speer
Attorney at Law
201 North Cherry Street
P.O. Box 1000
Olathe, Kansas 66061

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Executive Sessions; Acquisition of Property

Synopsis: The Kansas Open Meetings Act provides that only certain subjects may be discussed behind closed doors. In absence of an applicable exception, discussions concerning negotiation strategy in formulating offers, and offers received relating to the acquisition of a water utility must be held in open, public meeting. The "acquisition of real property" exception, K.S.A. 1988 Supp. 75-4319(b) (6), may only be used when the primary focus of the discussion is real property. Cited herein: K.S.A. 19-3501; 19-3505; 75-4317; K.S.A. 1988 Supp. 75-4318; 75-4319.

* * *

Dear Mr. Speer:

As the attorney for Water District No. 1 of Johnson county, you have requested our opinion regarding the applicability of the open meetings law to board deliberations involving the acquisition or annexation of another water utility.

Water District No. 1 of Johnson County was created pursuant to K.S.A. 19-3501 et seq., and is governed by a five member elected board, K.S.A. 19-3505. You inform us that two rural water districts in Johnson County have dissolved and are now part of the district. We are also informed that the district is currently negotiating to acquire another rural water district in the county and is contemplating acquiring a private water utility. You state that the acquisitions generally take place as follows:

"To acquire the facilities and other assets of these other utilities, a consideration may have to be paid or otherwise provided. The usual course toward such acquisitions or annexations is a series of negotiations leading to a contract. The formulation and evaluation of offers and counteroffers are conducted in the Board meetings or subcommittees composed of two or more Board members. In the process, there is necessarily involved the formulation of negotiating strategy. . . ."

The question you present to us is whether the Board may recess to an executive session "to discuss negotiating strategy in formulating offers and discussing received offers relating to the acquisition of the assets and customer accounts of another water utility."

The Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq., requires meetings of public bodies to be open to the public. K.S.A. 1988 Supp. 75-4318(a). A public body may, however, recess into a closed meeting to discuss the subjects listed in the act. K.S.A. 1988 Supp. 75-4319(b)(6) provides that an executive session may be called for "preliminary discussions relating to the acquisition of real property." You ask whether this exception can be used in the instant case in that acquisition of a water district or public utility necessarily involves interest in real property such as easements, the rights to use public right of way for distribution of mains, and the title to the real estate itself.

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 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 purpose of the sixth exception to the KOMA is to "protect against adverse effects of publicity when public knowledge of a governmental land purchase would increase prices to the taxpayer's detriment." Smooth and Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 278 (1981).

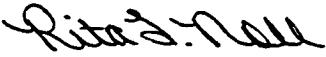
Given the intent of K.S.A. 1988 Supp. 75-4319(b)(6), and the narrow interpretation that is given to exceptions of the open meetings law, we believe that discussions of "negotiating strategy in formulating offers and discussing received offers" must be held in an open meeting as there is no exception permitting such discussions to be behind closed doors. In State v. U.S.D. No. 305, 13 Kan.App.2d 117 (1988), the Court of Appeals stated that, based on the facts of that case, when subjects which may be discussed in an executive session are inextricably intertwined with non-exempt subjects, so that "segregation of the materials into open and closed sessions would make coherent discussion pragmatically impossible, it is

reasonable to close the entire meeting." The facts in the present situation are distinguishable from the above case. Exception (6) to the KOMA, K.S.A. 1988 Supp. 75-4319(b)(6), may be used for private discussions when the focus of the discussions is acquiring real property. When real property is only incidentally involved in the primary subject of the discussions, the exception cannot be used to boot-strap non-exempted subjects to the exception to permit closed-door discussion. That approach would essentially nullify the KOMA purpose of open public discussion.

In summary, the Kansas Open Meetings Act provides that only certain subjects may be discussed behind closed doors. In absence of an applicable exception, discussions concerning negotiation strategy in formulating offers and concerning received offers relating to the acquisition of a water utility must be held in open, public meeting. The "acquisition of real property exception, K.S.A. 1988 Supp. 75-4319(b)(6), may be used when the primary focus of the discussion is real property.

Very truly yours,


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