



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 78

Evelyn Zabel Wilson
Oberlin City Attorney
P.O. Box 267
Oberlin, Kansas 67749

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Executive Sessions; Contents of Motion

Synopsis: K.S.A. 75-4319(a)(1) and (2) require that the motion to go into an executive session contain a statement concerning the subject and the justification for the executive session. In our opinion the justification statement should be more than a reiteration of the subject. The KOMA does not require the justification statement to be so detailed that it negates the usefulness of an executive session. However, K.S.A. 75-4319(a)(2) requires a justification statement to be contained in the motion and it is our opinion that this statement should explain why an executive session is necessary or desirable. Such a motion gives the public assurances that the executive session is permissible and in the public interest, and may remind the members of the public body of the limitations upon and purpose served by the executive session discussion. Cited herein: K.S.A. 75-4319.

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Dear Ms. Wilson:

As Oberlin city attorney you request our opinion on the content of motions to recess into executive sessions under the Kansas open meetings act (KOMA), K.S.A. 75-4317 et seq., and you ask exactly how much stated justification is required in order to have a valid executive session.

K.S.A. 75-4319 permits public entities subject to the KOMA to discretionarily recess from an open meeting into an executive session in order to discuss the subjects set forth in subsection (b) of that statute. K.S.A. 75-4319(a) establishes the required procedures associated with recessing into such an executive session:

"(a) Upon formal motion made, seconded and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include a statement of (1) the justification for closing the meeting, (2) the subjects to be discussed during the closed or executive meeting and (3) the time and place at which the open meeting shall resume. Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion." (Emphasis added).

Smoot, Clothier "Open Meetings Profile: The Prosecutor's View", 20 W.L.J. 241, 273, 274 (1981) discusses executive session procedures and the statement required in the motion:

"There must be a formal motion made, seconded and carried; this motion must contain a statement of the justification for closing the meeting, the subjects to be discussed during the closed session and the time and place the meeting is to resume; and the motion, including the required statement, must be recorded in

the minutes of the meeting and must be maintained as part of the permanent records of the body.

"In short, the conduct of public meetings immediately prior to executive sessions is formalized by statute. Requiring the motion and statement of reasons for the closed meeting to be included in the minutes makes the minutes matters of public record pursuant to the state public records law.

"There may be a tendency to view these procedural requirements as 'technical' in light of the decision of the Kansas Supreme Court in Olathe Hospital Foundation, Inc. v. Extencicare, Inc., [217 Kan. 546 (1975)] in which the court stated:

'Under K.S.A. 75-4319 the deliberative session of the panel could have been an entirely lawful "executive meeting" - all that was missing was a formal motion to that effect. Such a brief session, coming at the time it did, was certainly not a "subterfuge to defeat the purposes of [the] act." There may have been a technical violation of the act, but there was not violation of its spirit.'

"Following this case an amendment to the Act resulted in greater restrictions on the use of executive sessions. These restrictions limit the subject matter to be discussed and specify the content of the formal motion. Arguably, the motion is much less a formality than under the previous law. In light of these amendments, the procedural requirements of the Act should be viewed as safeguards against abuse of the closed meeting exceptions and should be afforded equal status with the subject matter restrictions for executive sessions."

In Stevens v. City of Hutchinson, 11 Kan.App.2d 290 (1986), the Kansas appeals court examined the issue of whether the trial court abused its discretion in failing to provide legal redress for violation of K.S.A. 75-4319. Although the city conceded that it had held an improperly closed executive session, the court held to the judicially created "technical violation" rule and overlooked the "mere technical violation where the public body has made good faith effort to comply and is in substantial compliance with the KOMA and where no one is prejudiced or the public right to know has not been effectively denied." See also Stevens v. Board of Reno County Commissioners, 10 Kan.App.2d 523, 526 (1985). Thus, this judicial rule must be considered when examining whether the KOMA has been violated sufficiently to warrant court action.

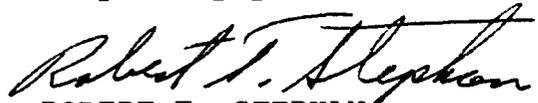
State v. U.S.D. No. 305, 13 Kan.App.2d 117, 121 (1988) involved a motion to go into executive session. The motion in question stated that the executive session was "for the purposes of discussing personnel matters of non-elected personnel because if this matter were discussed in open session it might invade the privacy of those discussed." In seeking sanctions against the school district, this office argued before the court that, because most executive session subjects permitted by K.S.A. 75-4319(b) are based upon some type of privacy interest, the justification statement in this case was no more than a reiteration of the subject matter statement. In rejecting the state's position, the court stated that "it seems logical to us that the privacy rights of non-elected personnel subject to discussion is sufficient justification for a closed session to meet the requirements of the KOMA." Id. at 121.

This office continues to believe that the motion to go into executive session represents more than a mere formality. The procedural requirements of K.S.A. 75-4319(a) provide safeguards against abuse of the closed or executive session. K.S.A. 75-4319(a)(1) and (2) require that the motion to go into executive session contain two distinct statements. Justification has been defined as "just, lawful excuse or reason for act or failing to act. . . . Justification means explanation with supporting data." Blacks Law Dictionary 778 (5th ed. 1978). Subject is defined differently than justification. It is our opinion that the justification statement should be more than a restatement of the subject matter set forth in K.S.A. 75-4319(b). However, State v. U.S.D. NO. 305 raises issues about how much detail a court would require as to the justification for the executive

session. Moreover, courts have shown a reluctance to impose sanctions for "mere technical violations."

In order to comply with the letter and the spirit of the law and avoid the appearance of an intent to subvert the purposes of the act, we encourage public bodies who wish to go into executive session to make a motion which, among other things, contains the subject and a statement concerning the justification. In our opinion the justification statement should be more than a reiteration of the subject. The KOMA does not require the justification statement to be so detailed that it negates the usefulness of an executive session. However, K.S.A. 75-4319(a)(2) requires a justification statement to be contained in the motion and it is our opinion that this statement should explain why an executive session is necessary or desirable. Such a motion gives the public assurances that the executive session is permissible and in the public interest, and may remind the members of the public body of the limitations upon and purpose served by the executive session discussion.

Very truly yours,


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