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ATTORNEY GENERAL OPINION NO. 92- 56

Meredith Williams
Executive Secretary
Kansas Public Employees Retirement System
Capitol Towers, 2nd Floor
400 W. 8th St.
Topeka, Kansas 66603-3911

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Authorized Subjects for Discussion in Executive
Session; Inclusion of Persons in Executive
Sessions; Attorney-Client Privileged Communications

Synopsis: Bodies subject to the Kansas open meetings act,
K.S.A. 75-4317 et seq., may conduct executive
sessions pursuant to the terms and limitations
established by K.S.A. 75-4319. Such bodies may
include in some executive sessions those
individuals whom the body determines will assist
with the executive session discussion. Mere
observers may not attend executive sessions.
Moreover, K.S.A. 75-4319(b)(2) may only be used to
close meetings if the attorney for the body is
present, if persons other than the client and the
attorney and his or her agents are excluded from
the executive session, and if the communication in
the executive session is privileged in nature.
More than one attorney may be present in an
executive session called pursuant to K.S.A.
75-4319(b)(2) if the attorneys represent the public
body and the communication in executive session is

privileged in nature. Cited herein: K.S.A.
60-246; 74-4903; 75-4317; 75-4319.

* * *

Dear Mr. Williams:

As executive secretary for the Kansas public employees retirement system (KPERs) you request our opinion on the following issues:

"1. May the Board of Trustees, exercising its reasonable judgment, determine which specified individuals are necessary to aid the Board in its discussions during closed or executive sessions?

"2. May the Board of Trustees have one or more specific, named members of the Retirement System's management staff present during a closed or executive session to aid the Board in its discussions with the direct placement investment managers or counsel?

"3. May the Board of Trustees have general and special counsel present during a closed or executive session, pursuant to K.S.A. 75-4319(b)(4), to aid the Board in its discussions with the direct placement investment managers?

"4. May the Board of Trustees have all members of the appropriate direct placement investment manager and special and general counsel teams present during a closed or executive session, pursuant to K.S.A. 75-4319(b)(4), to aid the Board in its discussions with the direct placement investment managers? May the Board of Trustees have all members of the special and general counsel teams present during a closed or executive session, pursuant to K.S.A. 75-4319(b)(2), to aid the Board in its discussions with counsel?"

These questions concern the provisions of the Kansas open meetings act (KOMA) set forth at K.S.A. 75-4317 et seq. This act generally requires openness in the meetings of public agencies subject to the KOMA. Meetings of the KPERs board of trustees are subject to the KOMA. K.S.A. 75-4319(b) sets forth certain specific subjects which may be discussed behind closed doors. Nevertheless, the presumption of the KOMA favors openness and exceptions to that openness are narrowly construed. See Tacha, "The Kansas Open Meetings Act: Sunshine on the Sunflower State?", 25 U.Kan. L. Rev. 169,

175 (1977); Smoot and Clothier, "Open Meetings Profile: The Prosecutor's View," 20 W.L.J. 241, 274 (1981).

Only the members of a public body have the right to attend an executive session properly called by that body. Attorney General Opinion No. 86-143. Mere observers may not attend executive sessions. Attorney General Opinions No. 92-51 and 82-176. Staff, agents for the body or other non-board individuals do not have an absolute right to be present in executive sessions. See Attorney General Opinions No. 87-170 and 86-143. However, persons who aid the body in its discussions may be discretionarily admitted by the public body. Attorney General Opinion No. 91-31. Individuals may attend executive sessions of bodies subject to the KOMA upon the invitation of the public body only if each such person is present to provide information (on a permissible topic) to the body or participate in its discussion. Attorney General Opinions No. 92-51 and 82-176.

The decision concerning which individuals will in fact assist the body during a specific executive session must be made by the public body on a case by case basis. The narrow construction given exceptions to the KOMA dictates careful consideration by the public body as to who will actually aid the body as compared to who will merely observe the executive session. Aid to the body may take several forms; participation in the discussion, provision of information, or responses to questions on a permissible topic. Whether such assistance to the public body will or does occur is a fact question. The entity initially resolving this fact issue must be the public body calling the executive session. However, the public body should not include in executive sessions any individual who will not assist the body with the executive session discussion.

Thus, in answer to your first three questions, and the first part of your fourth question, the KPERS board must exercise its judgment on a case by case basis to determine which specific individuals are in fact necessary to assist the board in a specific executive session discussion. Each situation will vary because of the specificity of each discussion and who can assist with that discussion. Persons permissibly included may be staff, managers of investments or board attorneys. Case by case decisions by the board as to whom to include in a specific executive session should consider the nature of the assistance to be given by each non-board member and the connection between the permissibly discussed executive session topic and the intended contribution by the non-board

member. It may be advisable to exclude all non-board members from executive sessions unless or until their assistance to the body becomes necessary. In this fashion, the public body may more easily judge who is in fact necessary to aid the discussion. Such judgment by a public body should be based upon fact, not speculation, and inclusion of non-board members in executive sessions should be the exception rather than the rule.

The second part of your fourth question concerns K.S.A. 75-4319(b)(2). This provision permits executive sessions for the purpose of "consultation with an attorney which would be deemed privileged in the attorney-client relationship." Thus, this specific exception contemplates the presence of a non-board member; the attorney for the body. The elements required to establish the existence of the attorney-client privilege include: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance for their client. Epstein and Martin, "The Attorney-Client Privilege and the Work Product Doctrine", ABA, Litigation Section (1988). It is not necessary that litigation be threatened or pending. See 81 Am.Jur.2d Witnesses, § 197 (1976).

Attorney General Opinions No. 86-162, 82-176, 82-130, 80-43 and 78-303 discuss K.S.A. 75-4319(b)(2). In order to utilize this executive session authority, the attorney must represent the public body in question and must be present during the executive session held by that body. Attorney General Opinion No. 82-247. Staff for the attorney may also be present without destroying the privileged nature of the communication. Id. There must be a consultation; the mere presence of an attorney does not, in itself, make the communication privileged. See Smoot and Clothier. Not all communications between counsel and client are privileged. To be privileged, communication must relate to the business or transaction for which the attorney has been retained or consulted. 81 Am.Jur.2nd Witnesses, § 196 (1976).

Under Kansas law, the term "communication" is a statement transmitting information between a lawyer and a client. State v. Breazeale, 11 Kan.App.2d 103 (1986); New York Underwriters Insurance Company v. Union Construction Company, 285 F.Supp. 268, 269 (D.Kan. 1968). Such communication must be of a legal nature, but may include facts or questions from the client to the attorney or advice, questions or legal statements from the attorney to the client. The communication must be regarded by the client as confidential in nature. Pickering v. Hollabaugh, 194 Kan. 804 (1965).

With regard to whether KPERS staff or investment managers may be present in an executive session called pursuant to K.S.A. 75-4319(b)(2), K.S.A. 60-426 addresses the attorney-client privilege and subsection (c) of that statute recognizes that this privilege may extend to staff or officials of a corporate client. K.S.A. 74-4903 creates the KPERS as "a body corporate. . . ." Thus, KPERS staff meet the definition of client. Such staff may therefore be permissibly present during an executive session without destroying the attorney-client privilege. However, staff present during such an executive session must, as always, assist the body in the permissible discussion.

The presence of any non-client third party who is not an employee or official of KPERS will destroy the privileged nature of a communication with an attorney. See 81 Am.Jur.2d Witnesses, § 187 (1976). See also "The Attorney-Corporate Client Privilege" Gergacz (Garland Law. Pub. 1987). Non-client third parties may not be included in executive sessions called pursuant to K.S.A. 75-4319(b)(2).

Thus, in answer to the second part of your fourth question, the decision to include all members of the special and general counsel teams in an executive session called pursuant to K.S.A. 75-4319(b)(2) must be made on a case by case basis by analyzing the elements of a privileged communication and other principles discussed herein. Inclusion of more than one attorney representing a body on different legal matters does not necessarily destroy the privileged nature of a communication. See Model Rules of Professional Conduct, Rule 226, 1.6. However, such executive session discussions should exclude non-clients, staff members or attorneys who do not in fact aid the body in its discussion, and any attorney for the board who does not participate in a privileged communication.

In summary, it is our opinion that bodies subject to the Kansas open meetings act may conduct executive sessions pursuant to the terms and limitations established by K.S.A. 75-4319 and that such bodies may include in some executive sessions persons who are not board members but whom the body determines will in fact assist in the executive session discussion. Mere observers may not be permitted to attend executive sessions. Moreover, K.S.A. 75-4319(b)(2) authority may be used to close meetings only: (1) if the attorney (or attorneys) for the body is present, (2) persons other than the client and the attorney are excluded, and (3) the communication engaged in is in fact of a privileged nature.

More than one attorney may be present to assist the board in its discussion during executive session called pursuant to K.S.A. 75-4319(b)(2) if the attorneys represent the public body in question and the communication occurring in executive session is of a privileged nature.

Very truly yours,



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