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February 15, 2013

ATTORNEY GENERAL OPINION NO. 2013- 5

Joe Shepack
Stafford County Counselor
P.O. Box 66
St. John, KS 67576-0066

Re: Public Records, Documents and Information—Records Open to the Public—
Open Records Act; Certain Records Not Required to be Open

Synopsis: A board of county commissioners is not required to disclose to the public draft minutes of county commission meetings before such minutes are approved by vote of the commission unless such draft minutes are publicly cited or identified in an open meeting or in the agenda of an open meeting. Cited herein: K.S.A. 45-215; 45-216; K.S.A. 2012 Supp. 45-217; 45-221; K.S.A. 75-4317; K.S.A. 2012 Supp. 75-4318; 75-4319.

* * *

Dear Mr. Shepack:

As Stafford County Counselor, you ask for our opinion regarding whether a board of county commissioners is required to disclose to the public draft minutes of county commission meetings before such minutes are formally approved by the board. Your question pertains to the Kansas Open Records Act (KORA).¹

As a preliminary matter, we acknowledge that a board of county commissioners is a “public agency” within the meaning of KORA,² and minutes of county commission meetings are “public records”³ open for inspection by the public unless otherwise provided by KORA.⁴

¹ K.S.A. 45-215 *et seq.*

² K.S.A. 2012 Supp. 45-217(f)(1).

³ K.S.A. 2012 Supp. 45-217(g).

⁴ K.S.A. 45-216.

KORA provides a list of exceptions to the general rule that public records are open for inspection by the public. This statute *allows* a public agency to withhold certain types of records from public disclosure, but does not *require* a public agency to do so. K.S.A. 2012 Supp. 45-221(a)(20) states in relevant part:

[A] public agency shall not be required to disclose:

...

(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, *except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.*⁵

In order to explain the practical meaning of K.S.A. 2012 Supp. 45-221(a)(20), it is helpful to describe the duties of a board of county commissioners under the Kansas Open Meetings Act (KOMA).⁶ KOMA requires the board to conduct its affairs in meetings open to the public, subject to certain exceptions that are not relevant to your inquiry.⁷ A body subject to KOMA must furnish notice of its meetings to any person requesting such notice.⁸ KOMA does not require a public agency to create an agenda for an open meeting. However, if a public agency chooses to create an agenda, it must provide the agenda to a person requesting it before the open meeting begins.⁹

KOMA also does not require a public agency to produce minutes of open meetings, but a public agency may choose to do so. Minutes of an open meeting are drafted sometime after the meeting, and the public agency must vote to approve the draft minutes at a later open meeting in order for such minutes to become official.¹⁰

Until the majority of a board of county commissioners votes to approve draft minutes of a county commission meeting, such minutes are “preliminary drafts” that would fall within the exception in K.S.A. 2012 Supp. 45-221(a)(20). However, by the plain language of the statute, a public agency shall not invoke this exception when draft minutes are (1) publicly cited or identified in an open meeting, or (2) publicly cited or identified in an agenda of an open meeting. Therefore, a public agency would be required to disclose draft meeting minutes if one of those two events occur.

⁵ Emphasis added.

⁶ K.S.A. 75-4317 *et seq.*

⁷ See K.S.A. 2012 Supp. 75-4319.

⁸ K.S.A. 2012 Supp. 75-4318(b).

⁹ K.S.A. 2012 Supp. 75-4318(d).

¹⁰ See K.S.A. 2012 Supp. 75-4318.

Draft minutes of a meeting of a public agency typically would not be “publicly cited or identified in an open meeting” until the open meeting at which the draft minutes are presented to the board for approval. Once publicly cited or identified in an open meeting, however, such draft minutes would be subject to public disclosure. Likewise, draft minutes would not be publicly cited or identified in an agenda of an open meeting unless and until an agenda is created. If the draft minutes are publicly cited or identified in an agenda of an open meeting, such draft minutes are subject to disclosure to the public. A member of the public wishing to access draft minutes must follow the public agency’s records request procedures.¹¹

Therefore, we opine that a board of county commissioners must allow the public to inspect draft county commission meeting minutes from and after the time when either of the following occurs: (1) when the draft meeting minutes are publicly cited or identified in an open meeting, or (2) when an agenda of an open meeting is created and it cites or identifies the draft meeting minutes. If neither of those events occurs, *e.g.*, if the draft minutes are never discussed or voted on in an open meeting and never identified in an agenda of an open meeting, then such draft minutes may be discretionarily closed to the public pursuant to K.S.A. 2012 Supp. 45-221(a)(20).

We note that KORA does not require a public agency to publish or post online draft meeting minutes for inspection by the general public, although the public agency may choose to do so. However, if a member of the public requests access to draft meeting minutes that must be disclosed pursuant to K.S.A. 2012 Supp. 45-221(a)(20), the public agency must grant the request.

Sincerely,

Derek Schmidt
Attorney General

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Assistant Attorney General

Sarah Fertig
Assistant Attorney General

DS:AA:LAM:SF:sb

¹¹ K.S.A. 2012 Supp. 45-220.