



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 176

Jerry Harper
District Attorney
Law Enforcement Center
Lawrence, Kansas 66044

Re: State Departments; Public Officers, Employees --
Open Meetings Law -- Persons Who May Attend
Executive Sessions

Synopsis: A public body subject to the Kansas Open Meetings Act may not permit individuals or special interest groups, including members of the news media, to attend executive sessions as mere observers while excluding the public generally. Individuals may attend executive sessions of government bodies subject to the Act upon invitation where such persons are present to provide information to the body or participate in its deliberations, but may not attend merely as observers. Cited herein: K.S.A. 75-4317, K.S.A. 1981 Supp. 75-4318, 75-4319, 75-4320a.

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Dear Mr. Harper:

Your predecessor, Mike Malone, inquired of this office regarding the application of the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., to certain executive sessions held by the governing board of Unified School District No. 497. Specifically, he desired to know if the Board's long-standing practice of permitting members of the news media to be present during executive sessions, authorized by K.S.A. 1981 Supp. 75-4319(b)(3) and concerning employer-employee negotiations, was lawful. We note those representatives of the media attending the closed meeting agree not to disclose the details of the board's deliberations.

K.S.A. 75-4317 states the purpose of the Kansas Open Meetings Act (hereinafter KOMA or Act) as follows:

"(a) In recognition of the fact that a representative government is dependent upon an informed electorate, 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.

"(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a)."

K.S.A. 1981 Supp. 75-4318 declares meetings of designated government bodies to be "open to the public." There is no question that the Act applies to the school board in question or to its regular or special meetings. The issue for resolution concerns closed or executive sessions authorized by the Act pursuant to K.S.A. 1981 Supp. 75-4319. That section provides in pertinent part:

"(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.

"(b) No subjects shall be discussed at any closed or executive meeting, except the following:

.....

"(3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency;

. . . .

"(c) No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as subterfuge to defeat the purposes of this act."

Unfortunately the Act does not address specifically the issue of whether such "closed" or "executive" meetings or recesses may include persons who are not members of the governing body subject to the Act. Certainly, at least two of the six subjects authorized for discussion in executive session imply the presence of persons other than the board members. K.S.A. 1981 Supp. 75-4319(b)(2) authorizes executive sessions for "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship." (Emphasis added.) Indeed, an attorney must be present before this exception may be relied upon to close a meeting. See Kan. Att'y Gen. Op. No. 78-303.

Prior to 1981, the third exception, contained in K.S.A. 1981 Supp. 75-4319(b)(2), authorized government bodies to meet with their "representative" for consultations involving employee-employer negotiations. Such executive sessions were authorized only when the representative was present. The 1981 Legislature amended this provision to permit discussion of employer-employee negotiations in closed session with or without the presence of the negotiator. L. 1981, ch. 344, §1. Yet, the exception, even as amended, still authorizes executive sessions which include a person other than the members of the governing body.

Hence, we cannot say that a closed or executive session authorized by KOMA is limited to members of the body subject to the Act. Consistent with this observation is a prior opinion of this office adopting the reasoning of courts of other states which have considered the question of who may attend executive sessions. In Kansas Attorney General Opinion No. 80-43 we stated:

"So long as the procedural requirements of that section are followed, the board may include in its discussions in executive session those persons selected by the board to be present. See Blum v. Board of Zoning Appeals of North Hempstead, 149 N.Y.S. 2d 5, 8, 1 Misc.

2d 668 (1956), Thomas v. Board of Trustees,
215 N.E. 2d 434, 436, 5 Ohio App.2d 365 (1966)."
Id. at 3.

Both cases cited therein, defined an executive session as "one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present." Accord, Dathe v. Wildrose School District No. 91, 217 N.W.2d 781 (N.D. 1974), permitting a school superintendent to attend executive sessions of school board to make recommendations on individual teacher contracts.

We think the statute generally permits public bodies to conduct executive sessions as they see fit. Such discretion to admit others is both required and necessary in some instances to facilitate the deliberations of the body. This commonly occurs where the non-members are persons who are providing information to, and participating in discussions with, the members of the government bodies. Dathe, supra. However, we do not think the Act grants unbridled discretion in this regard.

In the factual situation you pose, members of the news media are permitted to attend the executive session while the general public is excluded. Members of the media are not invited to participate or inform the government body, rather its members are present only as observers, to listen and learn. If such discrimination between the news media and public is permitted here, what would prevent government bodies from permitting the public to attend while excluding the news media? Likewise, what law would prevent the body from excluding certain members of either the news media or public? For a number of reasons we think the practice of permitting the media to be present at certain executive sessions while excluding the public generally, is contrary to both the spirit and intent of the Kansas Open Meetings Act.

First, as noted at the outset, KOMA is expressly designed to encourage an informed electorate. It is the voting franchise rather than the news-access interests of journalists which is the primary concern of the Act. Bestowing a preferred status on journalists in this context is inconsistent with the purpose of our law.

Second, the Kansas Open Meetings Act recognizes no special classes entitled to access to meetings of government bodies. K.S.A. 1981 Supp. 75-4318 requires meetings to be "open to the public." Moreover, standing to enforce the provisions of the Act is granted to "any person." K.S.A. 1981 Supp. 75-4320a.

Third, a meeting, ostensibly described as a closed session, ceases to be "closed" where any number of persons are permitted to attend merely as observers. Arguably, members of the media, sitting as observers, are simply representatives of a subclass of the public at large and their presence makes the gathering a "public" meeting at which all members of the public should be entitled to access.

Finally, this practice creates the potential for abuse. While we do not question the motives of the board of education or the journalists who attend such gatherings, the practice of excluding the majority of patrons of the school district from meetings attended by other patrons strikes us as a dangerous precedent. Furthermore, the members of the media are present not only because of their professional interests, but also because they have agreed not to disclose the information obtained during the executive sessions. Hence, such persons attend the executive session by virtue of their compliance with conditions established by the board. Presumably, journalists who refuse to make such agreements would be denied admittance, just as other voters and taxpayers are denied access. Under a statute which authorizes "public" access to government meetings, it is ironic that a special interest group, composed of news reporters, is admitted to closed door meetings on the condition they not report to the public. Therefore, unless there is some implied limitation inherent in the meaning of the term "executive session," any number of individuals or special interest groups might be admitted to executive sessions under a seemingly unlimited array of arbitrary conditions. Such practice is, in our view, contrary to a public meetings statute.

For the above reasons we do not believe the Act permits such latitude in determining who may attend executive sessions. In our judgment, the Act does not allow persons to attend executive sessions merely as observers. In such a role, the interests of the person or persons in attendance is indistinguishable from those of any other member of the public. Under such circumstances, persons are not admitted to the meeting to aid the governing body in its deliberations. Hence, the admission of some observers at the exclusion of others transforms the so-called executive session into a meeting at which the public should have access.

Therefore, in our opinion, a public body subject to the Kansas Open Meetings Act may not permit individuals or special interest groups, including members of the media, to attend executive sessions as mere observers while excluding the public generally. Individuals may attend executive

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sessions of government bodies subject to the Act upon invitation where such persons are present to provide information to the body or participate in its deliberations but may not attend merely as observers.

Very truly yours,



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Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle