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ATTORNEY GENERAL OPINION NO. 2018-1

Eric R. Yost
Sedgwick County Counselor
525 North Main, Suite 359
Wichita, KS 67203-3731

Re: State Departments; Public Officers and Employees—Public Officers and Employees; Open Public Meetings—Closed or Executive Meetings; Conditions; Authorized Subjects for Discussion

Synopsis: A motion to recess into a closed or executive meeting may only utilize one justification as listed in K.S.A. 2017 Supp. 75-4319(b), but multiple subjects may be discussed if those subjects fall within the justification stated in the motion to recess into a closed or executive meeting. A motion to recess into a closed or executive meeting must be recorded in its entirety in the minutes of the public body or agency. The recording of the motion is not “complete” if it merely summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion as it was in fact made. The statement describing the subject(s) to be discussed must be more than a generic or vague summary, or a list of the subject(s) to be discussed. The determination of whether a motion to recess into a closed or executive meeting sufficiently describes the subject(s) to be discussed is a fact-sensitive question which must be determined on a case-by-case basis. Cited herein: K.S.A. 2017 Supp. 75-4317; 75-4319; K.S.A. 2016 Supp. 75-4319.

* * *

Dear Mr. Yost:

As the Sedgwick County Counselor, you ask our opinion on issues related to the Kansas Open Meetings Act (KOMA).¹ Your questions are: (1) whether multiple matters may be discussed in a single closed or executive meeting; (2) whether it is sufficient for merely the elements of the statute to be in the public body's or agency's minutes or whether the entirety of the motion must be in the minutes; and (3) whether it is sufficient to include the matter to be discussed or if an additional description of the subject to be discussed must be stated.

The purpose of the KOMA is stated as follows: "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."² The KOMA is interpreted liberally with exceptions narrowly construed to carry out the public purpose of the law.³

The KOMA provides a process by which a public body or agency subject to the KOMA may recess an open meeting and enter into a closed or executive meeting. Prior to July 1, 2017, K.S.A. 2016 Supp. 75-4319(a) stated:

Upon formal motion made, seconded and carried, all public bodies and agencies subject to the open meetings 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 public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.⁴

Under this prior law, the "subjects" referred to one of the topics identified in K.S.A. 2016 Supp. 75-4319(b). The "justification" referred to an explanation of what was to be discussed, without revealing confidential information.⁵

During the 2017 legislative session, the Legislature amended K.S.A. 2016 Supp. 75-4319(a) to read as follows:

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 2017 Supp. 75-4317(a).

³ *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982).

⁴ Emphasis added.

⁵ *State v. U.S.D. No. 305*, 13 Kan. App. 2d 290 (1986); Kan. Atty. Gen. Op. 1991-78.

Upon formal motion made, seconded and carried, all public bodies and agencies subject to the open meetings 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: (1) A statement describing the *subjects* to be discussed during the closed or executive meeting; (2) the *justification* listed in subsection (b) for closing the meeting; and (3) the time and place at which the open meeting shall resume. The complete motion shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.⁶

Under the current law, “subjects” refers to an explanation of what is to be discussed, without revealing confidential information. “Justification” refers to one of the topics identified in K.S.A. 2017 Supp. 75-4319(b) such as, for example, personnel matters of nonelected personnel.⁷ In effect, the 2017 amendments transposed the meanings of “subjects” and “justification” in comparison with prior law.

Whether Multiple Matters May Be Discussed in a Single Closed or Executive Meeting

Any motion to recess to a closed or executive meeting must include the justification for closure as well as an explanation of the subjects to be discussed, without revealing confidential information.⁸ The issue, then, is whether the 2017 amendments grant the authority to a public body or agency to recess into a closed or executive meeting for more than one justification and discussion of more than one subject.

In analyzing the issue you raised, we note the following rule of statutory construction:

When the legislature revises an existing law, it is presumed that the legislature intended to change the law from how it existed prior to the amendment, and it is presumed that the legislature does not intend to enact useless or meaningless legislation.⁹

We first consider whether a public body or agency may utilize more than one justification for closing a meeting in a motion to recess into a closed or executive meeting. Under the prior law, the term “subjects” was plural in nature and granted public bodies and agencies the authority to enter into a closed or executive meeting for more than one of the topics identified in K.S.A. 2016 Supp. 75-4319(b). However, under the current law, the term “justification,” which now has the meaning assigned to the term “subjects” in the prior law, does not include an “s” on the end of the word

⁶ L. 2017, ch. 73, § 4 (emphasis added).

⁷ K.S.A. 2017 Supp. 75-4319(b)(1).

⁸ We note that the motion also must include the time and place that the open meeting will resume, but that requirement is not at issue here. See K.S.A. 2017 Supp. 75-4319(a).

⁹ *State v. Van Hoet*, 277 Kan. 815, 826 (2004).

and may or may not be plural. However, because we presume that a change of the existing law was intended, we conclude that the authority to enter into a closed or executive meeting has been restricted to only one of the justifications identified in K.S.A. 2017 Supp. 75-4319(b). For example, a public body could not enter into a single closed or executive meeting based on the need to discuss personnel matters of nonelected personnel¹⁰ and for the preliminary discussion of the acquisition of real property.¹¹

The next question is whether a public body or agency may discuss more than one subject during a closed or executive meeting. The current law states that the motion must describe the “subjects” to be discussed.¹² Therefore, the plain language of K.S.A. 2017 Supp. 75-4319(a) clearly allows a public body or agency to discuss multiple subjects in a closed or executive meeting if those subjects fall within the justification cited in the motion to recess into a closed or executive meeting. However, as noted below, the motion must adequately describe each subject to be discussed.

We therefore conclude that a motion to recess into a closed or executive meeting may only utilize one justification as identified in K.S.A. 2017 Supp. 75-4319(b), but multiple subjects may be discussed if those subjects fall within the justification cited in the motion to recess into a closed or executive meeting.

Whether It Is Sufficient for Merely the Elements of the Statute to Be in the Public Body’s or Public Agency’s Minutes or Whether the Entirety of the Motion Must Be in the Minutes

In 2017, the Legislature also amended the requirement to record the motion to recess into a closed or executive meeting in the public body’s or agency’s minutes. Under the prior law, a public body or agency was required to record “[s]uch motion, including the required statement” in the minutes.¹³ Under current law, a public body or agency must record the “complete motion” to recess into a closed or executive meeting.¹⁴ In essence, the issue is whether the motion must be recorded verbatim or whether the minutes may simply record the three required elements of a motion to recess into a closed or executive meeting.

In analyzing this issue, we again follow the rule of statutory construction that presumes that a revision of existing law is intended by the Legislature to change the law from how it existed prior to the amendment.¹⁵

¹⁰ K.S.A. 2017 Supp. 75-4319(b)(1).

¹¹ K.S.A. 2017 Supp. 75-4319(b)(6).

¹² K.S.A. 2017 Supp. 75-4319(a).

¹³ K.S.A. 2016 Supp. 75-4319(a).

¹⁴ L. 2017, ch. 73, § 4.

¹⁵ *Van Hoet* at 826.

The process to recess into a closed or executive meeting in the prior law required that the “motion” be recorded in the minutes,¹⁶ but the current process requires that the “complete motion” be recorded in the minutes.¹⁷ Because we presume that a change to the existing law was intended, we believe that a motion to recess into a closed or executive meeting must be recorded in its entirety in the minutes. We do not mean to suggest that the minutes must include all extraneous words, such as “ums” and “ahs,” that may have been included when a member of a public body or agency made a motion to recess into a closed or executive meeting. Such a requirement would be useless and not further the public’s right to know as such extraneous words are not substantive in nature.¹⁸ We conclude, however, that the recording of the motion is not “complete” if it merely summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion as it was in fact made.

Whether It Is Sufficient to Include the Matter to Be Discussed or if an Additional Description of the Subject to Be Discussed Must Be Stated

In 2017, the Legislature also amended K.S.A. 2016 Supp. 75-4319(a) to require the motion to recess into a closed or executive meeting to include a statement of what is to be discussed, without revealing confidential information.¹⁹ Under the prior law, the motion was required to include “[t]he justification for closing the meeting.”²⁰ The interpretation of the requirements of this phrase has changed over the years.²¹

As we previously stated, when the Legislature amends an existing law, courts presume that a change was intended by the Legislature.²² The previous law simply required a “statement”²³ of what is to be discussed while the current law requires a “statement describing”²⁴ the subject to be discussed. “Describe” is defined as “to represent or give an account of in words.”²⁵ The plain language of K.S.A. 2017 Supp. 75-4319(a) adding the word “describing” clearly indicates that the Legislature wanted more than a generic or vague summary of what is to be discussed during a closed or executive meeting.

Therefore, we conclude that a public body or agency must do more than provide a generic or vague summary, or a list of the subject(s) to be discussed. However, the KOMA does not require that the statement describing what will be discussed to be so

¹⁶ K.S.A. 2016 Supp. 75-4319(a).

¹⁷ K.S.A. 2017 Supp. 75-4319(a).

¹⁸ We note that the minutes will assist a public body or agency in responding to any complaint alleging a violation of the requirements of K.S.A. 2017 Supp. 75-4319.

¹⁹ L. 2017, ch. 73, § 4; K.S.A. 2017 Supp. 75-4319(a).

²⁰ K.S.A. 2016 Supp. 75-4319(a).

²¹ *Compare, e.g., State v. U.S.D. No. 305*, 13 Kan. App. 2d 117, 121 (1988) with Kan. Atty. Gen. Op. 1991-78.

²² *Van Hoet* at 826.

²³ K.S.A. 2016 Supp. 75-4319(a).

²⁴ K.S.A. 2017 Supp. 75-4319(a).

²⁵ <https://www.merriam-webster.com/dictionary/describe> (accessed January 3, 2018).

detailed that it negates the usefulness of a closed or executive meeting. The determination of whether a motion to recess into a closed or executive meeting sufficiently describes the subject(s) to be discussed in a specific situation is a fact-sensitive question which must be determined on a case-by-case basis.

Summary

A motion to recess into a closed or executive meeting may only utilize one justification as listed in K.S.A. 2017 Supp. 75-4319(b), but multiple subjects may be discussed if those subjects fall within the justification cited in the motion to recess into a closed or executive meeting. A motion to recess into a closed or executive meeting must be recorded in its entirety in the minutes of the public body or agency. The recording of the motion is not "complete" if it merely summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion as it was in fact made. The statement describing the subject(s) to be discussed must be more than a generic or vague summary, or a list of the subject(s) to be discussed. The determination of whether a motion sufficiently describes the subject(s) to be discussed is a fact-sensitive question which must be determined on a case-by-case basis.

Sincerely,

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