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October 18, 2023

ATTORNEY GENERAL OPINION NO. 2023-10

Mr. Thomas A. Adrian
Adrian & Pankratz
301 N. Main, Suite 400
Newton, KS 67114

Re: Waters and Watercourses—Groundwater Management Districts—
Legislative Declaration; Definitions; Board of Directors; Terms of
Members; Vote for Actions; District Powers; Extension or Reduction of
District Territory by Chief Engineer; No Limitation of Authority of
Chief Engineer

State Departments; Public Officers and Employees—Public Officers
and Employees—Open Public Meetings—Open Meetings Declared
Policy of State; Citation of Act; Meetings of State and Subdivisions
Open to Public; Closed or Executive Meetings; Conditions; Authorized
Subjects for Discussion

Synopsis: Members of a public body may exclude other members of the body who
have threatened litigation against the body from an executive session
held to consult with the body's attorney about the potential litigation.
Cited herein: K.S.A. 75-4317; 75-4318; 75-4319; 82a-1020; 82a-1021;
82a-1027; 82a-1028; 82a-1033; 82a-1039.

* * *

Dear Mr. Adrian:

As legal counsel for the Board of Directors of Southwest Kansas Groundwater Management District No. 3 (GMD3), you ask whether the Board may exclude from an executive session certain directors who have filed a petition to alter the GMD's boundaries and threatened future litigation against the Board. The justification for the executive session would be to consult with you about the directors' petition and possible additional litigation. Under these circumstances, we conclude the Board can exclude these directors.

To answer your question, we must interpret various statutes. Statutory interpretation invariably begins with the text of the statute, giving common words their ordinary, everyday meanings. Tools of statutory interpretation or legislative history may be consulted only when the statute is ambiguous.¹

In 1972, the Legislature passed the Kansas Groundwater Management District Act (GMD Act), K.S.A. 82a-1020 through 82a-1042, authorizing the formation of GMDs, with the aim of giving local water users a measure of authority in regulating groundwater.² GMDs are locally defined public entities that cover one or more aquifers for the purpose of managing groundwater.³ They have significant authority. For example, they can buy and sell water rights and land; acquire land and interest in land by eminent domain; construct, operate, and maintain water projects; levy water user charges and land assessments; and expand or reduce their boundaries.⁴

GMDs are governed by an elected board of directors, each of whom serves a term of three years.⁵ The number of directors is determined by the organic petition forming the GMD.⁶ Directors are elected by "eligible voters," which are people who either (1) own at least forty acres of land outside city limits or (2) annually withdraw at least one acre-foot of groundwater from within the GMD.⁷

GMD3 is situated in southwest Kansas, and it encompasses at least a portion of twelve counties that sit atop the Ogallala–High Plains Aquifer.⁸ Fifteen directors compose its Board.⁹

¹ *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

² K.S.A. 82a-1020; *see* K.S.A. 82a-1039.

³ K.S.A. 82a-1021(a)(4).

⁴ K.S.A. 82a-1028(e)-(h), (j). For an overview of GMDs, *see* John C. Peck, *Groundwater Management in Kansas: A Brief History and Assessment*, Kan. J.L. & Pub. Policy 441 (Spring 2006).

⁵ K.S.A. 82a-1027(a).

⁶ *Id.*

⁷ K.S.A. 82a-1021(a)(5).

⁸ <https://perma.cc/E6W5-M7GP>.

⁹ <https://perma.cc/9L3J-VKPF>.

As a governmental body created by statute, GMDs are subject to the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 through 75-4320f,¹⁰ which generally requires meetings of governmental bodies to be open to the public.¹¹ At the same time, it permits public bodies to enter into closed executive sessions for specific purposes, one of which is “for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney–client relationship.”¹²

In your letter, you explain that two directors who are also landowners have joined other landowners in filing a petition to have Hamilton County removed from GMD3—a procedure governed by statute.¹³ The petition, which you provided, is signed by the landowners, including the two directors in their capacity as landowners. You also believe the directors have credibly threatened litigation if Hamilton County is not permitted to withdraw from GMD3.

Your question is whether a public body may exclude these directors from an executive session held with you to discuss the petition and possible future litigation. Stated differently, your question is whether all members of a public body retain the unfettered right to attend all executive sessions of the body.

Our office has previously said only members of a public body have a “right” to attend an executive session, but these statements were made while analyzing whether non-members had the authority to attend an executive session.¹⁴ Our research reveals that this question has never been squarely presented in Kansas.

One commentator has recognized that whether a hostile board member may be excluded from an executive session is a reoccurring and “hotly debated” issue among public bodies, but KOMA is silent on the matter.¹⁵ In her opinion, “any rights possessed by the aggrieved board member being excluded from executive sessions, or other meetings for that matter, must be enforced using authority other than the KOMA.”¹⁶ We largely agree.

¹⁰ See K.S.A. 75-4318(a).

¹¹ This statutory scheme was enacted for the public benefit, so courts construe it broadly to fulfill this purpose. *State ex rel. Stephan v. Seward County Board of Commissioners*, 254 Kan. 446, 448, 866 P.2d 1024 (1994).

¹² K.S.A. 75-4319(b)(2).

¹³ K.S.A. 82a-1033.

¹⁴ Att’y Gen. Op. 1987-170 (K.S.A. 19-304 did not require county clerk to attend executive sessions of the board of county commissioners); Att’y Gen. Op. 1986-143 (members of advisory board did not have right to attend executive sessions held by board of education).

¹⁵ Theresa Marcel Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings Act*, J.K.B.A. 34, 43 (June/July 2003).

¹⁶ *Id.*

KOMA does not directly address this situation, but this is unsurprising because its stated focus is on the protection of the public, not the protection of members of a public body. Nonetheless, KOMA's language implies members of a public body may be excluded from an executive session under these circumstances.¹⁷

First, neither KOMA nor the GMD Act affirmatively grant individual board members the absolute right to be present at every executive session. Like courts, we “will not read the statute to add something not readily found in it.”¹⁸

Second, while it requires a majority of the members to be present to constitute a meeting, KOMA does not mandate that all members of the body be present to form a meeting. So it is fair to say the Legislature contemplated at least some situations in which a minority of members would be absent from a meeting. And under the GMD Act, it takes only a majority of voting directors to bind a GMD.¹⁹

Third, to invoke an attorney–client executive session, the ensuing discussion must be privileged under the attorney–client relationship.²⁰ The presence of an opposing party at the meeting waives the privilege, thereby defeating the justification for the executive session and placing the public body at risk of violating KOMA.²¹ Construing these provisions in *pari materia* with the view of bringing them into workable harmony, we conclude a public body may exclude a member of that body under the circumstances you have outlined.²² Otherwise, KOMA would permit members to effectively paralyze the public body by insisting they be privy to confidential communications.

We also find it persuasive that the directors appear to be acting in their capacity as landowners rather than directors. At least one court has relied on this distinction when holding that a member of a public body was properly excluded from a closed executive session after he initiated litigation against the body in his personal capacity.²³

¹⁷ See K.S.A. 75-4317.

¹⁸ *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

¹⁹ K.S.A. 82a-1027(c).

²⁰ K.S.A. 75-4319(b)(2).

²¹ See *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 375, 22 P.3d 124 (2001); Attorney General Opinion 1997-40; Attorney General Opinion 82-247; see also K.S.A. 75-4320 (penalties for knowingly violating KOMA). Of course, ethical considerations about maintaining confidential information are implicated, but we abstain from opining on such matters. See *generally* K.R.P.C. 1.6 (2023 Kan. S. Ct. R. 336).

²² See *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023) (courts construe statutes in *pari materia* even when the language of the statute is clear).

²³ *Hartstene Pointe Maintenance Ass'n v. Diehl*, No. 45739-3-II, 2015 WL 3884264, at *4-5 (Wash. App. June 23, 2015).

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In sum, we conclude a public body may exclude members who have threatened litigation against the body from an executive session held to discuss the possible litigation with its attorney. By reaching this conclusion we stress that our opinion is limited to these circumstances; we do not suggest a public body may generally exclude a present member from an executive session.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Kansas Attorney General

/s/ Kurtis K. Wiard

Kurtis K. Wiard
Assistant Solicitor General