



justification the “exception for real property under the KOMA”; the statement describing the subject to be discussed was “the potential sale of district real property.” The purpose of the executive sessions was to discuss the sale of the middle school building located in Bushton, Kansas. The board did not discuss any matters regarding or related to “the need . . . for the preliminary discussion of the acquisition of real property.” The board’s motion also referenced “attorney/client privilege,” but the board’s attorney was not present for the executive sessions either in person or by some other means. The board stipulates to these factual statements. The matters discussed during the executive sessions did not concern the preliminary discussion of the acquisition of real property in violation of K.S.A. 75-4319(b)(6). Board member Cherlyn Maier was absent from this meeting and did not participate in the executive sessions.

- b. On September 9, 2019, the board failed to comply with the requirements set forth in K.S.A. 75-4319(a) for recessing into executive session when its two (2) motions failed to include the place where the open meetings would resume. The board stipulates to these violations.

4. Based upon the above information, Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle individually admit and agree that they violated the KOMA as set out in paragraphs 3.a. and 3.b. above concerning the September 9, 2019, executive sessions.

5. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle now fully understand and agree that for each executive session held, they fully intend to comply with the requirements of K.S.A. 75-4319(a) and (b) concerning executive sessions.

6. The Attorney General and Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle understand and waive all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings conducted in accordance with K.S.A. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

8. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle waive any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open meetings (KOMA), and subject to an action for civil penalties or enforcement, and thus they do not have a right to appeal under the KJRA.

9. The Attorney General accepts the waivers and stipulations by Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle.

**WHEREAS**, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle be subject to this Order based on the provisions of K.S.A. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body for violation of the KOMA in a Consent Order;

**AND WHEREAS** the Attorney General and Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

**NOW THEREFORE**, Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle consent to the following terms and conditions, and the Attorney General orders that:

10. The Board agrees and shall:
  - a. Ensure that each board member individually obtains at least one (1.0) hour of training on the provisions of the KOMA to be presented by an attorney experienced in dealing with open meetings issues, within three (3) months of the effective date of this Consent Order;
  - b. Provide the Attorney General's Office with a written statement confirming that each board member has obtained the required KOMA training within ten (10) days of receiving the training;
  - c. Undertake a prompt review of any existing board policy addressing board responsibilities and executive sessions, make any necessary changes, and update the history section of the policy to reflect its review, or in the absence

of an existing policy, to draft and adopt a policy that addresses board responsibilities and executive sessions;

- d. Provide the Attorney General's Office with a written statement confirming the board has reviewed any existing policy or drafted and adopted a policy as required in section 12.c. above, as well as a copy of the new or revised policy within three (3) months of the effective date of this Consent Order; and
- e. Not engage in any future violations of the KOMA.

11. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle understand and agree that if they fail to comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 75-4320d(c) and amendments thereto.

12. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle understand and agree that if they engage in any future violation of the KOMA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

13. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle agree and understand that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KOMA may be subject to investigation proceedings as provided by K.S.A. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

14. In consideration of these admissions and agreements by Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KOMA set forth herein.

15. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle agree that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

16. Except as provided in paragraphs 11 and 12, this Consent Order shall operate as a complete release of all claims Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle may have against the Attorney General, his agents or employees, arising out of the investigation of this

matter. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle agree not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle agree that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

17. Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 75-4320d(e) and amendments thereto.

18. This Consent Order shall be a public record in the custody of the Office of the Attorney General.


19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

20. This Consent Order shall become effective on the date indicated in the Certificate of Service.

**WHEREFORE**, the Attorney General and Michelle Brokes, Tony Zink, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, and Jerry Bieberle consent to these provisions.

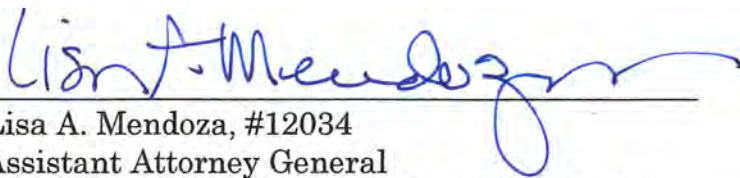
**IT IS SO ORDERED.**

**OFFICE OF THE ATTORNEY GENERAL**



Derek Schmidt  
Kansas Attorney General

**Prepared By:**



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**Approved By:**



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John Sherman, # 8937  
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126 North Douglas, PO Box 83  
Ellsworth, KS 67439-0083  
Phone: (785) 472-3186  
*Attorney for USD No. 112 Board of Education (Central Plains)*

USD No. 112 Board of Education (Central Plains)

Michelle Brokes  
Michelle Brokes, President

12/9/19  
Date

Tony Zink  
Tony Zink, Vice President

12/09/19  
Date

Jacob Charvat  
Jacob Charvat

12-11-19  
Date

Brad Schiermeyer  
Brad Schiermeyer

12-9-19  
Date

Tami Schepmann  
Tami Schepmann

12-9-19  
Date

Jerry Bieberle  
Jerry Bieberle

12-9-19  
Date

ATTEST:

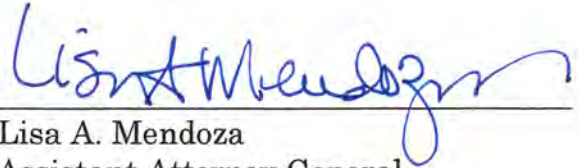
Diane Ney  
Diane Ney, Board Clerk

12 9-2019  
Date

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of December, 2019, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

John Sherman  
Sherman Hoffman & Hoffman, LC  
126 North Douglas, PO Box 83  
Ellsworth, KS 67439-0083  
*Attorney for USD No. 112 Board of Education (Central Plains)*

  
\_\_\_\_\_  
Lisa A. Mendoza  
Assistant Attorney General





STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
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December 4, 2019

John Sherman  
Sherman Hoffman & Hoffman, LC  
126 North Douglas, PO Box 83  
Ellsworth, KS 67439-0083

RE: KOMA Complaint Self-report – USD No. 112 Board of Education (Central Plains)  
Our File Number, CV-19-001987

Dear Mr. Sherman:

On October 16, 2019, this office received your letter making a self-report of a possible violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.* by the USD No. 112 Board of Education in Ellsworth County, Kansas. On November 12, 2019, we received your completed complaint form as required by K.S.A. 75-4320e(a). As a remedy, you seek “. . . [F]urther Appropriate Open Meetings Training. . . .”

The board is a public body or agency subject to the KOMA,<sup>1</sup> and thus this office has jurisdiction to review any complaint that the KOMA has been violated.<sup>2</sup>

In your complaint you report “what appears to be a prima facie violation of [the KOMA] at the September 9, 2019, USD No. 112 Board meeting. You go on to describe it as follows:

. . . The prima facie violation is shown on page 4 of the minutes with regard to executive sessions to discuss the potential sale of District real property, under the attorney/client privilege pursuant to the exception for real property under the KOMA. The motions have wording to include Greg Clark (the Superintendent) and myself . . . to be on the call.

At the time I was on a family vacation . . . and had been contacted by phone for the earlier executive session on personnel. However, since I was

<sup>1</sup> K.S.A. 75-4318(a).

<sup>2</sup> See K.S.A. 75-4320(a), 75-4320a(a), 75-4320b and 75-4320d.



Letter to John Sherman  
December 4, 2019  
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on vacation I was I was not contacted with regard to an executive session on the sale of District real property. Therefore, I was not in attendance.

I am not quite sure where the attorney client privilege wording came from. In any event I was not in attendance in person or by phone.

As you know K.S.A. 75-4319(b)(6) allows an executive session for the preliminary discussion of the acquisition of real property, but not the sale of real property.

...

... While the minutes reflect I was to be on [the] call for the executive session, the Board, out of apparent courtesy to me, did not call.

... The Board had available to it a document from the Kansas Association of School Boards with language (under the revised act) containing sample wording for motions to go into Executive Session [sic].

... In what I think is a fairly common misunderstanding, the Board felt it could go it executive session to discuss the sale of real estate, as real estate is mentioned as an exception.

... After returning to the open session, the Board voted to offer to sell the middle school building to the City of Bushton for \$1.00.

... At a special meeting of the USD No. 112 Board on October 7, 2019 the Board voted to rescind its motion for sale of property to the City of Bushton. The reason for the rescission vote, [sic] was that improvements in the middle school building had been made (HVAC, etc.) and those improvements were pledged to a bank pursuant to the terms of a lease purchase agreement. ...

Based on our review of the board's September 9, 2019, and October 7, 2019, meeting minutes, your summary generally and accurately sets out the sequence of events giving rise to the self-report, and violation of the KOMA, with one exception: it did not set out the specific language used in the board's motion. The two motions were virtually identical:

On motion by Tony Zink and seconded by Brad Schiermeyer the board voted 6-0 to go into Executive Session at 8:00 p.m., for 30 minutes, to include Greg Clark, with John Sherman to be on call, to discuss the potential sale of district real property, under attorney/client privilege, pursuant to the exception for real property under the KOMA and return to open meeting at 8:30 p.m.

The board returned to open meeting at 8:30 p.m. and on motion by Tony Zink and seconded by Brad Schiermeyer, the board voted 6-0 to go back into Executive Session at 8:30 p.m., for 20 minutes, to include Greg Clark, with John Sherman to be on call, to discuss the potential sale of district real property, under attorney/client privilege, pursuant to the exception for real property under the KOMA and return to open meeting at 8:50 a.m.

The board returned to open meeting at 8:50 p.m. . . .

The board consists of seven (7) members: Michelle Brokes – President, Tony Zink – Vice President, Jacob Charvat, Brad Schiermeyer, Tami Schepmann, Jerry Bieberle, and Cherlyn Maier. For the September 9, 2019, board meeting, Ms. Meier was recorded as being absent. Mr. Bieberle was recorded as being late to the meeting, but arrived at 6:09 p.m., and was present, as was the remainder of the board, for the two executive sessions described in your self-report.

Because the board essentially admits it improperly recessed into executive session on September 9, 2019, we need not engage in an in-depth review of the executive sessions. However, we would be remiss if we did not briefly describe how the executive sessions and the motions to recess into executive session fell short of complying with the KOMA.

The KOMA requires all meetings of public bodies to be open.<sup>3</sup> A public body may, but is not required to, hold an executive session. If the public body decides to recess into executive session, it must follow a specific procedure in order to comply with certain statutory requirements.<sup>4</sup> A motion for executive session must include a statement describing the subjects to be discussed. Under the current law, “subject” refers to an explanation of *what* is to be discussed, without revealing confidential information; the statement of the subject must be more than a generic or vague summary, or a list of the subject(s) to be discussed.<sup>5</sup> The motion must also include a justification as listed in the statute.<sup>6</sup> A “justification” refers to one of the topics identified in K.S.A. 75-4319(b). A motion to recess into executive session may only utilize one justification, but multiple subjects may be discussed if those subjects fall within the justification

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<sup>3</sup> K.S.A. 75-4317(a).

<sup>4</sup> K.S.A. 75-4319(a) (“Upon formal motion made, seconded and carried, all public bodies and agencies subject to [the KOMA] may recess but not adjourn, open meetings for closed or executive meetings. Any motion for [executive session] 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 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.”).

<sup>5</sup> “However, the KOMA does not require that the statement describing what will be discussed to be so detailed that it negates the usefulness of” an executive session. The determination about whether the motion sufficiently describes the subject(s) to be discussed in a specific situation is a fact-sensitive question that must be determined on a case-by-case basis. Attorney General Opinion 2018-1, <http://ksag.washburnlaw.edu/opinions/2018/2018-001.pdf>, accessed November 25, 2019.

<sup>6</sup> *Id.*

cited in the motion for executive session.<sup>7</sup> The motion for executive session must also include the time and place at which the open meeting will resume. The reason for this is simple—it allows members of the public to know when and where the public body will take up the public or open portion of the meeting.<sup>8</sup>

The KOMA also establishes certain requirements for the recording of the motion for executive session. 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.”<sup>9</sup>

The presence of other individuals during the executive session is permissible if they will assist with the executive session discussion.<sup>10</sup>

Turning to the board’s motion, substantively, the justification it identified in its motion—“pursuant to the exception for real property”—does not accurately reflect the actual statutory justification language. The KOMA describes this justification as involving “the need . . . for the preliminary discussion of the *acquisition* of real property. . . .”<sup>11</sup> A public body need not use the exact statutory language in its motion for executive session. However, the board’s motion demonstrates the danger when a public body chooses not to use the statutory language. The truncated language used in the motion here led the board to misconstrue the actual purpose of this particular justification, which only permits discussion of the *acquisition*, not the sale, of real property.<sup>12</sup>

Although not the primary focus of the self-report, the board’s motions for executive session also fell short of compliance with the statutory requirements. The motions did have a statement describing the subject to be discussed (“to discuss the potential sale of district real property”), generally set out a justification identified in the statute (even though ultimately it was not a proper justification to use under the circumstances), and identified the time the open meeting would resume. However, the two (2) motions for executive session at issue did not include the *place* where the open meetings were to resume. This element is consistently missing from the board’s three (3) other

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<sup>7</sup> Attorney General Opinion 2018-1.

<sup>8</sup> The announcement of place is required even when the public body does not recess to another location to hold its executive session.

<sup>9</sup> *Id.*

<sup>10</sup> Attorney General Opinion 92-56, <http://ksag.washburnlaw.edu/opinions/1992/1992-056.pdf>, accessed November 25, 2019. The one exception to this general rule is when the executive session is held for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship.

<sup>11</sup> K.S.A. 75-4318(b)(6). Emphasis added.

<sup>12</sup> The motion was further complicated by a reference to “attorney/client privilege,” leaving us to wonder if the board was including this as a truncated reference to another justification set out in the KOMA for executive sessions: “the need . . . for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship. . . .” K.S.A. 75-4318(b)(2). A motion for executive session can use only one justification as the basis for the executive session. It is unclear whether this phrase referred to the subjects to be discussed or was an alternative justification. In an event, you were not present for these executive sessions. A public body using “attorney client privilege” as its justification must include an attorney in the executive session.

motions for executive session it held on September 9, 2019.<sup>13</sup> The motions as set forth in the minutes also appear to be more of a summary than the “complete motion” required to be recorded. The motions also improperly recorded that you, as the board’s attorney, were present in the executive sessions, when in fact you were not.

Based on the foregoing, it is clear there is a basis for the board to essentially stipulate and admit that it improperly held two (2) executive sessions “to discuss the potential sale of district real property, under attorney/client privilege, pursuant to the exception for real property” without its attorney being present. Based on its admissions, we must conclude that the board engaged in two (2) improper executive sessions in violation of the KOMA. Moreover, its executive session motions as described above did not comply with the requirements of K.S.A. 75-4319(a), and thus violated the KOMA as well.

Although we conclude that the board violated the KOMA, our analysis does not end there. We must consider whether this is more than a technical violation<sup>14</sup> of the KOMA. “Technical violation” is a term of art adopted by courts in discussing KOMA violations. “Our courts will look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted].”<sup>15</sup>

The procedural and substantive requirements for executive session help ensure that the public’s right to know is not harmed or impaired. The motion itself promotes the policy and purpose of the KOMA by ensuring the public knows the reason given by the public body for holding any discussions outside of public view, how long those closed discussions will last, and where the open meeting will resume. It is also a reminder to the public body that the KOMA stands for more than mere procedural requirements. By being required to set forth a proper justification in the motion, the public body is reminded of the public policy in the KOMA that discussions in closed or executive sessions are limited to certain authorized topics.

With these considerations in mind, it is clear that the board’s action of discussing the sale of district real property in executive session harmed the spirit and intention of the KOMA. This is a matter that should have been discussed during the board’s open meeting.

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<sup>13</sup> By contrast, the board’s executive session motion during its special meeting on October 7, 2019, contained this element: “On motion by Tony Zink and seconded by Brad Schiermeyer, the board voted 6-0 to go into Executive Session at 5:02 p.m. for 28 minutes, to include Greg Clark and John Sherman, for the purpose of consultation with the Board’s attorney, which would be deemed privileged in the attorney-client relationship, in order to discuss existing legal obligations and liabilities of the District, resulting from the agreement to lease and purchase certain equipment and fixtures located in the Bushton school building, which the Board has proposed to sell to the City of Bushton, and that the Board resume the open meeting *in this room* at 5:30 p.m.” (Emphasis added). However, based on the wording, it appears that this motion was recorded after the vote, rather than as it occurred.

<sup>14</sup> See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

<sup>15</sup> *Id.*

There were commonsense red flags that should have warned the board that it was skating on thin ice. These red flags included the fact that the matters it intended to discuss during executive session—the sale of district real property—clearly fell outside the reason or purpose for the justification it used. This cannot be ignored.

In mitigation, although for reasons other than the self-reported violation, on October 7, 2019, the board voted to rescind the sale of the middle school building in Bushton, Kansas. We have no evidence to suggest that the board routinely uses improper justifications to recess into executive session. By making a self-report, the board was candid and forthright in admitting its actions may have violated the KOMA, although it did not realize it at the time. The board further stated that it did not intentionally violate the KOMA, and there is no evidence it was attempting to subvert or avoid the KOMA's requirements. Moreover, there is no evidence any board member has ever been found to be in violation of the KOMA.

While the board was forthcoming in this matter, ultimately we must be mindful of the KOMA's procedural and substantive safeguards. These safeguards are designed to ensure that the public's business is discussed in public. "The thrust of the KOMA is openness in the cluster of concepts that flavor the democratic process: discussion, analysis, and decision-making among members of a governing body."<sup>16</sup> Except under limited circumstances, the legislature did not intend for discussion, analysis and decision-making by a public body to occur outside of public view, especially where the expenditure of public monies is involved. Therefore, we cannot condone the discussion of such matters in executive session. "Public bodies cannot be allowed to do indirectly what the legislature has forbidden."<sup>17</sup>

The KOMA exists to protect the public. The public's right to know is protected when the transaction of governmental business, including any discussion involving the sale of district real property, is carried out in an open meeting. After considering the totality of the circumstances, we find that the board's actions impinged on the public's right to know and undermined the public policy embodied in the KOMA. We believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

### ***Penalties under the KOMA***

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.<sup>18</sup> Additionally, completion of training concerning the requirements of the KOMA may be required.<sup>19</sup> Any member of a public body subject to the KOMA who knowingly violates any provisions of the act, or intentionally fails to furnish

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<sup>16</sup> *State ex rel. Stephan v. Board of County Com'rs of Seward County*, 254 Kan. 446, 452, 866 P.2d 1024, 22 Media L. Rep. 1430 (1994).

<sup>17</sup> *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

<sup>18</sup> K.S.A. 75-4320(a).

<sup>19</sup> See K.S.A. 75-4320a(a); see also K.S.A. 75-4320d(a)(1)(A)(ii); and see K.S.A. 75-4320f(b).

information as required by K.S.A. 75-4318(b) concerning notice, may be subject to these penalties. “To ‘knowingly’ violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific intent to violate the law.”<sup>20</sup> In other words, the violation need not be willful or intentional. Rather, if the KOMA prohibits the action or conduct, and the public body engages in the conduct, that is a knowing violation of the law.<sup>21</sup> “Ignorance of the law is no excuse.”<sup>22</sup>

### ***Conclusion***

In light of the foregoing, we find by a preponderance of the evidence that on September 9, 2019, the board knowingly violated the KOMA on two (2) occasions when it recessed into executive session to discuss the sale of district real property, a matter that did not fall under the so-called “exception for real property” identified as the justification by the board, and when its motions failed to comply with the statutory requirements. We also find that remedial action is required to ensure compliance with the KOMA.

Based on the facts of this case, we have determined that the imposition of a civil penalty<sup>23</sup> as authorized by the KOMA is not warranted. This is due in part to the board’s wise decision to self-report its “prima facie violation[s],” rather than wait for a member of the community to file a complaint. Additionally, the board acknowledged it improperly recessed into executive session, has no prior violations, and we have no evidence that its actions were a subterfuge to defeat the purposes of the KOMA. However, we caution that, at least during this meeting, it fell short of its obligations to comply with the requirements of the KOMA.

Although we decline to impose a civil penalty based on the totality of the circumstances, we believe the imposition of a training requirement on the board will help underscore the importance of the KOMA. We believe training is a reasonable requirement that will help ensure the board understands the significance of its obligations under the KOMA. We also believe that the board must review its operating policies and adopt a policy, or amend any policy it current has, that provides guidelines for recessing into executive session.

For the above reasons, we are seeking the board’s voluntary compliance through the means of a Consent Order as provided for by the KOMA.<sup>24</sup> We have enclosed the Consent Order for the board’s review. The Consent Order requires the board to acknowledge violation of the KOMA and to attend at least one hour of training on the provisions of the KOMA presented by an attorney experienced in dealing with open meetings issues within 90 days. Although not required, we strongly urge the board to require its staff and the clerk to attend training as well to help ensure the board

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<sup>20</sup> K.S.A. 75-4320(a); *see also State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091 (1982).

<sup>21</sup> *Id.*, 231 Kan. 536-37.

<sup>22</sup> *Id.*, 231 Kan. 536.

<sup>23</sup> K.S.A. 75-4320d(a)(1)(A)(ii); penalties are assessed against the individual, not the public body.

<sup>24</sup> K.S.A. 75-4320d(a)(1).

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complies with the KOMA. Additionally, although Ms. Maier was absent from the September 9, 2019, board meeting, and thus cannot be held to have violated the KOMA, we also strongly encourage her to attend the training required by the Consent Order.

Our offer of a Consent Order as authorized by K.S.A. 75-4320d(a)(1) is effective up to **5:00 p.m. on Friday, December 20, 2019**. Because it meets regularly, we believe this will offer you sufficient time to confer with the board about this matter. If additional time is needed to discuss this matter, the board may wish to call a special meeting.

If the Consent Order is approved, please secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files. You do not need to complete the dates on the first page or the certificate of service on the last page. We will insert the dates when the Attorney General executes the Consent Order.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, December 20, 2019**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 75-4320a, 75-4320a(a), 75-4320d, and/or 75-4320f.

We note that this office periodically offers KOMA training. This training is free and open to the public. One such training opportunity will take place on Tuesday, December 17, 2019, from 6:00 p.m. to 8:00 p.m. in Salina, Kansas at the Tony's Pizza Events Center – Heritage Hall. For more information about this training and to RSVP, please see the City of Salina's website: <http://salina.ks.us/news/?FeedID=5683>. You may find more information about other upcoming training on our website: <http://ag.ks.gov/open-government/upcoming-training>. The Kansas Association of School Boards also offers KOMA training.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or [lisa.mendoza@ag.ks.gov](mailto:lisa.mendoza@ag.ks.gov) with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL  
Derek Schmidt



Lisa A. Mendoza  
Assistant Attorney General  
Director, Open Government Enforcement Unit

Enclosure (Consent Order)