

BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Shawnee County, Kansas

In the Matter of the)
Lincoln County Commission)
_____)

Case No. 2022-OG-0002

CONSENT ORDER

NOW on this 16th day of November, 2022 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 75-4320(d)(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about May 26, 2021, the Attorney General's Office received a complaint alleging the Lincoln County Commission ("the commission"), specifically, commission members Randy Lohmann and Darrell Oetting, violated the KOMA. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the commission held a meeting when two of the three commissioners attended a Lincoln County Hospital Board meeting, discussed a flooring contract proposal received by the board, and failed to give notice of its meeting. The commission appoints the hospital board of trustees, approves the hospital board's budget and provides substantial funding to the hospital. Commissioner Dennis Ray did not attend this meeting. This action violated K.S.A. 75-4318(a), which provides that "all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof . . . shall be open to the public . . ." and K.S.A. 75-4318(b), which provides that "[N]otice of the date, time and place of any regular or special meeting of a public body . . . shall be furnished to any person requesting such notice. . . ."

2. The commission is a public body that is subject to the requirements of the KOMA, and any meetings it holds must comply with the KOMA.

3. Investigation and/or statements provided on behalf of the commission, as described in a letter dated October 28, 2022, to County Attorney Scott Wright,

which is attached hereto and incorporated by reference as Exhibit "A," confirm the following violation of the KOMA by a preponderance of the evidence:

- a. On April 27, 2021, Commissioners Randy Lohmann and Darrell Oetting both attended the Lincoln County Hospital Board meeting and engaged in discussion of the business or affairs of the commission; this constituted a meeting as defined by K.S.A. 75-4317a; and
- b. The commission failed to provide notice of the April 27, 2021, meeting during the hospital board meeting to those requesting notice as required by K.S.A. 75-4318(b).

4. Based upon the above information, Commissioners Randy Lohmann and Darrell Oetting individually admit and agree that they violated the KOMA as set out in paragraph 3 above.

5. Commissioners Randy Lohmann and Darrell Oetting now fully understand and agree that for each meeting held, they intend to comply with the requirements of K.S.A. 75-4318(a) and (b).

6. The Attorney General and Commissioners Randy Lohmann and Darrell Oetting mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. Commissioners Randy Lohmann and Darrell Oetting 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. Commissioners Randy Lohmann and Darrell Oetting 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 Commissioners Randy Lohmann and Darrell Oetting.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper for Commissioners Randy Lohmann and Darrell Oetting to 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 Commissioners Randy Lohmann and Darrell Oetting mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Commissioners Randy Lohmann and Darrell Oetting consent to the following terms and conditions, and the Attorney General orders that:

10. Commissioners Randy Lohmann and Darrell Oetting agree to and shall do the following:

- a. Commissioner Lohmann: (1) Pay a civil penalty of \$75.00, individually and not from commission, county, or other public funds, and (2) attend at least one hour of KOMA training on or before **Friday, January 6, 2023**. The civil penalty shall be paid by certified check or money order and made payable to the Office of the Attorney General pursuant to K.S.A. 75-760 on or before **Friday, December 16, 2022**.
- b. Commissioner Oetting: Pay a civil penalty of \$50.00 individually and not from commission, county, or other public funds, **provided that** the \$50.00 civil penalty assessed to Commissioner Oetting shall be waived if he participates in at least one hour of KOMA training on or before **Friday, January 6, 2023**. If Commissioner Oetting chooses to pay the civil penalty rather than participate in KOMA training, it shall be paid by certified check or money order and made payable to the Office of the Attorney General pursuant to K.S.A. 75-760 on or before **Friday, December 16, 2022**.
- c. Commissioners Lohmann and Oetting: Provide a written certification of training attendance to this office within ten days of the training; and
- d. Not engage in any future violations of the KOMA.

11. Commissioners Randy Lohmann and Darrell Oetting 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. Commissioners Randy Lohmann and Darrell Oetting 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. Commissioners Randy Lohmann and Darrell Oetting 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 Commissioners Randy Lohmann and Darrell Oetting, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution of the KOMA violations set forth herein.

15. Commissioners Randy Lohmann and Darrell Oetting 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 Commissioners Randy Lohmann and Darrell Oetting may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Commissioners Randy Lohmann and Darrell Oetting 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. Commissioners Randy Lohmann and Darrell Oetting 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. Commissioners Randy Lohmann and Darrell Oetting understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 75-4320(e) and amendments thereto.

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

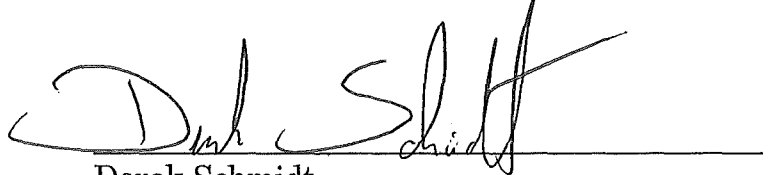
19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

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

WHEREFORE, the Attorney General and Commissioners Randy Lohmann and Darrell Oetting consent to these provisions.

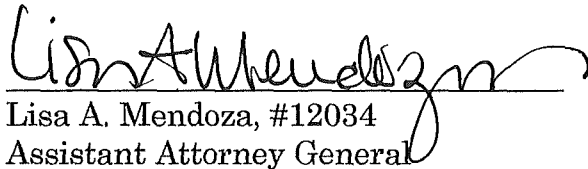
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL



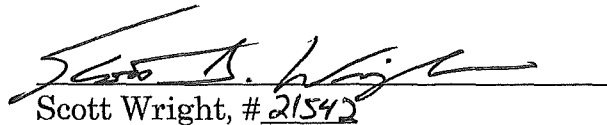
Derek Schmidt
Kansas Attorney General

Prepared By:



Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597

Approved By:



Scott Wright, # 21542
Lincoln County Attorney
216 E. Lincoln
Lincoln, KS 67455

Lincoln County Commission:

Randy Lohmann
Randy Lohmann

11-7-22
Date

Darrell Oetting
Darrell Oetting

11-7-22
Date

ATTEST:

Dawn Harlow
Dawn Harlow, Clerk



11-7-22
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2022, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Scott Wright
Lincoln County Attorney
216 E. Lincoln
Lincoln, KS 67455

Lisa A. Mendoza
Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

October 28, 2022

Scott Wright
Lincoln County Attorney
216 E. Lincoln Ave.
Lincoln, KS 67455

RE: KOMA Complaint – Lincoln County Commissioners Randy Lohmann and
Darrell Oetting
Our File Number CV-21-000835

Dear Mr. Wright:

We are writing to you in your capacity as county attorney for Lincoln County. We understand that you also represent the Lincoln County Commission as a county counselor in civil matters. If you are no longer the county counselor, we would appreciate it if you would forward this letter to the current county counselor or other attorney who handles civil matters for the commission.

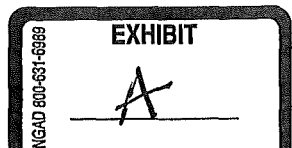
On May 26, 2021, we received a complaint from David Gerstmann alleging that Lincoln County Commissioners Randy Lohmann and Darrell Oetting violated the Kansas Open Meetings Act (KOMA).¹ Specifically, he alleged that Commissioners Lohmann and Oetting essentially held a commission meeting by appearing at the April 27, 2021, hospital board meeting and engaging in a discussion of county business during that meeting. Mr. Gerstmann also alleged that the commissioners failed to provide notice of this special meeting to individuals who have requested notice of commission meetings.² As a remedy, Mr. Gerstmann would like both commissioners to receive KOMA training, and for Commissioner Oetting to be fined “for showing malice toward the act.”

This office has jurisdiction to investigate and resolve any complaint that a public body or agency violated the KOMA.³

¹ K.S.A. 75-4317 *et seq.* Mr. Gerstmann did not name Commissioner Dennis Ray in the complaint.

² Mr. Gerstmann stated that he is one of the individuals who has requested notice of the commission’s meetings.

³ See K.S.A. 75-4320(a), 75-4320b, 75-4320d and 75-4320f.



We consulted with former county attorney Jennifer O'Hare about Mr. Gerstmann's complaint. Ms. O'Hare provided answers to our specific questions, information concerning those who have requested notice of meetings, copies of notices provided to those requesting notice, and written statements from Commissioners Lohmann and Oetting. Commissioners Lohmann and Oetting remain on the commission.

The facts here are relatively straightforward. During its meeting on April 26, 2021, the commissioners discussed the upcoming Lincoln County Hospital Board meeting. The commission appoints the hospital board trustees, approves its budget, and provides funding for the hospital. As part of its discussion about the upcoming hospital board meeting, the commission discussed which commissioners would be attending the board meeting and whether it should provide notice that a commissioner or commissioners would be attending the hospital board meeting. Commissioner Lohmann normally attends the hospital board meeting. Commissioner Oetting indicated he also wanted to attend to discuss "an individual taxpayer issue." Commissioner Lohmann believed it would be permissible for both commissioners to attend as observers as long as they did not talk to each other or make decisions. Because Commissioner Oetting wanted to attend, Commissioner Lohmann indicated that was fine, but he might stop by the board meeting.

Commissioner Ray indicated he would not be attending the hospital board meeting.

Because two commissioners indicated that they might attend the hospital board meeting, County Clerk Dawn Harlow urged the commission to provide meeting notice to those on the notice list. The commission ultimately determined that notice was not required, so the clerk did not provide notice to any individual requesting notice of the commission's meetings.

At least five individuals, including the complainant, have requested notice of meetings.⁴ The commission advised that it sends notice to any person or entity who requests notice, and that "[N]otice is typically discussed by the Board and direction given to the County Clerk."

On April 27, 2021, both Commissioners Lohmann and Oetting attended the hospital board meeting. Rather than sitting in the audience as observers, they sat next to each other at the table with the hospital board of trustees. During the meeting, the board recognized each of the commissioners and permitted each one to speak on an issue related to approval of a flooring contractor proposal, which would require an expenditure of hospital funds. The complainant provided a recording of the hospital board meeting. Although the recording is of poor quality, both commissioners can be heard weighing in on the flooring contractor proposal. At one point, Commissioner Lohmann suggested trying to "buy local," and Commissioner Oetting suggested two

⁴ At the time he filed the complaint, the complainant was also on the hospital board of trustees.

individuals who might be able to do the work more quickly and for less money. He also provided a phone number for one of the individuals. Paying heed to the commissioners' comments, at the end of this discussion, the trustees asked the hospital Chief Executive Office to search for another vendor.

Commissioner Ray did not attend the hospital board meeting.

According to Commissioner Lohmann's statement, he "normally attend[s] the monthly meeting of the [board as] the representative from the Lincoln county commission . . . Commissioner Oetting indicated he wanted to attend the April 27 hospital board meeting. We discussed this at our county commission meeting. I did have some concerns that his attendance [might] create[] a KOMA issue but thought if he was just an observer there would be no problem. Unfortunately, we did discuss an issue together. I understand why this KOMA complaint was filed. . . ."

Commissioner Oetting's general recollection is somewhat similar. He "attended the [hospital board meeting]. There was a misunderstanding, and I did not know that Mr. Lohmann was going to attend the meeting. I also thought I could attend as an observer as I had an individual taxpayer issue and wanted to attend the meeting. Mr. Lohmann showed up to the meeting and we did have a brief discussion. I understand now that we need to provide notice. I understand why the KOMA violation was filed against me. I realize now that if there is a question about notice, we should just give it so that there is no question that I am not in compliance with KOMA . . . I dispute that I showed malice to the act as alleged by Mr. Gerstmann. . . ."

The KOMA applies when a public body, such as the commission, holds a meeting as defined by the Act. Under the KOMA, a meeting "means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a public body or agency subject to this act for the purpose of discussing the business or affairs of the public body or agency."⁵ A public body must provide notice of the date, time and place of any regular or special meeting it holds to any person requesting such notice.⁶ A public body need not take binding action during a meeting.

Our analysis is straightforward. First, the commission conceded a majority, or two out of its three members, attended the April 27, 2021, hospital board meeting. Next, it also conceded that the two commissioners engaged in an interactive communication when they made comments to each other and to the hospital board about a flooring proposal. In Commissioner Oetting's words, "we had a brief discussion." When they engaged in

⁵ K.S.A. 75-4317a. A meeting may also occur by means of a serial communication. See K.S.A. 75-4318(e). There is no evidence that serial communications are an issue in this matter.

⁶ K.S.A. 75-4318(b).

discussion, the commissioners went beyond being “mere observers” of the hospital board meeting. *The first two elements of a meeting are met.*

Neither commissioner addressed the third element of a meeting—the discussion of the business or affairs of the body. Based on the totality of the circumstances, we conclude that the commission discussed the business or affairs of the body. The commissioners approve the hospital’s budget and provide substantial funding for its operations. They each weighed in on the expenditure of hospital funds for the purchase of flooring by commenting on the bid received; the length of time the bidder was going to take to perform the requested services; describing how they, as commissioners, make decisions on such expenditures (by buying local if possible); and providing at least two names of individuals who could possibly provide services that were less expensive than the bid the board received. Ultimately, the board determined its Chief Executive Officer should obtain more information consistent with the commissioners’ comments before it made a final decision. The third element of a meeting is met.

Having established that the commission held a meeting, it was required to provide notice to any individual who had requested notice of its meetings. At least five individuals have requested notice of the commission’s meetings.

Based on the commission’s admissions, as well as the facts we have gathered, the commission violated the KOMA when Commissioners Lohmann and Oetting attended the April 27, 2021, hospital board meeting and discussed the business or affairs of the body by weighing in on the expenditure of hospital funds for the purchase of flooring. These actions constituted a meeting as defined by the KOMA. Although urged to do so in advance by the clerk, the commission did not provide meeting notice to the individuals who requested notice. We also conclude this is more than a technical violation.⁷

The KOMA “is the cornerstone of public access to state and local governments in Kansas.”⁸ It is designed to ensure the public has the ability to attend meetings for the conduct of governmental affairs and the transaction of governmental business. When this ability is impacted, the public’s right to know about the government’s business is effectively denied.

It is not a violation of the KOMA for a majority of the members of a public body—without giving notice to those requesting it—to attend a meeting concerning county business as

⁷ See *Stevens v. City of Hutchinson*, 11 Kan. App. 2d, 290, 291. (“Technical violation” is a term of art adopted by the courts in discussing KOMA violations. “. . . [O]ur 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 be effectively denied. [Citations omitted].”).

⁸ Bradley J. Smoot and Louis M. Clothier, *Open Meetings Profile: The Prosecutor’s View*, 20 Washburn Law Journal 241, 242 (1981).

long as the members to not engage in the discussion.⁹ But, as Commissioners Lohmann and Oetting discovered, the temptation to speak in such instances is much too great. This temptation was magnified when the commissioners chose to sit next to each other at the table with the hospital board trustees. This situation demonstrates why we strongly urge public bodies to use caution in such instances.

In mitigation, despite the complainant's allegation of "malice," there is nothing to suggest that the failure to give notice was a subterfuge to defeat the purposes of the KOMA. Rather, it appears the failure to give notice was due to a misinterpretation or lack of understanding of how the commissioners could attend the same events without violating the KOMA. To its credit, the commission did not try to hide or deny what happened here. Moreover, each of the commissioners now express an understanding of what they should have done in this situation. Commissioner Oetting also indicated he would be willing to take additional training.

The commission has a prior technical violation of the KOMA involving the failure to observe the statutory requirements for recessing into executive session.¹⁰ On January 17, 2019, we advised former County Attorney Jennifer O'Hare of this violation and requested that she advise the commission to take immediate steps to ensure it complied with the statutory requirements for recessing into executive session.¹¹ While it is unclear when this occurred, we noticed from a review of its meeting minutes that beginning with its January 22, 2019, meeting, the commission's motions for executive session complied with the KOMA. When reviewing its recent meeting minutes,¹² the commission continues to meet the statutory requirements for recessing into executive session.

On January 7, 2021, this office entered into a Consent Order with Commissioner Lohmann and former Commissioner Alexis Pflugh for holding a meeting by engaging in virtually simultaneous Facebook posts discussing county business and failing to provide notice of the meeting to those who requested notice.¹³ The Consent Order required each commissioner to pay a \$50.00 civil penalty, but the Order waived the civil penalty if each commissioner participated in at least one hour of KOMA training on or before April 1, 2021. On March 4, 2021, both commissioners completed training on the KOMA and

⁹ See Attorney General Opinion 2000-64, <https://ksag.washburnlaw.edu/opinions/2000/2000-064.htm>, accessed October 25, 2022.

¹⁰ At the time of this earlier violation, the commission was comprised of Commissioner Pflugh (Chairperson), Commissioner Lohmann, and Commissioner and Vice-Chairman Al Joe Wallace.

¹¹ We note that in response to a prior KOMA complaint, the commission asserted that it was unaware of this earlier KOMA violation.

¹² Board of Lincoln County Commissioners, Minutes, Resolutions, and Agenda, Document Manager, <http://www.lincolncoks.com/ElectedOfficials/Commissioners/tabid/5978/Default.aspx>, accessed October 25, 2022.

¹³ In the Matter of the Lincoln County Commission, 2021-OG-0001, https://ag.ks.gov/docs/default-source/open-government-orders/2021-og-0001.pdf?sfvrsn=c9f1a81a_7, accessed October 25, 2022.

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the Kansas Open Records Act. The Kansas Association of Counties provided the training. Commissioners Oetting and Ray also participated in this training, although neither was in office at the time of the violation.

After due consideration of the facts and previous history of violations, we believe remedial action is required to ensure compliance with the KOMA. We have concluded the imposition of a civil penalty¹⁴ as authorized by the KOMA is necessary. However, we have determined not to impose the maximum amount permitted by law. This is due in part to the commission's recognition that it needs additional KOMA training. However, we believe the imposition of a civil penalty is an important reminder to the commission of the significance of the KOMA and its obligations under the Act.

Therefore, we are seeking the commission's voluntary compliance through the means of a Consent Order as provided for by the KOMA.¹⁵

We have enclosed the Consent Order for the commission's review. The Consent Order requires the commission to acknowledge the KOMA violation, receive training, and certify attendance to this office within 10 days of the training. The commission also agrees to comply with the KOMA. Additionally, the Consent Order requires Commissioner Lohmann to pay a civil penalty of \$75.00, and Commissioner Oetting to pay a civil penalty of \$50.00. The civil penalty for each must be paid individually and not from commission or county funds. Because Commissioner Lohmann has entered into a prior Consent Order for a similar violation, the \$75.00 civil penalty is in addition to the training requirement and will not be waived if he receives training. Because this is Commissioner Oetting's first KOMA violation, the civil penalty will be waived if he receives KOMA training. The training must occur within 45 days of the date of the Consent Order.

Because Commissioner Ray was not involved in the April 27, 2021, KOMA violation, he is not required to sign the Consent Order or participate in the KOMA training. Although not required to participate in training, we still encourage Commissioner Ray to voluntarily participate in the training.

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, November 18, 2022**. Because it meets regularly, we believe this will offer the commission sufficient time to review this matter. If the commission needs additional time to discuss this matter, it may wish to call a special meeting.

If the Consent Order is approved, please have Commissioners Lohmann and Oetting sign where indicated and return the Order to me. I will obtain the necessary signatures from our office and provide you with a copy for the commission's files. You do not need

¹⁴ K.S.A. 75-4320(d)(a)(1)(A)(ii).

¹⁵ K.S.A. 75-4320d(a)(1).

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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.

We note that this office periodically offers training on the KOMA. You may find more information about upcoming training on our website: <https://ag.ks.gov/open-government/upcoming-training>. The Kansas Association of Counties also offers KOMA training.

We thank you and the commission in advance for your continuing cooperation. Please feel free to contact me at (785) 296-2215 or 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)