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MEMORANDUM

To: Chairman Tarwater and Members of the Unemployment Compensation
Modernization and Improvement Council

From: Charles Reimer, Assistant Revisor

Date: June 24, 2021

Subject: General Kansas Open Meetings Act and Kansas Open Records Act
Considerations

I. General Application of the Kansas Open Meetings Act (KOMA)

The KOMA applies to:

- Legislative and administrative bodies and agencies of the state, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups, that receive or expend public funds and that are supported in whole or in part by public funds.¹
- Legislatively created groups may be subordinate bodies subject to KOMA.²

The Unemployment Compensation Modernization and Improvement Council is likely generally subject to KOMA. Therefore, members should be aware of the applicable law.

What does the KOMA require?

KOMA requires that: (1) Meetings be open to the public; and (2) that notice of meetings be provided if requested. The Chair may delegate the duty of providing the notice to those individuals that request notice. Usually, the Committee Assistant or Legislative Research Staff provides notice of meetings for interim committees.

KOMA is interpreted broadly to achieve its purpose of facilitating an informed electorate. Because KOMA involves a key principle in our democracy of open government, it is a sensitive area for the media and the public and the potential appearance of impropriety should always be a

¹ K.S.A. 75-4318(a).

² See AG Opin. Nos. 94-93; 94-55. Considerations include whether the group is created by statute, statutorily created duties and authority, the degree of independence or legislative control (e.g. over agenda), degree of governmental oversight and existence of reporting requirements.

consideration. If a question arises, the Attorney General or District Attorney may investigate and closely examine the specific circumstances and communications involved.

Are We Having a Meeting?

“Meeting” means:

- Any gathering or assembly;
- via any method of interactive (two-way) communication, including electronic;³
- or that occurs at any location or social situation;
- involving a majority of the voting members;⁴
- for the purpose of engaging in a discussion (a two-way dialogue) about the business of the body.⁵

Since the Council has 13 members, including legislators, private citizens and the Secretary of Labor, seven members would constitute a majority.

Serial Communications:

- A “meeting” also includes interactive communications in a series (e.g. not contemporaneous) if they: (1) Collectively involve a majority of the membership, (2) share a common topic of discussion concerning its business or affairs, and (3) are intended by any participant (even just one) to reach agreement on a matter that would require binding action to be taken by the body.⁶
- “Interactive communications” includes the use of any form of two-way communication, including phone calls, emails, or texts.⁷
- The consequence of interactive communications constituting a “meeting” under the KOMA is that no notice is provided and the meeting is not open to the public, in violation of the KOMA. KOMA violations may result in a fine imposed against a member personally for each separate violation, such as each email, of up to \$500, and other potential consequences such as recall from office.⁸

Examples:

- Social events or travel are not meetings if business is not discussed by a majority. But beware of appearances of KOMA violations.
- Attending an educational convention or listening in on a meeting of another body is not a meeting if no discussion involving a majority of the members about their body’s business occurs.

³ In-person discussion is only one means of interactive communication. For example, KOMA permits teleconference or video-conference meetings or using such methods for participation by one or more members. The public must have access and be able to hear the discussion and ascertain how each member voted. See AG Opin. Nos. 2011-023; 2005-03; 86-153.

⁴ A majority is determined using the total membership, including any vacancies. Non-voting members are not included. Ex-officio members are included if they have voting privileges. See AG Opin.No. 2013-19.

⁵ K.S.A. 75-4317a.

⁶ K.S.A. 75-4318(f); See AG Opin. No. 98-49.

⁷ AG Opin. No. 2009-22. Examples of potential serial communications that might constitute a “meeting” include phone or email trees, electronic bulletin boards or internet forums that enable two-way communication, use of a staff member to ferry communications back and forth, or a series of small meetings collectively including the majority. If so, notice and reasonable access is required. See AG Opin. Nos. 98-49; 98-26.

⁸ K.S.A. 75-4320(a).

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- Facebook, Twitter, or email interactions may constitute a meeting; a one-way email generally would not. To avoid potential issues, warnings not to “reply all” and not to forward should be included in emails.
- Discussing when and where to meet is not a meeting. Discussing an agenda might be, depending on how carefully the discussion is narrowly limited so as not to include any information-gathering or substance.⁹
- Informal discussions before, during a recess or after a scheduled meeting may be meetings.

Giving Notice

- Notice of meetings (date, time, and place) must be provided upon request, including an oral request, to the requestor.¹⁰ An agenda is not required by KOMA, but if made must include the items planned and copies must be available upon request at the meeting.¹¹
- Notice may be provided orally or by other means to the requestor; publication is not required.¹²
- The person presiding over the meeting has responsibility for providing notice, but may delegate to staff.¹³
- Notice should be reasonable in manner and timing under the circumstances.¹⁴

Making the Meeting “Open”

- “Open” means reasonably accessible to the public in light of the circumstances. KOMA does not make specific accommodation or venue requirements, assuming there is no intent to subvert KOMA.¹⁵
- A prior agenda may be changed at the meeting, but to avoid questions, that possibility should be noted in the agenda.
- Recording or videotaping is allowed, subject to reasonable rules of the body.¹⁶
- There is no requirement that the public be permitted to speak or participate.¹⁷
- KOMA does not require minutes (except for executive session motions).

⁹ AG Opin. No. 98-49. See also AG Opin. No. 98-26 citing a North Dakota AG Opinion which stated “it would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of opinions, or action) regarding public business that the open meetings law is triggered.”

¹⁰ K.S.A. 75-4318(b).

¹¹ K.S.A. 75-4318(d); AG Opin. No. 86-133.

¹² K.S.A. 75-4318(b).

¹³ K.S.A. 75-4318(c).

¹⁴ AG Opin. Nos. 93-113; 86-133.

¹⁵ K.S.A. 75-4318; 75-4317(b).

¹⁶ K.S.A. 75-4318(e).

¹⁷ K.S.A. 75-4318.

Closed Session of the Council to Discuss Audit

Section 1(g)(2) of HB 2196 provides that the council may hold an executive session that shall not be public under the Kansas open meetings act for the purpose of hearing and discussing any confidential portions of the audit of the Department of Labor conducted by the Council pursuant to section 1(g)(1) of HB 2196. KOMA also provides that closed executive sessions may be held by a public body like the Council to discuss certain matters.¹⁸

II. General Application of the Kansas Open Records Act (KORA)

The Kansas Open Records Act (KORA)¹⁹ is the statutory act that requires public records of a public agency to be open for inspection.

Public Agency

The term “public agency” is defined as “the state or any political or taxing subdivision of the state or any office, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.”²⁰ The Unemployment Compensation Modernization and Improvement Council falls under the definition of public agency, as it is supported by public funds appropriated by the state.

Required Procedures

Pursuant to KORA, public records are required to be provided or made available for inspection within a timely action in response to applications for inspection of public records.²¹ Responding to these requests occurs by a public agency’s “official custodian,” who is responsible for the maintenance of public records, regardless of whether such records are in the officer’s or employee’s actual personal custody and control.²² A response to a KORA request must be made within 3 days of receipt of the request.²³

¹⁸ K.S.A. 75-4319

¹⁹ K.S.A. 45-215 *et seq.*

²⁰ K.S.A. 45-217(f)(2).

²¹ *Id.*

²² K.S.A. 45-217(e).

²³ K.S.A. 45-218(d).

Public Records

According to KORA, “all public records shall be open for inspection by any person, except as provided by this act.”²⁴ “Public record” means any recorded information, regardless of form, characteristics or location, that is made, maintained or kept by or is in the possession of any public agency or any officer or employee of a public agency.²⁵ However public records do not include records “made, maintained or kept” by members of the legislature.²⁶

Public Posting of Council Materials by Secretary of Labor

In addition to applicable KORA requirements, 2021 HB 2196²⁷ provides that the Secretary of Labor shall post testimony and other relevant materials discussed, presented to or produced for the council on a publicly accessible website maintained by the secretary.

Exception Applicable to Council’s Audit

2021 HB 2196²⁸ provides that confidential information in the audit conducted by the Council through an independent firm of the Department of Labor and the unemployment insurance system shall be redacted and shall not be made public. KORA also provides for certain exceptions to public disclosure.²⁹

III. KOMA and KORA Enforcement

Members who “knowingly” violate the provisions of KOMA or KORA will be individually liable for the payment of a civil penalty not to exceed \$500 for each violation.³⁰ In lieu of bringing an action against a violator, the attorney general may settle the issue by entering into a consent order with the offending party.³¹ A district court or the attorney general may order a violator of KOMA or KORA to complete training to assist such violator in becoming more familiar with the provisions of the violated act.³²

²⁴ K.S.A. 45-218(a).

²⁵ K.S.A. 45-217(g)(1).

²⁶ K.S.A. 45-217(g)(3)(B).

²⁷ 2021 HB 2196 Section 1(j)(3).

²⁸ *Id.* at (g)(1).

²⁹ K.S.A. 45-221.

³⁰ K.S.A. 75-4320(a), 45-223(a).

³¹ K.S.A. 75-4320d(a), 75-4320f, 45-251(a), 45-253.

³² K.S.A. 75-4320a(a), 75-4320d(a)(1)(A)(i), 45-222(a), 45-251(a)(1)(A)(i).