

Governmental Business in Secrecy in Kansas

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Summary: The Kansas *Open Meetings Act* [K.S.A. 75-4317 through 75-4320] specifies that in closing an open meeting, any governmental body subject to the *Act* must pass a formal motion in which is stated (1) the justification for closing the meeting, (2) the subjects to be discussed during the closed meeting and (3) the time and place at which the open meeting is to resume. The motion must be recorded in the minutes of the meeting and maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting is to be limited to those subjects stated in the motion.

Examination of the 2014 minutes of the governing bodies of the 10 most populous counties and the 10 most populous cities of Kansas revealed that 631 closed sessions were held for a total of at least 240 hours. All of the governing bodies except for the Manhattan City Commission closed meetings at times without disclosing *any* meaningful information about the subjects they discussed. Meaningful information is information that would allow a member of the public to identify the issue or issues that prompted closing the meeting. In doing this, they conducted at least 200 hours of governmental business in complete secrecy. In determining whether or not the secrecy was justified, I followed the principle that in closing a meeting a governmental body is not expected to disclose information that would defeat the purpose of a legitimately-closed meeting and, where partial information was provided gave the benefit of the doubt to the governmental body.

An example of the mischief such secrecy can lead to is that of the Lawrence-Douglas County Health Board, the Douglas County Commission and the Lawrence City Commission. In 2012 and 2013 they successfully hid their discussions and settlement of a \$750,000 lawsuit and other unknown matters for almost a year and a half by closing meetings to discuss “personnel matters” or “privileged matters” or equivalents.

During 2014 the amount of business conducted in secrecy varied widely, led by the Saline County Board of Commissioners (41 hours) and followed by the Salina City Commission (31 hours), the Shawnee County Commission (25 hrs.) and the Board of Riley County Commissioners (20 hrs.).

The Manhattan City Commission conducted no governmental business in secrecy. Other governmental bodies that conducted little business in secrecy were the Overland Park City Council (0.2 hours in 2014), the Olathe City Council (0.5 hours), the Shawnee City Council (0.5 hours) and the Douglas County Commission (1.2 hours).

The subjects to be discussed during closed sessions were most commonly described as “personnel matters” or an equivalent or “privileged communications.” Rarely in these cases was an informative subject disclosed (such as “a situation in which an employee may have misused a County credit card” or a specific lawsuit). In 88% of closed sessions and for 83% of closed session time, governmental business was conducted in secrecy.

Some governmental bodies closed their open meetings routinely with motions that suggested little or no planning of what they were going to discuss. For example, the Shawnee County Commission commonly “resolved [sic] into executive session for <a specified period of time> for non-elected personnel, attorney client privilege, employer/employee negotiations and discussions relating to the acquisition of real property” or some permutation of the same.

By conducting a substantial portion of their business in complete secrecy, governmental bodies have acted in opposition to the clearly-stated purpose of the Kansas *Open Meetings Act*, that “the conduct of governmental affairs and the transaction of governmental business be open to the public.” Their actions are inconsistent with the respect most citizens of Kansas want shown for open government. Most of the instances of closed sessions were not mere technical violations because, in not specifying the subjects of their discussions in meaningful ways, a significant public right to know was denied.

Much of the difficulty has come from the interpretation of the word *subjects* in the *Open Meetings Act* (K.S.A. 75-4319(a)(2)). There are at least two interpretations, one consistent with the purpose of the *Act* and one very inconsistent with the purpose of the *Act*. The interpretation that is consistent with the purpose of the *Act*, requires that meaningful subjects be stated in closing meetings. The one that is inconsistent with the purpose of the *Act* allows essentially meaningless subjects, such as “personnel matters” and “privileged communications” to be stated in closing meetings. That interpretation, promoted by a 1987 Salina Ninth Judicial District Court decision, has led to an enormous amount of governmental business in secrecy.

Although the *Open Meetings Act* requires that the times and places at which open meetings are to resume be stated in the motions closing meetings, 5 governing bodies never or rarely stated the times at which open meetings were to resume and 15 never stated the places at which their open meetings were to resume. Although some used the phrases “not before <a certain time>” or “not after <a certain time>” those phrases do not comply with the requirements of the *Act* to state the specific times when open meetings were to resume. Although many presumably resumed meetings in the same places at which the open meetings were closed that practice does not comply with the requirements of the *Act* to state the places where open meetings were to resume.

Although the Kansas *Open Meetings Act* requires that any binding action be taken in open sessions, at times governmental bodies passed meaningless motions in open sessions,

thereby subverting this requirement.

Prior to the enactment of the *Open Meetings Act*, governmental bodies conducted governmental business in secrecy at will. Now almost all of the governing bodies of the largest cities and counties in Kansas pass meaningless motions and then conduct governmental business in complete secrecy. As long as governing bodies close meetings at will to do business in secrecy, there seems to be little value in having an *Open Meetings Act* in Kansas.

The Kansas *Open Meetings Act* should be amended to require that when closing an open meeting, a governmental body state the subjects to be discussed in sufficient detail to allow members of the public to identify the specific issue or issues that compelled the governmental body to close the open meeting. This can be done easily while protecting the interests of the governmental entities involved. Recommended practices for closing meetings can help governmental bodies to avoid business in secrecy and to comply with other requirements of the *Open Meetings Act* without harming the interests of the governmental bodies involved.

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RESULTS FOR THE CALENDAR YEAR 2014 - CITIES

For the Tables below, TIME CLSD SESSIONS = time (hours) spent in closed sessions during the calendar year 2014; TIME BUS IN SECRECY = time (hours) spent doing governmental business in secrecy; RTN TIME STATED = percent of the times the time at which the governmental body was to return to open meeting was stated; PLACE STATED = percent of the times the place at which the open meeting was to resume was stated. One-half of the times and counts for the Kansas City Kansas and Wyandott County Unified Government Commission were attributed to Kansas City Kansas.

For the governmental bodies of the ten largest (most populous) *cities* in Kansas:

NAME	TIME IN CLSD SESSIONS	TIME BUS IN SECRECY	RTN TIME STATED	PLACE STATED
Kansas City	9.8	8.3	100%	0%
Lawrence	8.1	7.6	100%	75%
Lenexa	3.5	3.5	100%	0%
Manhattan	1.0	0.0	100%	0%
Olathe	14.8	0.5	100%	0%
Overland Park	3.5	0.2	100%	50%
Salina	31.3	31.3	100%	0%
Shawnee	1.4	0.5	67%	0%
Topeka	9.8	7.8	9%	0%
Wichita	13.9	12.5	0%	97%
All cities	96.0	72.3	68%	25%

RESULTS FOR THE CALENDAR YEAR 2014 - COUNTIES

For the governmental bodies of the ten largest (most populous) *counties* in Kansas:

NAME	TIME IN CLSD SESSIONS	TIME BUS IN SECRECY	RTN TIME STATED	PLACE STATED
Butler	3.8	3.8	100%	0%
Douglas	1.4	1.2	100%	0%
Johnson	9.5	9.2	100%	0%
Leavenworth	13.1	10.9	90%	0%
Reno	6.6	6.6	80%	0%
Riley	31.7	19.8	100%	100%
Saline	40.5	40.5	0%	0%
Sedgwick	2.8	2.8	8%	100%
Shawnee	24.7	24.6	0%	0%
Wyandott	9.8	8.3	100%	0%
All counties	143.9	127.7	41%	20%

Example - motion closing a meeting that fails to identify the issue to be discussed:

MOTION: made by <person 1>, seconded by <person 2> that the Commission recess to executive session for <length of time> for the discussion of personnel matters of non-elected personnel.

Because this motion provides no information that would allow a member of the public to identify the issue being discussed, governmental business is being conducted in secrecy. No special circumstances justify the secrecy.

Example - motion closing a meeting that identifies the issue to be discussed:

MOTION: made by <person 1>, seconded by <person 2> that the Commission recess to executive session for <length of time> to discuss a situation in which a City employee may have misused a City credit card for personal gain.

Here governmental business is *not* being discussed in secrecy.