Government in Secrecy in Douglas County, Kansas

2009 - 2013

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SUMMARY: Since January 2009, the Board of Trustees of Lawrence Memorial Hospital, the Board of Directors of the Health Department, the County Commission and the City Commission have held at least 176 closed sessions (closed portions of open meetings). In at least 120 instances, with the full support of their attorneys, no meaningful information was disclosed to the public about the subject(s) or issues discussed in those closed sessions. By doing this, these groups have conducted a substantial portion of their business in complete secrecy, and have acted in opposition to the clearly-stated purpose of the Kansas *Open Meetings Act*, which is that "the conduct of governmental affairs and the transaction of governmental business be open to the public." Their actions are inconsistent with the respect I believe most citizens of Douglas County want shown for open government. In addition, the Health Board, the Douglas County Commission and the Lawrence City Commission have successfully hidden their discussions of a $750,000 lawsuit and other unknown matters. 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. As long as boards and commissions close meetings at will to do business in complete secrecy, there seems to be little value in having an *Open Meetings Act* in Douglas County, Kansas.

In order to comply with the letter and the spirit of the *Open Meetings Act*, and to avoid the appearance of an intent to subvert the purposes of the *Act*, I ask all of our boards and commissions to (1) provide the public with meaningful descriptions of the subjects discussed in past closed sessions, (2) review the requirements of the Kansas *Open Meetings Act*, (3) in future motions calling for closed sessions, specify the subject(s) to be discussed in sufficient detail that citizens can readily identify the topics being discussed and understand the issues that caused the group to close the open meeting, (4) continue to include the legal justification for closing the meeting and the time and place at which the meeting is to resume and, (5) when a consensus is reached or decision made in a closed session take appropriate action in open meeting. This can be done while protecting the interests of the City and County entities those boards and commissions serve.

I have no evidence that anyone has profited personally by conducting meetings in secrecy. To the contrary, most board and commission members give substantial time and effort and receive little or no compensation in return. Nevertheless, they should not conduct government business in secrecy, as they have in the past.

INTRODUCTION

Knowing that the Kansas *Open Meetings Act* states that "it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public,"[1] it comes as a surprise to find that a substantial portion of the business of government in Douglas County, Kansas has been and continues to be done in complete secrecy. The most striking example of business in secrecy is the filing and settlement of a lawsuit, over a period of about 15 months, in which a former employee of the Health Department sued the Board of Directors of the Health Department, the Lawrence City Commission, the Douglas County Commission and Dan Partridge for $750,000, with no mention in open meetings or the local newspaper and with the knowledge of almost none of the citizens of the City or the County. The following is a report of 120 closed sessions (closed portions of open meetings) over the past 4½ years during which the Douglas County Commission, the Lawrence City Commission, the Board of Directors of the Health Department and the Board of Directors of Lawrence Memorial Hospital have done their business in complete secrecy, and an analysis of the applicability of the Kansas *Open Meetings Act* to this situation.

THE LAWRENCE MEMORIAL HOSPITAL BOARD OF TRUSTEES

Examination of the minutes of the Hospital Board[2] from January 2009 through March 2013 shows that closed sessions were held during almost every Board meeting (at least 40 closed sessions). In all cases but two, the following (or a very similar) motion was passed:

> MOTION: made by <person 1>, seconded by <person 2> that the Board of Trustees recess to Executive Session for consultation with the hospital attorney which would be deemed privileged in the attorney-client relationship, to include the Chief Executive Officer, <other specified persons> and Chief of Staff. The open meeting is to resume in this room at <specified time>. Motion carried.

In the other two cases (January 21, 2009 and May 20, 2009), the subject was specified as a "personnel matter." No information was given about the meaning of "personnel matter."

All of the motions included a justification for the closed session (either stated or implied). None of the motions provided any useful information about the subject(s) being discussed in the closed sessions. The inclusion of a diversity of persons who were not members of the Board raises special questions about the legality of those sessions. (See *Discussion*, page 14.)

Although the minutes of the July 14, 2009 meeting did not note the presence of any attorney, as

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[1] K.S.A. 75-4317

[2] The minutes of the Board of Trustees for the Hospital are not available through any web site but must be requested from Public Relations Department of the Hospital. Contact Janice Early, Director of Community Relations at 785-505-3132 or Janice.Early@LMH.org for assistance.

required for the use of K.S.A. 75-4319(b)(2), this appears to have been an oversight in recording the minutes.

Summary for the Board of Trustees of the Hospital: The Hospital Board held at least 40 closed sessions between January 2009 and March 2013. The Board typically closed its sessions "for consultation with the hospital attorney which would be deemed privileged in the attorney-client relationship." Using this form, no meaningful information was disclosed to the public about the subject(s) or issue(s) discussed in those sessions. As a result, the discussions were held in complete secrecy. The practice continues.

THE HEALTH DEPARTMENT BOARD OF DIRECTORS

Examination of the minutes of the Lawrence-Douglas County Health Board from January 2009 through July 2013[3] shows that 30 closed sessions were held. Between January 2009 and June 2012, 23 closed sessions were held. For 13 sessions, the following motion (or an equivalent) was used for recessing into closed sessions:

> At <specific time>, <specific person> made a motion to adjourn into Executive Session for the purpose of discussing a personnel matter until <specific time>.

Note that no meaningful information was provided about the subjects or issues being discussed in the closed sessions.[4]

Six closed sessions were held for the director's annual evaluation and four for consideration of the Kay Kent Award.[5] In those routine matters, the subjects of discussion were clear.

Since August 2012, the Board has been using a motion of the following form (or an equivalent) most of the time, except for the Director's annual evaluation:

> At <specified time> <specified individual> made a motion to adjourn into executive session for <number of> minutes to consult with the Health Board's attorney for the purpose of maintaining the attorney-client privilege returning to public session at <specified time> in <specified place>.

Note that this form also conveys no meaningful information about the subject(s) or issue(s) that

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[3] Although posted on the Health Department's web site (www.ldchealth.org), these are kept well out of plain view. To access the Board's minutes, on the index page, select "Information," then under "About Us" select "Health Board," then under "Health Board Documents," select one of the years, then in the list that appears, then select an entry such as "10-2012 LDCHD BP." "LDCHD BP" is an abbreviation for "Lawrence Douglas County Health Department Board Packet."

[4] Since everything the Health Department does is, in some sense, a "personnel matter," the words "personnel matter" convey no meaningful information to the public about the subject(s) being discussed.

[5] The Kay Kent Excellence in Public Health Service Award is an employee-of-the-year award.

are being discussed in the closed sessions.

The legal justification for holding a closed session was not stated for 25 of the 30 closed sessions, although for 11 the justification is probably implicit from the nature of the subject being discussed (e.g. the Director's annual performance evaluation) and in 5 cases was clearly stated. The time at which the open meeting was to resume was stated in all but one motion (on July 20, 2009) but, until March 2013, the place at which the open meeting was to resume was stated in none. Binding action was taken in closed sessions on March 16, 2009 and March 22, 2010 and possibly on February 21, 2011 and March 19, 2012. (The significance of these facts will be considered later, under *Discussion* (page 5)).

Examination of the minutes of the Health Board in light of recent events raises additional concerns. In May 2011, the Kansas Human Rights Commission found probable cause that a former employee had been discriminated against (fired) in part because of his age. After negotiations seeking a settlement failed, the former employee filed two lawsuits, on December 7, 2011 and April 9, 2012, naming the Lawrence-Douglas County Health Board, the City of Lawrence, the Board of Commissioners of Douglas County and Dan Partridge, individually, as defendants and seeking $749,744.88 in damages.[6] The two lawsuits were consolidated for the purpose of disposition and a settlement agreement was reportedly reached early this year.

Examination of the minutes of the Health Board from January 2009 through June 2012 shows that although the Health Board is the first-named defendant, there is NO record of any discussion by the Board of the findings of the Kansas Human Rights Commission or of either of the lawsuits except that on June 18, 2012 the Health Board had a closed session "for the purpose of discussing a personnel matter and legal counsel related to pending litigation." The number of closed sessions held for other than routine business increased from 2 for 2009 and 1 for 2010 to 7 for 2011. No meaningful information was given to the public about any of these. One person who is a position to know about the Health Board's closed sessions has confirmed that the Board discussed the *McDaniel* lawsuit on several occasions.[7] In motions creating the closed sessions, the lawsuit appears to have been called a "personnel matter."

Summary for the the Health Department Board: The Health Board held 30 closed sessions between January 2009 and May 2013. In 18 instances, no meaningful information was disclosed to the public about the subject(s) or issue(s) discussed in the sessions. The Health Board has successfully hidden its discussions of the *McDaniel* lawsuit. Recently, the Health Board has included an attorney in its closed sessions, still without providing any meaningful information on the subject(s) or issue(s) discussed.

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[6] *McDaniel, James vs. Lawrence-Douglas County Health Board et al.* Cases No. 2011CV709 and 2012CV201, District Court of Douglas County, Kansas

[7] Since the Board should have stated that it was going to discuss the *McDaniel* lawsuit in its motions closing their meetings, this person was only complying with one of the requirements of the *Open Meetings Act* in revealing that the *McDaniel* lawsuit had been discussed. See *Discussion* (page 5, below).

THE DOUGLAS COUNTY COMMISSION

Examination of the minutes of the Douglas County Commission from January 2009 through July 31, 2013[8] shows that 47 closed sessions were held. In 27 cases, the following (or an equivalent) motion was passed:

> <Person 1> moved for the Board to recess to executive session for <length of time> for the purpose of consultation with the County Counselor on a matter which would be deemed privileged under the attorney-client relationship. The justification is to maintain attorney client privilege on a matter involving Douglas County. Attendees included <attorney> and <other listed persons>. Motion was seconded by <person 2> and carried unanimously.

Where this form of motion was used, no meaningful information was provided to the public about the subject(s) or issue(s) discussed. Adequate information was provided in 17 instances involving the acquisition of property and security issues. No meaningful information was provided in one instance involving personnel. On June 16, 2010, six months before the *McDaniel* lawsuit was filed, "ongoing litigation" was mentioned without any additional information being given and on June 12, 2013, "litigation" was mentioned, with no additional information given.

Summary for the Douglas County Commission: The Douglas County Commission held 47 closed sessions between January 2009 and June 5, 2013. In 28 instances, no meaningful information was disclosed to the public about the subject(s) or issue(s) discussed in those sessions. The Douglas County Commission has successfully hidden its discussions of the *McDaniel* lawsuit.

THE LAWRENCE CITY COMMISSION[9]

Examination of the minutes of the City Commission[10] from January 2009 through August 13, 2013 shows that 59 closed sessions were held. In 26 instances, the following (or an equivalent) motion was passed, providing no useful information about the subject(s) or issue(s) discussed:

> Moved by <person 1>, seconded by <person 2>, to recess into executive session for <length of time> for the purpose of consultation with attorneys for the City deemed

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[8] The minutes of the County Commission are available at www.Douglas-County.com (capitals not required). From the right column, select "Commission Minutes Archive," then select a specific year, then select a specific date. For some browsers, the County's web site pages will not load until loading has been stopped once and restarted.

[9] Of all our local government officials, Commissioner Mike Amyx probably has shown the most concern about open meetings.

[10] The minutes of the City Commission are available at www.ci.Lawrence.KS.us (capitals not required). From the top left of the index page, select "Agendas & Minutes." Then, for the current year select the date for which minutes are required. For past years, go to the bottom of the page and select "City Commission Agenda/Minutes Archives," then select the year desired, then select the date for which minutes are required.

> privileged under the attorney-client relationship. The justification for the executive session is to keep discussions with the attorneys for the City confidential at this time.

Discussion of property acquisition and union negotiations were the reasons for 24 sessions and for these adequate information was probably given. "Personnel" issues were the reason for 8 sessions. For 7 of these no meaningful information about the actual subject(s) discussed was provided. On August 13, 2013, "pending and potential litigation" was mentioned with no additional information given.

Twice (on March 27, 2013 and May 7, 2013), I have sent letters to the City Commission, asking it to place the subject of open meetings on its agenda. I have received no response from either.

Summary for the Lawrence City Commission: The Lawrence City Commission held 59 closed sessions between January 2009 and August 13, 2013. In 34 instances, no meaningful information was disclosed to the public about the subject(s) discussed in the sessions. The City Commission has successfully hidden its discussions of the *McDaniel* lawsuit. On two occasions it has declined to place the subject of open meetings on its agenda.

SUMMARY FOR BOTH BOARDS AND COMMISSIONS: Since January 2009, the boards and commissions examined held at least 176 closed sessions. In at least 120 instances, no meaningful information was disclosed to the public about the subjects discussed in the closed sessions or the issues that prompted closing the open meetings. The Health Board, the Douglas County Commission and the Lawrence City Commission have successfully hidden their discussions of a $750,000 lawsuit for well over a year. The practice of holding closed sessions without providing meaningful information about the subjects or issues discussed (in complete secrecy) continues.

I have no evidence that anyone has profited personally by conducting meetings in secrecy. To the contrary, most board and commission members give substantial time and effort and receive little or no compensation in return. Nevertheless, they should not conduct business in secrecy.

DISCUSSION

The *Kansas Open Meetings Act* can be found in the Kansas Statutes at K.S.A. 75-4317 through K.S.A. 75-4320(c). Since its enactment in 1972, interpretation of the *Act* has been the subject of court decisions and the opinions of Kansas Attorneys General. Although a few learning aids and summaries have been published[11, 12] the court decisions and Attorney General opinions need to be studied in order to get a thorough understanding of the *Act* as it functions. Many of the opin-

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[11] Smith, Michael J., Assistant Attorney General: *Kansas Open Meetings Act (KOMA)*, revised August 2009. Available at http://ag.ks.gov/docs/publications/kansas-open-meetings-act-(koma)-guidelines.PDF. Last checked September 6, 2013.

[12] Kansas Legislative Research Department, Martha Dorsey, Principal Analyst: *Kansas Legislator Briefing Book 2009, Kansas Open Meetings Act*.

ions can be found on a Washburn University School of Law web site.[13] Those not yet posted can be obtained through the office of the Attorney General.[14]

The purpose of the Kansas *Open Meetings Act* is clear:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.[1]

The *Act* has wide applicability:

> All meetings for the conduct of the affairs of, and transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot.[15]

This includes all the governmental bodies within Douglas that are the subject of this report.

K.S.A. 75-4319 specifies the conditions for closing an open meeting: (In two cases, I have italicized the word *subjects* to facilitate the discussion that follows.)

> (a) Upon formal motion made, seconded and carried, all bodies and agencies subject to the open meetings act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include a statement of
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> (1) the justification for closing the meeting,
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> (2) the *subjects* to be discussed during the closed or executive meeting and
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> (3) the time and place at which the open meeting shall resume.
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> Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.

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[13] http://ksag.washburnlaw.edu/. Last checked September 6, 2013.

[14] 120 SW 10th Ave., 2nd Floor, Topeka, Kansas 66612, 1-888-428-8436.

[15] K.S.A. 75-4318(a)

> (b) No *subjects* shall be discussed at any closed or executive meeting, except the following:
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> (1) Personnel matters of nonelected personnel;
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> (2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;
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> (3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency;
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> (4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;
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> and 12 other entries, not listed here.

The 12 entries not listed above (relating to parumutuel racing, tribal gaming matters, etc.) rarely affect governmental bodies in Douglas County.

The motion to go into closed session is more than a mere formality, because it provides safeguards against abuse of the closed or executive session.[16] The exceptions are to be interpreted narrowly - that is to allow closed sessions only for the limited subjects and purposes specified by the *Act*.[17]

Two Interpretations of the *Open Meetings Act*

Difficulty arises from the interpretation of the word *subjects* in K.S.A. 75-4319(a)(2). There are at least two interpretations, one consistent with the purpose of the *Open Meetings Act* and one very inconsistent with the purpose of the *Act*.

The first interpretation (consistent with the purpose of the *Act*) is that the motion to enter a closed session should state the topics (subjects) to be discussed in sufficient detail that a member of the public can identify the subject(s) to be discussed and understand the issue(s) that prompted the board or commission to enter the closed session. The *justification* for closing the meeting is then one of the items listed under K.S.A. 75-4319(b), such as for the discussion of an employee personnel matter or to get confidential legal advice from the board or commission's attorney.

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[16] Attorney General Opinion No. 91-78, July 15, 1991.

[17] Attorney General Opinions 87-10, 88-25 and 91-78. See also *Johnson v. Killion*, 178 Kan. 154, 158-59, 283 P.2d 433 (1955); *Smith v. Marshall*, 225 Kan. 70, 75, 587 P.2d 320 (1978); *State ex rel. Murray v. Palmgren*, 321 Kan. 524 (1982); *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986); Tacha: *The Kansas Open Meetings Act: Sunshine on the Sunflower State?*, 25 U. Kan. L. Rev. 169, 175 (1977); Smoot and Clother: *Open Meetings Profile: The Prosecutor's View*, 20 Washburn L.J. 241, 275 (1981).

Thus an adequate motion to enter a closed session might be the following:

> <specified person> made a motion that the Board enter an executive session to discuss a situation where an employee may have violated the City's policy on <specific subject>. The justification for the executive session is to protect the privacy of the employee's personnel records. The open meeting is to resume in this room at <specified time>.

or

> <specified person> made a motion that the Board enter an executive session to discuss the lawsuit *Jones v. the City of Lawrence*[18] with the City's attorney. The justification for the executive session is to maintain the confidentiality of attorney-client communications. The open meeting is to resume in this room at <specified time>.

The second interpretation (inconsistent with the purpose of the *Act*) is that the motion only needs to state as the subject of discussion one of the items listed under K.S.A. 75-4319(b). This leaves *justification* completely undefined. Thus a legally-adequate motion to enter a closed session might be the following:

> <specified person> made a motion that the Board enter an executive session to meet with the Board's attorney to discuss privileged matters. The justification for the executive session is to maintain the confidentiality attorney-client communications. The open meeting is to resume in this room at <specified time>.

or, if the group can't afford an attorney or the attorney is not available,

> <specified person> made a motion that the Board enter an executive session to discuss personnel matters. The justification for the executive session is to maintain the confidentiality of personnel matters. The open meeting is to resume in this room at <specified time>.

Note that these motions can be used by groups to do business in complete secrecy. No useful information is provided to the public about the subject(s) being discussed in the closed session or the issue(s) that prompted the group to close the session. This is the interpretation of the *Open Meetings Act* used by the boards and commissions noted above to do business in complete secrecy in Douglas County.

Although the intent of the 1972 Kansas Legislature seems to have been specified in K.S.A. 75-4317 (to have an "informed electorate"), we cannot be sure that the Legislature did not intend have an open meetings act that would allow governmental bodies to do business in secrecy while promoting the impression that the Legislature favored open government. In any case, the *Open Meetings Act*, as it stands, is a legislative Trojan horse, and the County and City Commissions, the Health Board and the Hospital Board regularly have taken advantage of its ambiguity, with

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[18] *Jones v. the City of Lawrence* is fictitious.

the full support of their attorneys, to do business in secrecy.

Opinions Supporting the First Interpretation

All of the opinions of the Kansas Attorneys General that consider this issue, and all of the court opinions except one (see below) support the first interpretation (consistent with the purpose of the *Act*).

Attorney General Opinions 86-33 and 91-78 state that a public body adjourning to closed session must do more than cite the justification for closing the meeting. Not mentioning the subject matter "would render a portion of the statute meaningless, a result which in construing statutes is to be avoided."[19]

The subject must be stated with "a reasonable degree of specificity," so as to make the subject clear to members of the public,[20] The *Open Meetings Act* does not require the motion to be so detailed that it negates the usefulness of having a closed session. For example, it is not necessary to disclose the results of a performance review of a non-elected employee, or reports mandated to be confidential under the risk management and peer review laws, or individual patient protected health information, or another subject closed by statute.[21]

Statutory Construction

To determine the meaning of the word "subjects" in K.S.A. 75-4319(a)(2), we can apply a set of traditional rules that are commonly used to determine the meaning of laws. These are called *rules of statutory construction*.[22]

The first rule is the plain meaning rule which holds that absent contrary definitions within the statute, words should be given their plain meanings. "Absent an indication to the contrary, words in a statue are assumed to bear their ordinary, contemporary common meanings."[23] The plain meaning of "the subjects to be discussed" is "the topics to be discussed." In the Board's discussions, typical subjects (topics) might be for example,

Johnson v. Lawrence Memorial Hospital[24]

or

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[19] Attorney General Opinion 86-33, citing *American Fidelity Insurance Co. v. Employers Mutual Casualty Co.*, 3 Kan.App.2d 245 (1979) and Opinion 91-78.

[20] Attorney General Opinion 86-33.

[21] Attorney General Opinions No. 86-33, 89-42 and 08-22.

[22] There are many rules of statutory construction. Only the three rules which are most relevant and significant to this discussion are cited here. See also Singer, N.J.: *Statutes and Statutory Construction*, multiple volumes, 6th edition, 2002 revision, The West Group, 2002.

[23] 73 *Am. Jur.* 2d Statutes §115

[24] *Johnson v. Lawrence Memorial Hospital* is fictitious.

"an incident in which a patient alleges injury due to negligence."

Since the legislature did not limit the use of the word "subjects" in K.S.A. 75-4319(a)(2) to the list under K.S.A. 75-4319(b), we are not entitled to make that limitation and therefore "subjects" should be given its plain meaning: topics.

The second rule is the mischief rule which holds that the meaning given to statutes should be consistent with eliminating the defect ("mischief") which the legislature intended to eliminate in passing the statute. The stated intent of the *Open Meetings Act* is to have "an informed electorate" and the "mischief" which the *Act* is intended to eliminate is the operation of boards and commissions in secrecy, at the expense of the electorate.

The Kansas *Open Meetings Act*, K.S.A. 75-4317 et seq. was enacted for the public benefit and is therefore construed broadly in favor of the public to give effect to its specific purpose and we must give effect to the entire statute if it is reasonably possible to do so.[25]

Since the motions of the boards and commissions discussed above have allowed those groups to conduct business in secrecy, without stating so much as the topics of discussion, they are contrary to the stated intent of the *Open Meetings Act* and have allowed those boards and commissions to engage in the "mischief" which the *Act* was intended to eliminate.

The third rule holds that the words of a statute should be interpreted so as to avoid absurd or unreasonable results. To state that the subject of its closed meetings is one of the items in K.S.A. 75-4319(b) and the justification for closing its meetings is the same is to assume that the legislature intended that the single subject/justification be stated twice. Such an assumption makes no sense at all. "The justification should be more than a reiteration of the subject"[26] and "A contrary reading (i.e. that no mention of the subject matter is needed) would render a portion of the statute meaningless, a result which in construing statutes is to be avoided."[27]

All three rules of statutory construction lead to a conclusion that a group entering a closed session should state the topics to be discussed and with a "reasonable degree of specificity"[28] so that a member of the public can identify and understand the issues that prompted the board or commission to enter the closed session.

State of Kansas v. United School District No. 305

The attorneys for the Health Board and the Hospital Board have cited *State of Kansas v. United School District No. 305, Saline County*, 13 Kan.App.2d 117, 121 (1988) to justify their position.

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[25] *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4, 646 P.2d 1091 (1982)

[26] Attorney General Opinion 91-78, July 15, 1991

[27] Attorney General Opinion 86-33, March 7, 1986 citing *American Fidelity Insurance Co. v. Employers Mutual Casualty Co.*, 3 Kan.App.2d 245 (1979)

[28] Attorney General Opinion 86-33

That decision was based on a Saline County District Court case[29] that, for the most part, was concerned with whether or not U.S.D. No. 305, after properly closing an open meeting to consider whether or not four employees had mishandled bids for asbestos removal, had gone beyond the proper scope of the closed session by going on to select a committee for further investigation of the matter in the closed session. District Court Judge Carl B. Anderson, Jr. found that, in this particular case, committee selection was proper because it was impractical to separate it from the details of the employee evaluation. Most of the case was concerned with the scope of School Board's discussion. At the end of his opinion, Judge Anderson took up the question of the adequacy of the School Board's motion to enter a closed session. In doing so, he failed to consider the possible interpretations of *subject* in K.S.A. 75-4319(a)(2) of the *Open Meetings Act* (or even that more than his one interpretation was possible) and assumed that *subjects* in K.S.A. 75-4319(a)(2) was the same as *subjects* in K.S.A. 75-4319(b). In adopting Judge Anderson's interpretation, the Appeals Court gave no additional thought to the possible meanings of *subject*, stating "Little need be said about this issue."[30] It was sloppy work on the part of both Judge Anderson and the Appeals Court. Nevertheless, those decisions have been used to justify closing meetings without providing significant information about the subject(s) to be discussed.

Special Concern: The Content of Meetings Closed for Privileged Communication with an Attorney

Meetings may be closed for consultation with a board's attorney, as specified by K.S.A. 75-4319(b)(2), but the attorney must be present during the closed session[31] and the session limited to privileged communications as defined by K.S.A. 60-426.

With boards and commissions in Douglas County routinely closing sessions for consultation with an attorney, I have a special concern that consultation with an attorney for the agency, as specified by K.S.A. 75-4319(b)(2) applies only to communications between the attorney and Board members. These include board members giving the attorney information and asking him or her questions and the attorney providing advice and perhaps asking additional questions. They do not include discussion among Board members, except for the specific purpose of obtaining legal advice. To allow discussion of any subject among Board members merely because an attorney is present is contrary to the purpose of the *Open Meetings Act*. Consider the Court's findings in *Hinsdale v. City of Liberal Kansas*[32]

> The mere attendance of an attorney at a meeting does not render everything done or said at that meeting privileged. For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal

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[29] *State of Kansas vs. Board of Education of Unified School District No. 305, et al.* Saline County District Court, Case No. 87 C-169.

[30] *State of Kansas v. United School District No. 305, Saline County*, 13 Kan.App.2d 117, 121 (1988)

[31] Attorney General Opinion No. 78-303, September 28, 1978.

[32] *Daniel D. Hinsdale v. City of Liberal Kansas*, 961 F.Supp. 1490 (1997)

> services. … The party seeking to assert the privilege must show that the particular communication was part of a request for advice or part of the advice, and that the communication was intended to be and was kept confidential. … The mere fact that a closed meeting was held does not automatically render all conversations in the closed session protected by the attorney-client privilege. … the privilege does not protect discussions *among* commission members or the opinions, impressions, and conclusions of commission members based on events occurring during the closed session. [italics added]

With members of the public unable to attend closed sessions, the attorneys for boards and commissions have a special ethical obligation to inform their board and commission members of the distinction between privileged communications and those that are not privileged and to avoid non-privileged communications in sessions closed under K.S.A. 75-4319(b)(2). Board members are still allowed to discuss other subjects specified by the *Act* under K.S.A. 75-4319(b), such as the evaluation of an employee's performance, as long as those subjects and the justifications are specified in the motion closing the meeting.

On July 23, 2013, I sent attorneys Andrew Ramirez (for the Hospital), Evan Ice (for the County), John Bullock (for the Health Board), and Toni Wheeler (for the City) a letter asking their opinions as to whether or not there were any limitations on the discussions board and commission members could have in sessions closed for consultation with their attorney. On July 26, 2013, I was informed that the Hospital could not afford to have Mr. Ramirez respond to questions about open meetings.[33] Mr. Ice responded on August 15, 2013 and Mr. Bullock responded on August 20, 2013 with a near-copy of Mr. Ice's letter. Neither acknowledged the limitations noted in the *Hinsdale* case. Ms. Wheeler has not responded.

Special Concern: Subjects Not Separable from Subjects that may be Discussed in Closed Sessions

Appropriately, the Court has acknowledged that a subject not listed in K.S.A. 75-4319(b) may discussed in a closed session when it would be impractical to separate that subject from another subject that may properly discussed in a closed session.[29, 30] This does not give boards and commissions permission to discuss all manner of seemingly "related" subjects in closed sessions. With the public not able to attend closed sessions, the attorneys for boards and commissions have a special ethical obligation to assure that this abuse does not occur.

Special Concern: Meetings Closed for the Discussion of Personnel Matters

The personnel exemption (K.S.A. 75-4319(b)(1)), used by the Health Board on frequent occasions, and by other boards, allows the discussion of "personnel matters of nonelected personnel" in closed sessions. According to Attorney General Opinion 86-33, "the sole purpose for the per-

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[33] For 2012, the Hospital's net operating revenue was $175 million.

sonnel exception is to protect individual privacy." According to Attorney General opinion 87-10, the purpose of K.S.A. 75-4319(b)(1) is to "protect the privacy of employees; saving personal reputations and encouraging qualified to select and remain in the employ of government." [underlining present in the original] It does not include discussion of other "personnel matters." Among the other subjects that may NOT be discussed in closed meetings are

> (1) personnel policy[34]
> (2) personnel reorganization, the addition or elimination of job functions or positions, etc.[35]
> (3) any other personnel matter which is not specified by the *Act* (narrowly construed), such as discussion of lawsuits in which a group is a named defendant.

Special Concern: The Presence of Persons who are not Board members in Closed Sessions

Under the *Open Meetings Act*, a public body may permit individuals to attend to provide information or to participate in deliberations, but it does not permit individuals to attend as observers while excluding the public generally.[36] The presence of such observers makes the meeting a "public" meeting subject to the *Act*. Their presence at a meeting closed for privileged communication with the group's attorney(s) makes the communication no longer privileged. The inclusion of diverse persons in closed sessions of the Hospital Board is of special concern there.

Special Concern: Binding Action in Closed Sessions

Binding action was taken by the Health Board in closed sessions on March 16, 2009 and March 22, 2010 possibly on February 21, 2011 and March 19, 2012. We can only guess how much binding action may have been taken by other groups at other times in secrecy. Such action is not permitted by the *Open Meetings Act* and carefully needs to be avoided.[37]

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[34] Attorney General Opinion No. 09-21, September 23, 2009.

[35] Attorney General Opinion No. 88-25, February 24, 1988.

[36] Attorney General Opinion 82-176

[37] K.S.A. 75-4319(c); See also Attorney General Opinion No. 1991-31. Reaching a consensus in closed session is permitted. [*O'Hair v. U.S.D. No. 300*, 15 Kan.App.2d 52 (1991)]. A "consensus," however, may constitute binding action and violate the *Open Meetings Act* if a body fails to follow up with a formal open vote on a decision which would normally require a vote. [*City of Topeka v. Watertower Place Development Group*, 265 Kan. 148 (1998)]