

*Statement for the Committee on the Judiciary
in support of Senate Bill No. 360
Amending the Kansas Open Meetings Act*

Alan L. Cowles, M.D., Ph.D.

February 2, 2016

Chairman King, Vice-Chair Smith, Ranking Member Haley and Members of the Committee:

Thank you for this opportunity to testify in support of Senate Bill No. 360, amending the *Kansas Open Meetings Act*.

As you know, the *Kansas Open Meetings Act* [K.S.A. 75-4317 et seq.] 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 purpose of this requirement is to enable Kansas citizens to know enough about what their elected officials are doing so that they may respond appropriately.

To serve its purpose, the required motion needs to give citizens *meaningful* information about the subjects being discussed. Meaningful information is information that would allow a member of the public to identify the issue or issues that are to be discussed in the closed meeting.

Unfortunately, the current *Kansas Open Meetings Act* does not define *subject* or *justification* clearly, and this and a 1987 court case¹ in which the purpose of the *Open Meetings Act* was ignored, have led many governmental bodies to provide, as subjects to be discussed, phrases such as “personnel matters”² or “privileged information,” thereby leaving the public without any clue as to what is really being discussed.

In 2012, I became aware of a \$750,000 lawsuit, filed by a former city-county employee, with the Lawrence-Douglas County Health Board, the Douglas County Commission and the

¹ *State of Kansas vs. Board of Education of Unified School District No. 305, et al.* Saline County District Court, Case No. 87 C-169, November 17, 1987. See also *State of Kansas v. United School District No. 305, Saline County*, 13 Kan.App.2d 117, 121 (1988).

² Almost anything any branch of government in Kansas engages in is, to some extent, a “personnel matter, thereby making “personnel matter” essentially meaningless.

Lawrence City Commission named as defendants. For almost a year and a half, these groups successfully hid their discussions by holding executive sessions to discuss “personnel matters” or “privileged matters” or equivalents. The incident led me to study the practice of closing meetings, first in Douglas County and then for the State of Kansas as a whole.

Last year, I studied the minutes of the governing bodies of the 10 most populous counties and the 10 most populous cities of Kansas for calendar year 2014,³ giving the benefit of the doubt in questionable cases to the counties and cities. The study revealed that 631 closed sessions were held for a total of at least 240 hours. 95% of the governing bodies closed meetings at times without disclosing *any* meaningful information about the subjects they were to discuss. In doing this, they conducted at least 200 hours of governmental business in complete secrecy. The subjects to be discussed during closed sessions were most commonly described vaguely as “personnel matters” or an equivalent or “privileged communications.” In 88% of closed sessions and for 83% of closed session time, governmental business was conducted in secrecy.

During 2014 the amount of business conducted in secrecy varied widely, with governmental bodies conducting as much as 41 hours of business in secrecy. On the other hand, the Manhattan City Commission showed that it didn’t have to conduct any governmental business in secrecy during 2014. We should note that the City of Manhattan survived very well.

By conducting a substantial portion of their business in complete secrecy, 95% of the governmental bodies 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.

Motions to close meetings have become a meaningless ritual that give the public no chance to know what business is being conducted. Prior to the enactment of the *Open Meetings Act*, governmental bodies conducted governmental business in complete 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.

³ The full report, *Governmental Business in Secrecy in Kansas*, is available at www.KansasOpenMeetings.org.

Elected officials should remember that they are, at all times, responsible to the citizens. The *Kansas Open Meetings Act* should be amended so that elected officials can be held accountable. The *Act* should require that when closing an open meeting, a governmental body state the specific subjects to be discussed in sufficient detail to allow members of the public to identify the specific issues that the governing body intends to discuss in the closed session. This can be done easily while protecting the interests of the governmental entities involved. Eliminating governmental business in secrecy is not a partisan matter because all citizens are currently being denied their right to know and respond appropriately to the actions of their elected officials

Members of the Committee, the principle that governments are created for the benefit of the people is one of the most basic of American principles, going back more than 200 years to the very origins of our country. We see the principle expressed in the *Declaration of Independence*, the *Gettysburg Address* and countless other American documents. If governments are going to function for the benefit of the people, the people have to know enough of what their elected officials are doing to respond appropriately to their actions.

The changes in the Amendment (S.B. 360) are aimed at correcting the unfortunate wording of the current *Act* so that governmental bodies going into executive session will have to give the public enough information about the subjects to be discussed to enable citizens to know about the actions of their elected officials and to respond appropriately. I recommend you support Senate Bill No. 360.

Before closing, I would like to address a few important details:

1. While studying the minutes of cities and counties, I found that many were struggling to come up with motions to close meetings and that they often left out the time and place at which the open meeting was to resume. The cities and counties can be helped by giving them examples of motions they can use in closing meetings. You have example in the form of a one-page document entitled *Recommended Practices - An Example*. Note that a common liability concern is addressed in the discussion. The publication of recommended practices can make compliance with the *Open Meetings Act* much easier for governmental bodies.
2. I have a concern about closing meetings to discuss privileged communications, as seen in K.S.A. 75-4319(b)(2). Since *some* legal issue can be imagined for any subject of discussion, there may be a temptation to close

discussions about any subject by simply by citing K.S.A. 75-4319(b)(2) and including a lawyer in the discussion. I suggest the following wording:

(2) to maintain the confidentiality of privileged communications with an attorney for the public body or agency participating in the closed or executive meeting regarding a legal action involving the body or agency;

and would appreciate your suggestions as to how to avoid this problem.

3. Some states require the persons participating in a closed meeting to sign an affidavit stating that only the subjects disclosed in the motion closing the meeting were discussed. This reminds the participants that compliance with the *Open Meetings Act* is important. I recommend it.

4. Some states make recordings of closed sessions. The recordings are filed with the District Courts, and can be reviewed if a question arises about the closed meeting. I do not recommend this without additional study.

Members of the Committee, this year marks the 50th anniversary of a landmark piece of legislation designed to make government more open and responsive to the people, the federal *Freedom of Information Act*. We all appreciate the many times that legislation has enabled us to know more about the operations of our federal government. For Kansans, there may be no better gift in this 50th anniversary year than to improve the Kansas *Open Meetings Act*, so that its basic principle, “*that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public*” can be carried out.

Thank you.

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RECOMMENDED PRACTICES — AN EXAMPLE

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Recommended practices for closing meetings can help groups to close meetings without doing governmental business in secrecy. Recommended templates (forms) for motions closing meetings can enable governmental entities to comply with the provisions of the Kansas *Open Meetings Act* with ease. Here is an example, using the *Open Meetings Act* currently in effect:

The Personnel Exemption (K.S.A. 75-4319(b)(1))

The personnel exemption (K.S.A. 75-4319(b)(1)) allows the discussion of “personnel matters of nonelected personnel” in closed sessions. The purpose of the “personnel matters” exception to the Kansas *Open Meetings Act* is to protect the privacy of employees, save personal reputations and encourage qualified people to select and remain the employ of government.”^{1,2,3} Although there is no requirement in the *Open Meetings Act* that the discussion of an employee’s actions or performance be carried out in a closed session, common expectations of privacy should be considered carefully before discussing an employee’s performance in an open meeting.

The personnel exemption does not include discussion of other “personnel matters.” Among the other subjects that may NOT be discussed in closed meetings are

- personnel policy⁴
- personnel reorganization,⁵
- the addition or elimination of job functions or positions, etc.,⁴³
- salaries and benefits applying to job categories, except that negotiations with labor organizations may be discussed in closed sessions under K.S.A. 75-4319(b)(3)⁶
- any other personnel matter which is not specified by the Act, narrowly construed.

¹ Stephan, Robert T. Attorney General Opinion No. 86-33, March 7, 1986

² Smoot & Clothier, 20 *Washburn Law Journal* 241-288, page 275 (1981)

³ Stephan, Robert T.: Attorney General Opinion 87-10, November 23, 1987

⁴ Six, Steve and Smith, M.J.: Attorney General Opinion No. 09-21, September 23, 2009.

⁵ Stephan, Robert T.: Attorney General Opinion No. 88-25, February 24, 1988.

⁶ Stephan, Robert T.: Attorney General Opinion 81-39, February 10, 1981

RECOMMENDED PRACTICES — EXAMPLE, continued:

Motions Closing Meetings to Discuss Personnel Matters

A motion closing a meeting under the personnel exemption (K.S.A. 75-4319(b)(1)) should provide sufficient information about the subject(s) of the proposed discussion to enable members of the public to identify the issue(s) that prompt the governing body to close the meeting. For example,

I move that the Commission 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 matters as allowed by K.S.A. 75-4319(b)(1). The open meeting is to resume in this room at <specified time>.

Specific subjects (above) might be "the use of City credit cards" or the "the use of City automobiles" or "racial discrimination."

The governmental body using this form need not be concerned about incurring liability with such a motion because three essential elements of libel or slander are missing. No individual is identified. No statement is made indicating that any individual did something wrong. And nothing untrue is said.

Motions closing meetings for a required periodic evaluation of the employee may disclose the identity of the individual being evaluated. For example,

I move that the Commission enter an executive session for the <specified position holder's> annual evaluation. The justification for the executive session is to protect the privacy of the <specified position holder's> personnel records. The open meeting is to resume in this room at <specified time>.

If, for example, specified position holder is the City Manager, the motion would say, "for the City Manager's annual evaluation." Although the identity of the person in the specified position may be determined easily, the motion is acceptable because it implies nothing positive or negative about the person's actual performance. Since the motion reassures the public that the governing body is fulfilling a periodic obligation, this form is preferred over a motion stating only that the governing body is to discuss "an employee's performance."

Alan L. Cowles, M.D., Ph.D.
Lawrence, Kansas 785-331-2334