

OFFICE OF DISTRICT ATTORNEY  
STEPHEN M. HOWE, DISTRICT ATTORNEY

January 10, 2012

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Gardner City Attorney  
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City of Gardner Mayor  
238 Grand St.  
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Kristy Harrison  
Gardner City Council President  
740 Valerie Lane  
Gardner, KS 66030

Brian Broxterman  
Gardner City Council Vice President  
745 S. Elm St.  
Gardner, KS 66030

Larry Fotovich  
Gardner City Councilmember  
29504 W. 184<sup>th</sup> St.  
Gardner, KS 66030

Chris Morrow  
Gardner City Councilmember  
420 N. Cherry St.  
Gardner, KS 66030

Re: Kansas Open Meetings Act (KOMA); K.S.A. 75-4320b

Dear Mayor Drovetta and Gardner City Council Members:

The Legislature has authorized the District Attorney to investigate alleged violations of the Kansas Open Meetings Act (KOMA); K.S.A. 75-4320b. My office recently investigated whether your

fellow members of the Gardner City Council had violated the Kansas Open Meetings Act on two occasions: 1) through serial e-mails on June 10, 2011; and 2) at a work session on July 14, 2011. The investigation has been completed.

In August 2011, the District Attorney's Office received a complaint regarding Mayor Drovetta's use of email for interactive communications with each of the five city council members regarding city business.

Copies of emails sent to and from the Mayor and City Council Members were obtained from the City Clerk. These records indicate that Mayor Drovetta sent an email to each Council Member on 06/10/11 that contained the following language:

I'm writing each of you individually; please respond as soon as practical.

There is a candidate very interested in the position but is currently compensated at a higher rate. The candidate would be willing to make a lateral move because of the opportunity for growth in Gardner. The candidate does not wish to apply if there is no willingness on the part of the Council to consider.

This candidate is very experienced and a long way from retirement.

The annual salary bump would be \$10K above our max of \$110K. We currently offer 5K in deferred compensation although that was placed on hold due to budget concerns. The candidate currently receives \$10K in deferred compensation.

The question I need answered is would you consider exceeding our maximum if this candidate turned out to be "the right fit" for our needs?

The email records and interviews of the Mayor and each Council Member indicate Mr. Drovetta received email responses from every Council Member except Dennis Pugh. Two of the responses included additional interaction between the Council Member and the Mayor regarding the subject of the email.

In July 2011, the District Attorney's Office received two complaints alleging that the Mayor and the Gardner City Council violated the Kansas Open Meetings Act during a council meeting on 07/14/11. An investigation revealed the Mayor and City Council convened an open meeting on that date and went into executive session to discuss a propose salary range increase for some city positions held by non-elected personnel. This was done even after Councilman Fotovich alerted council members of the potential of violating the Kansas Open Meetings Act. Council members had been provided with the results of a survey indicating that the pay ranges for some positions were significantly below the average salaries of similar positions in other local cities. During this executive session, the Mayor and Council Members discussed overall pay increases for these positions.

As you know, it is the policy of this State that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public. K.S.A. 75-4317. Further, serial

communications between a majority of the membership of a public body, the purpose of which is to discuss a common topic of business or affairs of that body by the members, constitutes a meeting. Such communications may occur through calling trees, e-mail or an agent of the body. See Attorney General Opinions 98-26; 98-49; K.S.A. 75-4317a.

Concerning the serial e-mail issue; in my opinion, a mayor and/or a city council member can notify other city council members of an agenda item. This can be done through the use of electronic mail. But a mayor and/or a city council member should not send an e-mail to a majority of the membership with a request that they indicate their prospective vote on an issue. This would constitute a meeting that would violate the Kansas Open Meetings Act. If a meeting has occurred, then KOMA has been violated. "All that remains is for them to walk into the next meeting and vote. The public will never know why the members voted the way they did, and the purpose of the KOMA is defeated. We believe this violates both the spirit and letter of the KOMA since the public was excluded." Attorney General Opinion 98-49. I concur with the Attorney General's Opinion on this issue.

As to the executive session issue; there are 16 subjects that may be discussed in a closed or **executive session**. These are set forth in K.S.A. 75-4316(b). Discussion during the closed or executive meeting shall be limited to the subject(s) stated in the motion to recess for an executive meeting. K.S.A. 75-4319(a). In my opinion, this means you cannot discuss overall pay increases for certain positions in an executive session that is convened to discuss non-elected personnel. This violates the Kansas Open Meetings Act.

Please remember that any mayor and/or city council member who knowingly violates any provision of the Kansas Open Meetings Act shall be liable for the payment of a civil penalty in an action brought by the District Attorney in a sum not to exceed \$500 for each violation. K.S.A. 75-4320(a).

In both instances, these were violations of the Kansas Open Meetings Act and you should refrain from this type of conduct.

I am not filing an action alleging these violations of the Kansas Open Meetings Act at this time. The reason for this is that after the investigations began, the Kansas Attorney General's Office conducted training on KOMA and the Kansas Open Records Act for you and your fellow members of the Gardner City Council. However, should future violations occur, I will reconsider this decision.

Respectfully,



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