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VIA EMAIL AND U.S. MAIL

Counsel:

This letter is to advise you of the results of this office's investigation of a complaint of violations of the Kansas Open Meetings Act (KOMA) made by *The Wichita Eagle* (Eagle) against the Board of Education of Unified School District 259 (Board). Mr. Kautsch's letter of February 21, 2017 to this office conveying the complaint stated that it related to (1) a motion made by the Board on February 13 to go into executive session and reconvening the open meeting on February 21, and (2) a meeting the Board reportedly had on February 18, made without notice to parties requesting notice. The *Eagle* later supplemented its complaint to include the vote by the Board to appoint a new superintendent during the meeting on February 21.

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Specifically, the complaints are (1) "The Board's February 13 motion violated KOMA because the 8-day executive session did not occur during a recess"; (2) "The Board's meeting on Saturday, February 18 violated KOMA because requesters of notice were not notified of the meeting"; and (3) the vote to appoint a new superintendent on February 21 was a binding action at a meeting that was not in substantial compliance with KOMA and therefore voidable under K.S.A. 75 – 4320 (a).

During the investigation, all Board members were interviewed regarding the meetings at issue here by the District Attorney's Deputy Chief of Investigations, Clint Snyder. Mr. Snyder also interviewed Clerk of the Board Mike Willome and Superintendent John Allison. Mr. Tretbar provided a written response to the Eagle's complaint on behalf of the Board. Mr. Powell provided some additional information. This office has reviewed documents related to the meetings that are the subject of the complaints and relevant legal authorities.

The investigation established the following. A regular meeting of the Board was held on February 13, 2017. The minutes of that meeting reflect the following:

"At approximately 8:15 p.m., Ms. Fuller (Mr. Davis) moved the Board of Education recess forthwith into Executive Session regarding a personnel matter of non-elected personnel under authority of K.S.A. 75- 4319 (b) (1), and that the meeting will resume in Room 307 of the Alvin E. Morris Administrative Center, 201 N. Water, Wichita, Kansas at 12 p.m. on February 21, 2017. The Clerk of the Board is directed to furnish notice of the date, time, and place of when and where the meeting will resume in compliance with K.S.A. 75-4519 (b).

The motion passed 7-0."

All those interviewed regarding this motion agree that the minutes correctly reflect the entire content of the oral motion. The Board then went into executive session, but no further business was conducted that evening.

The agenda for the February 13 meeting and the Board meeting guide (a summary version of the agenda) also advised the readers to "See Attorney General Opinion No. 96-14 (1996) for authority to recess into executive session on one day and return from recess on a subsequent date."

Mr. Willome subsequently complied with the Board's directive to provide notification. On February 15, 2017, he sent an e-mail notification to individuals who had previously requested notification of meeting dates, times, and locations, informing them of the public meeting to be reconvened from executive session on February 21, 2017 at noon in Room 307 of the Alvin E Morris Administrative Center, 201 N. Water, Wichita, Kansas. The notice also referenced a board meeting scheduled for February 27, 2017 at North High School.

On Saturday, February 18, 2017 the Board met in the offices of Fleeson Gooing Coulson & Kitch at approximately 1:00 p.m. All seven board members were in attendance. The purpose of the meeting was to interview two candidates for the superintendent's position that would open in July due to Superintendent Allison's resignation. Shannon Krysl, Chief Human Resources Officer, was also present to assist candidates and the Board. Only Board members participated in the interviews. The board members report that no additional business was conducted and no votes were taken. No other board meetings occurred between the time the Board went into executive session on February 13 and the time it met on the afternoon of February 18. The Board next met at its noon meeting on February 21.

All Board members expressed that their primary goal in meeting to interview candidates on February 18 was to protect the candidates' privacy interests. While convenience of the meeting time and location was also noted by some as a reason for the Saturday meeting, members stressed that their primary purpose in meeting when and where they did was to protect the candidates' personal privacy.

The Board members all stated that in entering an 8-day executive session, they relied on advice they had received from their legal counsel, Mr. Powell and Mr. Tretbar. Several expressed familiarity with Kan. Atty. Gen. Op. No. 96-14, which was noted on the agenda and meeting guide as legal authority for recessing into an executive session on one day and returning to an open meeting on a subsequent day.

On Tuesday, February 21, 2017- the first workday following the President's Day holiday - the Board met again at the school district's administrative center at approximately noon. A motion was made to appoint Alicia Thompson as the new superintendent beginning July 1, 2017 pending the negotiation of an employment contract to be considered by the Board at its next scheduled meeting. The motion was approved by all six of the members in attendance. The meeting adjourned at approximately 12:20 p.m.

At its regularly scheduled meeting at North High School on Monday, February 27, 2017 the Board voted unanimously to approve an employment contract that had been negotiated with Dr. Thompson.

The Opposing Positions

The Eagle contends that the Board violated KOMA when it went into executive session on February 13. In essence, the Eagle maintains that the "recess" taken by the Board was a de facto "adjournment," or alternatively, an executive session that was unlawful in duration. Therefore, the purported "executive session" held on February 18 was a new meeting for which notice was not given contrary to the provisions of K.S.A. 75 – 4318 (b). Additionally, since the decision to hire Dr. Thompson directly stemmed from activities conducted at that unlawfully convened meeting, that decision was a binding action that would be voidable under K.S.A. 75 – 4320 (a), even though the actual vote to approve a written contract was taken at a regularly scheduled open meeting otherwise in full compliance with the law.

The Board asserts that it did not violate KOMA through any of its actions discussed herein. It cites Kan. Atty. Gen. Op. No. 96-14 as its primary authority for the proposition that the Board can recess into executive session on one day and reconvene on a subsequent day. It is the multi-day meeting break that is the main bone of contention here. The Eagle also relies on this opinion to support its position, suggesting that the Board's reliance on the opinion is misplaced given the opinion's rationale.

The parties appear to be in agreement about two matters. The first is that meetings of the Board are subject to KOMA. The second is the proposition that a candidate for employment can be lawfully interviewed by the Board in a properly convened executive session. K.S.A. 75 – 4319(b)(1) specifically allows executive session discussion of “personnel matters of nonelected personnel.” Kan. Atty. Gen. Op. No. 96-61 construed this statutory provision in light of a companion provision in the Kansas Open Records Act that allowed discretionary withholding of personnel records pertaining to employees or applicants for employment. The opinion stated, “Because the privacy interest is the same, a public body may go into executive session... to interview, discuss, and consider applicants or prospective employees of that body in order to protect that prospective employee's privacy interest.”

Legal Authorities and Discussion

KOMA was enacted to help ensure openness and accountability in government. K.S.A. 75-4317 states, in pertinent part:

- (a) 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 in the transaction of governmental business be open to the public.
- (b) it is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as announced in subsection (a).

However, when enacting KOMA, the Legislature recognized that there were limited instances where governmental business could properly be done outside the view of the public. That recognition is shown in K.S.A. 75-4319, which allows a governmental body to go into executive or closed sessions to discuss 16 discrete subjects. K.S.A. 75-4319 (a) provides:

Upon formal motion made, seconded and carried, all public 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: (1) The justification for closing the meeting; (2) the subjects to be discussed during the closed or executive meeting; and (3) the time and place at

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which the open meeting shall resume. Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as part of the permanent records of the public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.

Under the facts here, there are 2 primary questions to be addressed:

1. Did the 8-day executive session from February 13 through February 21 violate KOMA because it did not occur during a "recess" or because no notice was given of the February 18 candidate interview meeting?
2. Did the action of going into executive session on February 13 violate KOMA in another manner?

As to the first question, there are no definitions of the terms "recess," "adjourn," or "adjournment" in the KOMA statutes. There are no definitions of those terms contained in case law interpreting KOMA. The sole Kansas authority attempting to define those terms that is acknowledged by the parties is Kan. Atty. Gen. Op. No. 96-14. While that opinion is not completely on point here, its analysis and conclusions have some relevance to the resolution of the first question.

The opinion dealt with two questions: (1) Whether a city governing body could recess rather than adjourn a meeting for a long period of time, at least to another day, and (2) if so, must notice of the date, time and place of the resumed meeting be given? After a short discussion of statutes allowing city governing bodies to both adjourn and recess - without a clear legal distinction between the two concepts - the Attorney General answered the first question in the affirmative. The second question was given more attention, with the opinion concluding that notice must be given.

Of import is the opinion's discussion of various legal definitional distinctions between the terms "recess" and "adjournment" and the statutory differentiation made between the two in KOMA. The opinion noted that the terms were frequently used interchangeably, but also that recess has been construed to be a more temporary break in a meeting, whereas an adjournment is delaying the meeting to another time or place. But both of those concepts seem to recognize the continuity of one meeting, not the ending of one and the beginning of another. The opinion also notes the existence of K.S.A. 72-8205 that permits boards of education to specify that any regular meeting may be adjourned to another time and place. In fact, apparently because of this statutory authority, the Board has adopted a policy allowing for exactly that. *See* BOE policy 0200 (1)(a) <http://www.usd259.org/cms/lib010/KS01906405/Centricity/domain/622/boe%20policies/0200%20Board%20of%20Education%20Agendas%20and%20Meetings.pdf>.

Looking at the language in K.S.A. 75-4319(a) that allows a public body to "recess, but not adjourn" into executive session, having reviewed the conflicting definitions regarding recess

and adjournment, the Attorney General opined, "... it is our opinion that in the open meetings context the term recess is used to denote a short break in a meeting occurring on the same day (perhaps to allow members or attendees some time to do other things or relax) while the word adjourn is used when the body concludes the meeting or hearing for a given day. *Cf.* K.S.A. 75-4318 and 75-4319." Significantly, the opinion concludes "If there is no intent to subvert the KOMA, the meeting subject to that act may be **adjourned, recessed** or continued to another date, time or place. However, it is our opinion that any meeting, as that term is defined by K.S.A. 1995 Supp. 75-4317a, triggers the KOMA notice requirements." (Emphasis added.) Therefore, the opinion seems to discount the statutory distinction between recess and adjournment, giving primacy instead to the intent behind the temporal breaks. Without an intent to subvert KOMA, a recessed or adjourned meeting doesn't violate the law.

Although this opinion specifically dealt with city governing bodies, its reasoning would apply equally well to any public body that is lawfully authorized to recess or adjourn its meetings. Whether it is a correct interpretation of the law is a different matter. But it is the interpretation the Board relied on in meeting as it did and it is the one the Eagle cites in support of its position.

Looking at the facts here, we have not found sufficient evidence to support a finding that the Board, in meeting as it did between February 13 and February 21, intended to subvert KOMA. What the Board did behind closed doors on February 18 it was entitled to do behind closed doors, and no public notice was required. The fact that the executive session that began on February 13 did not conclude on that same date does not change the appropriateness of candidate interviews occurring in a closed session. If the purpose for the closed-door session was proper under the law, it is difficult to conclude that the Board intended to subvert KOMA or substantially undermine the protections it affords.

Given that there is insufficient evidence to show that the Board acted with improper intent, given the lack of statutory definitions of the terms "recess", "adjourn," and "adjournment," and given the lack of controlling case law addressing the issue of a multi-day executive session of a public body subject to KOMA, the session cannot clearly be said to violate KOMA by virtue of its 8-day length. This result does not suggest that an executive session of a more extended duration, for example 6 months, could not violate KOMA. Each case must be judged on its own facts, but a lengthier delay may well reflect an intent to subvert KOMA in a given situation.

Having concluded that there is an insufficient basis to find a KOMA violation based on the extended executive session, the Eagle's complaint about the vote to appoint Dr. Thompson on February 21 is moot. However, the question of whether the Board's actions on February 13 violated KOMA in another way should be addressed.

As noted earlier, K.S.A. 75-4319 (a) requires that the formal motion to recess into executive session contains 3 elements: "(1) The justification for closing the meeting; (2) the subjects to be discussed during the closed or executive meeting; and (3) the time and place at which the open meeting shall resume." The motion to go into the executive session that is at issue here contained a statement of the subject to be discussed and a statement of the

time and place when the meeting will resume. What it lacked, ironically, is a statement of justification for the session. If the board wanted to meet in executive session to protect the privacy interests of the candidates for the superintendent's position, they were required to say so. Having failed to do so, the Board violated KOMA. *See, State v. Board of Education of USD 305, Saline County*, 13 Kan. App. 2d 117, 764 P2D459 (1988), Kan. Atty. Gen. Op. No. 86-33, Kan. Atty. Gen. Op. No. 91-78.

A review of the minutes of all board meetings held in 2017 to date reveal the same deficiency in every other motion to recess into executive session. Not a single justification statement has been given, though the other requirements have been met.

After informing Mr. Powell of our finding regarding this violation, this office received his assurance that steps will be taken to ensure this type of violation does not occur again. Mr. Powell confirmed that he will take steps to educate the Board regarding the justification statement requirement of KOMA and will work to change their procedures to ensure a justification statement is always given as part of a motion to recess into executive session.

Given that the Board relied on advice from legal counsel in moving into executive session as they did, and given that counsel for the district has agreed to take corrective measures immediately regarding justification statements, this office does not believe it necessary to take further, formal action under KOMA in regard to the violation.

Sincerely,

Ann Swegle
Deputy District Attorney
On behalf of District Attorney Marc Bennett
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