Approved: March 20, 2003
Date

MINUTES OF THE SENATE COMMITTEE ON ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairperson Barbara P. Allen at 1:30 p.m. on February 11, 2003 in Room 245-N of the Capitol.

All members were present except:

Committee staff present: Ken Wilke, Revisor of Statutes
Mike Heim, Legislative Research
Dennis Hodgins, Legislative Research
Nancy Kirkwood, Committee Secretary

Conferees appearing before the committee: Brad Bryant, Deputy Assistant Secretary of State
Senator Huelskamp

Others attending: see attached list

Mike Heim, Principal Analyst, passed out to committee an explanation of the Open Meetings Act per request of Chairperson Allen. The Chair had made the request at the hearing on January 30, 2003, regarding **SB 76 - concerning public meetings**. (Attachment 1).

Hearing on
SB 95 - Elections; names of political parties

Chairperson Allen opened the public hearing on **SB 95.** The Chair welcomed Brad Bryant to the committee as it was hearing three of the Secretary of State's bills today. Brad furnished testimony in support of **SB 95.** The bill has two provisions: (1) it removes unnecessary restrictions on the number of words in the names of parties, and (2) it repeals unconstitutional laws banning seditious political parties (Attachment 2).

Committee questions and discussion followed. There being no further conferees to come before the committee, the Chair closed the hearing on **SB 95.**

SB 101 - Elections; presidential primary

Brad Bryant presented testimony in support of **SB 101**. He stated although the Secretary of State's office had requested this bill, they do not favor its passage. Secretary of State favors holding the presidential primary, and encourage the legislature to appropriate funds for it. If the legislature chooses not to fund the primary, it would be better to enact **SB 101** in the 2003 session rather than wait until 2004 when some of the cost and effort in planning for the primary will already have occurred (Attachment 3).

The Chair made mention to committee the fiscal note had been passed out and the funding was not included in the Governor's budget.

After committee discussion and no others to testify on the bill, the Chair closed the hearing on **SB 101**.

SB 109 - Counties; county assumption of certain cemetery lands

Chairperson Allen opened the hearing on **SB 109**. Senator Huelskamp, recognized by the Chair, distributed written testimony from C. Edward Young, Administrator from Seward County from Southwest Kansas. **SB 109** came in reference to an issue that developed in Seward County. The township board was unable to take care of a cemetery and brought the transfer control or ownership to the county. At that time the county was open to taking care of it, however under the current statutes, the cemetery would have to set vacant for 5 years before the county could take on the management control of that cemetery (Attachment 4).

MINUTES OF THE SENATE COMMITTEE ON ELECTIONS AND LOCAL GOVERNMENT at on February 11, 2003 in Room 245-N of the Capitol.

The fiscal note passed out enactment of **SB 109** would have no fiscal effect on the state. There being no other conferees to testify on **SB 109**, the hearing was closed.

A motion by Senator Huelskamp to pass **SB 109** favorable and place on the consent calendar, seconded by Senator O'Connor. The motion carried.

SB 102 - Elections; counting of ballots

Chairperson Allen welcomed Brad Bryant back to committee and opened the hearing on **SB 102**

Brad presented testimony in support of **SB 102**. This bill was proposed by the Secretary of State as a ballot bill. (1) Sections 1 and 2 close a loophole in existing law that could allow a voter to cast two ballots, one before the election and one on election day, and have them both count. (2) Section 3 of the bill requires the counting of partial provisional ballots if a voter casts a ballot in the wrong precinct as long as it is in the same county (Attachment 5).

There being no others to testify on **SB 102**, the hearing was closed.

Senator O'Connor moved to pass **SB 95** out favorably, seconded by Senator Clark, motion carried.

The Chair brought the committee's attention to the meeting tomorrow, Wednesday, February 12, 2003. The committee will be hearing **SB 103 - Elections; recall procedures.** Chairperson Allen recognized Mike Heim, Legislative Research to give a brief overview of **SB 103** to the committee today. Tomorrow the committee will go straight to the hearing of **SB 103.**

Adjournment

The meeting adjourned at 2:30 p.m. The next meeting is scheduled for tomorrow, Wednesday, February 12, 2003.

SENATE
ELECTIONS AND LOCAL GOVERNMENT
GUEST LIST

Date Thurs Feb 11

Brad Bryant	Sec. of State
Twila Dripbread	DOB
Jesse Bonjon	SOS
Melissa Wangemann	Sec. of State

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February 10, 2003

To: Senate Elections and Local Government Committee

From: Mike Heim, Principal Analyst

Re: Overview of Kansas Open Meetings Act

Purpose and Nature of the Law

The Kansas Open Meetings Act was enacted in 1972. The law recognizes "that a representative government is dependent upon an informed electorate" and declares that the policy of the state to be one where "meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public." See KSA 75-4317. The Kansas Supreme Court has held from an early date that the open meetings act is entitled to a broad interpretation so that its public purpose be fully carried out and that the act is "remedial in nature" and therefore subject to broad constructions in order to carry out the stated legislative intent. Further the court said a strict construction of the act "flies in the face" of its purpose. See *State ex rel., Murray v. Palmgres*, 231 Kan. 524, 646 P.2d 1091 (1982).

Some of the general observations of commentators on this act reveal its purpose as well as its challenges for local government practitioners. One referred to this law as the "cornerstone of public access to state and local government in Kansas." See Smoot and Clothier *Open Meetings Profile: The Prosecutors View,* 20 Washburn L.J. 241, 242 (1981). Another described the law as providing "an important right of access to the meetings of public bodies" and "a policy directive to members of public bodies and to private citizens seeking admission to those bodies." See Tacha, *The Kansas Open Meetings Act: Sunshine on the Sunflower State*? 25 Kan. L. Rev. 169, 204 (1977). Another said the law served as ". . . a guarantor of access to government meetings. " See Harper, *The Kansas Open Meetings Act of 1972,* 43 J.B.A.K. 257 (1974). And yet another commentator said, "for a city attorney, few areas of the law provide greater opportunity for consent by silence and less opportunity for advance research than questions arising under the Kansas Open Meetings Act." See Bengston, *Kansas Open Meetings Act: An Update*, 5 Kan. Mun. Law Ann. 41 (1988). The latter quote could just as well apply to any attorney advising any local unit of government on questions regarding the application of the Kansas Open Meetings Act which will inevitably and will frequently arise.

Local Government and State Entities Subject to or Excused From KOMA

The act covers "...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..." See KSA 75-4318.

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Attachment 1

The act obviously covers meetings of the governing bodies of all cities, counties, townships and school districts as well as the numerous special district governments that exist under Kansas law. See, for example, *Stoldt v. City of Toronto,* 234 Kan. 957, 678 P.2d 153 (1984); *USD No. 407 v. Fisk,* 232 Kan. 820, 660 P.2d 533 (1983); *State, ex rel Stephan v. Board of Sedgwick County Comm'rs,* 244 Kan. 536, 770 P.2d 455 (1989). See also the following Attorney General opinions dealing with certain political subdivisions and the open meetings law including Op. Att'y Gen. 228 (1981) dealing with townships, Op. Att'y Gen. 97 (1988) dealing with Kansas rural water districts, Op. Att'y Gen. 92 (1989) dealing with Johnson County Water District No. 1, and Op. Att'y Gen. 69 (1990) dealing with levee districts.

Five-Part Test. Still the language used in KOMA describing the scope of its coverage is somewhat ambiguous when applied to entities other than the political subdivision itself. In *State, ex rel Murray v. Palmgren,* 231 Kan. 524, 534, 646 P.2d 1091 (1982), the court adopted a five part test articulated by Smoot and Clothier, 20 Washburn L.J. 241 at 256-7 (1981) as follows:

1. The group of people meeting together must be a "body or agency" within the meaning of the act.

2. The group must have legislative or administrative powers or at least be legislative or administrative in its method of conduct.

3. The body must be part of a governmental entity at the state or local level, whether it is the governing body or some subordinate group.

4. It must receive or expend public funds or be a subordinate group of a body subject to the act.

5. It must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed.

Subordinate Groups. Much of the focus regarding coverage of KOMA has been on which entities constitute subordinate groups of state or local units of government. In *Palmgren*, the court held that the board of trustees of the Thomas County Hospital was a "subordinate group" of the Thomas County Board of County Commissioners and therefore was subject to the act.

The *Palmgren* court further clarified the "public funds" terminology which was interpreted in Professor Tacha's article, 25 Kan. L. Rev. 169 (1977), as follows: "If the section were interpreted as it grammatically should be, so long as the parent state or local body meets the public funding test, all subordinate groups would automatically be covered by the act regardless of the degree or existence of public funding." 25 Kan. L. Rev. at 186, p. 535). The court reasoned that since the Thomas County Board of County Commissioners received and expended public funds and since the board of trustees of the Thomas County Hospital was a subordinate group thereof, the latter entity was subject to KOMA. See also Op. Att'y Gen. 112 (1995) which reasoned that if a committee of a recreation commission contains a majority of a quorum of the commission then the meeting of the committee is subject to KOMA.

Lessee of Public Hospital Excluded. The KOMA, however, was held not to apply to a not-for-profit corporation which leased a public owned hospital in *Memorial Hospital Association, Inc. v. Knutson,* 239 Kan. 663, 722 P.2d 1093 (1986). The court cited with approval the *Palmgren* five-part test but arguably ignored the test. The court noted that other courts have found two types of entities which are not subject to open meetings laws: (1) those which have no decision-making authority and are merely advisory; and (2) those independent agencies which have some connection by contract or other tie but are not actually created by some form of government action. The court agreed with the district court reasoning that the legislative history of KSA 19-4611 reflected a legislative intent that the lessee of the county hospital property would not be subject to KOMA. (p. 671). The court noted that the board of directors of the not-for-profit association originally were appointed by the Riley County Board of County Commissioners but the corporate bylaws were changed in 1984 so that new directors would be appointed by existing directors. The court also noted that the lessee did not have the power to tax under the applicable law, KSA 19-4611, that the lessee was not required to hold meetings or maintain and submit records to the board nor was the board of county commissioners given the power to set the compensation for the board of directors. The court found that the association was not advisory to nor the alter ego of either the county commission or the hospital board of trustees and that the not-for-profit association had no authority to make decisions which involved a community resource. The court held that the lessee not-for-profit corporation had no governmental decision-making authority to expend public funds but rather was an independent entity which by contract had agreed to provide hospital services under a lease.

Other Nonprofit Corporations for Disabled, Aging and Poverty. The Attorney General has issued several opinions since the *Memorial Hospital Association* case and opined that certain not-for-profit corporations were subject to KOMA. For example, in Op. Att'y Gen. 143 (1987), the Attorney General said that the board of directors of Three Rivers, Inc., a private, nonprofit corporation operating a rural center for independent living for disabled persons, was subject to KOMA. Curiously, the opinion never mentioned the*Memorial Hospital Association* case decided a year earlier. The opinion contained its own test to determine whether a body is a public agency as follows:

1. if the agency has authority to make governmental decisions and act for the state, it is covered whereas if it only collects information, makes recommendations or renders advice, it is not;

2. if the agency has independent authority in the exercise of its functions, presumably it is not covered;

3. if the agency is subject to governmental audits or otherwise has its business procedures supervised, presumably it is covered; or

4. if the corporate instrumentality accomplishes public ends, either governmental or proprietary, presumably it is covered.

The Attorney General concluded that Three Rivers was a governmental administrative agency since it had to meet SRS program guidelines, had to receive SRS approval of its budget and had been carrying on activities which otherwise would be handled by a governmental subdivision.

Shortly thereafter, the Attorney General, utilizing a similar rationale but this time discussing and distinguishing the *Memorial Hospital Association* case opined that the Cowley County Developmental Service was also covered by KOMA. See Op. Att'y Gen. 27 (1988). The private nonprofit corporation, whose board members had been appointed by the county commission operated group homes for mentally handicapped adults. Over 72% of the corporation's funding came from government sources and the agency was licensed by SRS.

See also Op. Att'y Gen. 219 (1979) which concluded that Area Agencies on Aging (AAA) which are private, nonprofit corporations were subject to KOMA and Op. Att'y Gen. 284 (1979) which reached the same conclusion with the McPherson County Diversified Services, Inc., which provided services to developmentally disabled citizens.

Another nonprofit corporation, the Economic Opportunity Foundation, Inc. (EOF) was said to be subject to KOMA by the Attorney General in, Op. Att'y Gen. 10 (1984). The EOF was created by joint resolutions of the City of Kansas City and Wyandotte County to combat poverty at the local level in connection with the Federal Economic Opportunity Act of 1964. Three members of the Foundation incorporated the EOF as a nonprofit corporation. The EOF had a 30-member board of trustees, ten were representatives of the various city and county officials, eight were representatives of the private sector and twelve were elected by residents of low income areas. The EOF was named as an official community action agency under the federal law which contained a provision that any nonprofit private organization receiving assistance would be deemed a state or local agency under 42 U.S.C.A. §9904(e). Finally, the EOF was subject to audits by two state agencies.

The Southwest Development Services, Inc., a nonprofit corporation subject to the control of the county and the Department of Social and Rehabilitation Services, also was said to be subject to KOMA. See Op. Att'y Gen. 111 (1994)

Advisory Committees and Commissions; Councils. The 2001 Legislature amended KSA 75-4318 to specifically provide that "Meetings of task forces, advisory committees, or subcommittees of advisory committees created pursuant to a governor's executive order shall be open to the public in accordance with this action." Further, the same legislation in KSA 75-4320c specifically states that the Sunflower Foundation: Health Care for Kansas established by a settlement agreement between the Kansas Attorney General and Blue Cross is deemed to be a public body subject to KOMA.

The Attorney General has opined that various advisory, committees, boards and councils were subject to KOMA. These include: A mayor's commission on governmental efficiency composed of five persons appointed by the mayor upon recommendation from the city council charged with reviewing the city budget and operation (Op. Att'y Gen. 25 (1988)); a Jobs Development Council, a joint program between the Newton Chamber of Commerce, the City of Newton and Harvey County, comprised of appointees made by each participating entity and funded entirely by the city (Op. Att'y Gen. 48 (1986)); the Garden City-Finney County Alcohol Fund Advisory Committee (Op. Att'y Gen. 201 (1980)); fire district advisory boards appointed by the Reno County Board of County Commissioners (Op. Att'y Gen. 84 (1986)); advisory committees appointed by school boards to advise the boards on such matters as facilities planning (Op. Att'y Gen. 81 (1984)); and local historic preservation committees (Op. Att'y Gen. 22 (1999)).

But see Op. Att'y Gen. 92 (1986) which said three city employees serving as an engineering consultant selection committee were not a public body subject to KOMA. These

individuals lent their expertise and provided information to the city manager but as a group did not make any collective decisions.

An organization called "The Spirit of '76", a not-for-profit corporation established to aid the economic development commission of the City of Junction City, was said not to be covered by the Kansas Open Meetings Act (KOMA). The board of directors of the economic development commission was the same as the not for profit corporation. Prearranged meetings of the economic development corporation, however, were said to be subject to KOMA. See Op. Att'y Gen. 150 (1991).

Parent boards set up to administer youth baseball, soccer and wrestling for the Valley Center Recreation Commission were said to be subject of KOMA because they are subordinate groups of a political subdivision. See Op. Att'y Gen. 73 (1993).

Exclusions: Certain Bodies, Subject Matter or Where Other State or Federal Law Controls. An amendment in 2002 to KSA 75-4318 specifically excludes the following from KOMA:

(1) Any administrative body that is authorized by law to exercise quasi-judicial functions when such body is deliberating matters relating to a decision involving quasi-judicial functions;

(2) the parole board when conducting parole hearings or parole violation hearings held at a correctional institution;

(3) any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of the committee to the full house of representatives; and

(4) meetings exempted by state or federal law or by rules of the Kansas senate or house of representatives.

Arbitration Board, Other Miscellaneous Entities Not Covered . An arbitration board appointed under the provisions of a construction contract between a school district and a construction company as a result of a contract dispute was said not to be a public agency subject to KOMA according to the court in *In Re Arbitration between Johns Construction Company v. USD No. 210,* 233 Kan. 527, 664 P.2d 821 (1983).

The Attorney General has opined that various independent entities were not subject to KOMA. For example, the Kansas Cosmosphere and Discovery Center, Inc., a private nonprofit corporation which received public funds, but was not a legislative or administrative body or agency of the state or of a political or taxing subdivision was said not to be covered in Op. Att'y Gen. 256 (1982). Electric cooperatives which are nonprofit corporations formed to provide electric energy to members were said to be private business corporations and not subject to KOMA in Op. Att'y Gen. 175 (1985). Other entities said to be excluded from KOMA coverage have included: Planned Parenthood of South Central Kansas, Inc. in Op. Att'y Gen. 253 (1981); a parochial high school in Op. Att'y Gen. 94 (1981); and the Kansas University Endowment Association in Op. Att'y Gen. 239 (1980). See also Op. Att'y Gen. 45 (1987) where a married couple both serving on a five-member city council were said not to have violated KOMA by the fact of their marriage.

Further, a political party precinct committee is not a public body within the meaning of KOMA, Op. Att'y Gen. 157 (1994); Kansas Venture Capital, Inc., a for-profit corporation is not covered by KOMA , Op. Att'y 107 (1994); the mid-America commercialization corporation is not a public body subject to KOMA, Op. Att'y Gen. 99 (1994); the consensus estimating group consisting of staff of the Division of Budget, Department of Revenue, Legislative Research Department, and several economists, is not subject to KOMA, Op. Att'y Gen. 93 (1994); the Koch Crime Commission is not subject to KOMA, Op. Att'y Gen. 55 (1994); and the Association for K-10 Corridor Development, Inc. is not subject to KOMA ,Op. Att'y Gen. 42 (1994).

Meetings Subject to or Excused From KOMA

Definition of Meeting. The term "meeting" is defined in KSA 75-4317a to mean "any gathering, assembly, telephone call, or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency." Three elements are necessary to constitute a meeting under KOMA:

1. there has to be a gathering, assembly, telephone call, or other means of interactive communication;

2. there has to be a "majority of a quorum" present; and

3. the business or affairs of the body or agency have to be discussed.

If these three elements are not all present, then the meeting is not one that is subject to the requirements of KOMA.

In *State, ex rel Murray v. Palmgren*, 231 Kan. 524 (1982), discussed earlier, three meetings were said to have violated KOMA, involving either the board of county commissioners or the county hospital board of trustees or both. The first involved a meeting between the entire board of county commissioners, three members of the six-member county hospital board of trustees and an architect who discussed federal funding for the hospital. The second and third meetings involved four then three, respectively, hospital trustees meeting in Goodland with a hospital administrator to discuss the possibility of a contract with the administrator for the management of the hospital. The trial court found all three meetings met the KOMA meeting requirements as follows: (1) all meetings were prearranged (prearrangement as a requirement for coverage by KOMA was deleted in 1994); (2) none were open to the public but were held for the purpose of discussing the business or affairs of the public body; and (3) all meetings were attended by a majority of a quorum. Thus all meetings violated KOMA. The Supreme Court affirmed noting that the first meeting involved KOMA violations by both the county commission and the county hospital board of trustees.

Informal Gatherings, Social Events, Work Sessions, Recesses. Questions have arisen whether informal gatherings, social events, work sessions, and even discussions of members of public bodies which continue during a recess in a public meeting are covered by KOMA.

An unannounced gathering of members of the Public Employee Relations Board (PERB) held prior to a scheduled meeting was found to be a technical violation of KOMA in *Coggins v. Public Employee Relations Board*, 2 K.A.2d 416, 581 P.2d 817 (1978). The meeting occurred prior to the 1977 amendment to KOMA which added the statutory definition of

meeting now found at KSA 75-4317a. The court concluded the then undefined term "meetings" in KSA 75-4317 included "all gatherings at all stages of the decision-making process" (page 423). The court found that the morning gathering, although informal, had as its purpose the discussion of public business, *i.e.* The questioning of the hearing officer regarding the appropriateness of including the law school and engineering faculty in an employee bargaining unit at the University of Kansas.

See also Op. Att'y Gen. 197 (1980) which said KOMA applied to "work sessions" of the Louisburg City Council and Op. Att'y Gen. 262 (1981) which said KOMA applied to informal planned gatherings of a majority of a quorum of a city commission held prior to, during, or after a regularly scheduled city commission meeting.

Recess discussions during a regular meeting by members of the Reno County Board of County Commissioners were found not to violate KOMA since these discussions were not "prearranged" in *Stevens v. Board of Reno County Commissioners,* 10 K.A.2d 523, 526, 710 P.2d 698 (1985). The plaintiff in the case had videotaped the meeting and the videotape continued to operate during the recess. The court noted that the record disclosed that during the recess no one was asked to leave or refused entrance, that there was no record of any binding action being taken nor any evidence that the recess was used as a subterfuge to defeat the purposes of KOMA. Note that since 1994 there is no longer a requirement that a meeting be "prearranged."

Chance Meetings, Social Gatherings, and Retreats. The Attorney General has said that chance meetings at which public business or affairs are discussed by a majority of a quorum are not a KOMA violation since the legislature did not intend to preclude free association and free speech. Prearranged social gatherings, coffee breaks and luncheon dates involving members of public bodies likewise, do not violate KOMA unless the purpose of those gatherings is to discuss public business. See Op. Att'y Gen. 200 (1979). Despite this opinion, chance meetings where public business is discussed by a majority of a quorum of a governing body continues to be a topic of concern for members of local governing bodies.

The Attorney General has said that city business could not be discussed by a majority of a quorum of Lawrence City Commission at a retreat in the Colorado mountains, however, since the meeting, even though announced and open to the public, would be unreasonably inaccessible to city residents. City governing body members, however, were said to be able to attend meetings of the League of Kansas Municipalities away from their cities so long as the governing body did not discuss specific business or affairs of the city. See Op. Att'y Gen. 133 (1982).

No person may be excluded from a luncheon meeting between members of city and county governing bodies, a local chamber of commerce and a development company for failure to make a reservation or pay a fee. See Op. Att'y Gen. 148 (1980).

Public Body Meetings with Interest Groups. The Attorney General has said that meetings of a majority of a quorum of the membership of a school board with teachers for the purpose of discussing school district business was subject to KOMA. See Op. Att'y Gen. 43 (1980). Likewise, meetings between a majority of a quorum of a school board with a Mexican-American Committee for Education to discuss educational matters were said to be subject to KOMA. See Op. Att'y Gen. 28 (1980). Further, a majority of a quorum of a city commission participating in a public forum sponsored by the League of Women Voters where city business

would be discussed was said possibly to be covered by KOMA. See Op. Att'y Gen. 264 (1981).

Telephone and Conference Calls. The 1994 Legislature in response to the *Seward County* opinion (described below) amended the definition of "meeting" contained in KSA 75-4217a to delete the requirement that the meeting be "prearranged" and to add coverage for a "telephone call or any other means of interactive communication."

Whether telephone calls constituted violations of KOMA was a commonly raised concern of local officials and others prior to the 1994 amendments to the law. The Attorney General had said there was no violation of KOMA when one member of a seven-member county hospital board discussed hospital business by telephone with another board member. However, if three or more members of the board discuss hospital business by means of a telephone conference call, full compliance with KOMA, including public notice and access to the meeting, was said to be required. See Op. Att'y Gen. 159 (1980) and Op. Att'y Gen. 173 (1980). A telephone conversation if "prearranged" between a majority of a quorum of a city commission for the purpose of discussing an item scheduled on a meeting agenda was said to be a possible violation of KOMA. See Op. Att'y Gen. 268 (1981).

The court in *State ex rel. Stephan v. Board of Seward County Commissioners* 254 Kan. 446, 449, 866 P. 2d 1024 (1994), however, held that telephone calls were not "meetings" under KOMA. The Attorney General brought suit against the board of county commissioners alleging the board had violated the open meetings law through a series of telephone calls discussing county business. The court looked at the definition of meeting in KSA 75-4317a which term was then defined as a "prearranged gathering or assembly." The court concluded that inherent in the ordinary meaning of these words was the requirement that persons at a gathering or assembly be in the physical presence of each other. The court also reviewed the legislative history of the Act and noted that the issue of adding telephone calls had been before the Legislature in 1977 but the Legislature did not enact the proposed change.

Series of Meetings of Less Than a Quorum. The Attorney General in late April of 1998 issued an opinion, Op. Att'y Gen. 26 (1998), which concluded that:

> ". . . a series of meetings, each of which involves less than a majority of a quorum of a public body, but collectively totaling a majority of a quorum, at which there is a common topic of discussion of the business or affairs of that body constitutes a meeting for purposes of the KOMA." (p. 1).

The opinion specifically discussed several types of serial communications and concluded that each type violated KOMA based on the above principle, including: (1) calling trees, in which groups of governing body members constituting less than a majority of a quorum discuss a common issue and the chairman calls each member to "survey" their opinions before a formal vote is taken at the next meeting; (2) meetings of groups of less than a majority of a quorum at different locations to discuss the same issue, with a staff person moving between the groups and assisting with building a consensus; and (3) communications by e-mail in which the mailed comments accumulate and are forwarded to other members, or the use of discussion boards or LISTSERV (TM) mechanisms in which members automatically receive messages posted by others and can comment on them.

The Attorney General's opinion resulted in a hurried enactment of 1998 HB 2860 by the legislature in response to concerns expressed by various representatives of local governments. The bill added a new subsection to KSA 75-4317(a) as follows:

> (b) "Meeting" shall not mean a series of gatherings, assemblies, telephone calls or any other direct interactive communication of the membership of the body or agency subject to this act where each gathering, assembly, telephone call or other means of direct interactive communication involves less than a majority of a quorum, but where collectively more than a majority of a quorum are involved unless the participants had the specific intention to avoid the requirements of KSA 75-4318, and amendments, thereto.

Representatives of the news media convinced the Governor to veto the bill, arguing the above language gutted the open meetings law. The Governor sought further clarification from the Attorney General of Op. Att'y Gen. 26 (1998).

The clarification was issued as Op. Att'y Gen. 49 (1998). The Attorney General argued that language about serial communications in a 1989 Kansas Supreme Court case, *State ex rel Stephan v. Board of Sedgwick County Commissioners*, 244 Kan 536 (1989) was either dicta or was no longer applicable because of the 1994 amendments to KOMA. The court decision involved a resolution to increase Sedgwick County's quorum requirements to allow two members of the seven-member commission to communicate without implicating the KOMA. The court found that the Kansas Legislature chose language following on a numerical quorum requirement which is not specifically defined in the KOMA, and the court upheld the validity of the resolution. In explaining its decision, the court used the example of serial communications to demonstrate its point:

> "The State suggests that the quorum resolution at issue in the present case violates the Open Meetings Act by permitting two members of the county commission to meet outside the scope of the Act. Those two members could, in turn, individually speak with other members of the Board, thereby circumventing the provisions of the Open Meetings Act. The legislature, however, could have prevented this result by simply providing that the Open Meetings Act applies whenever two members of a governmental body or agency gather or assemble. Instead, it refused to adopt such an approach and defined a meeting simply as "a majority of a quorum," but did not define what constitutes a quorum."

The Attorney General in Op. Att'y Gen. 49 (1998) pointed out that KOMA would be implicated when third parties are used by governing body members to purposes of discussion between other members of the governing body. The opinion also concluded that e-mail, when it constitutes serial communication is considered a meeting under KOMA. Note the earlier opinion Op. Att'y Gen. 26 (1998) concluded that the inter active communication did not need to be in "real time"— but only mutual. Further, the opinion stated that KOMA does not apply to discussions of purely procedural issues such as agenda planning. In regard to staff briefings, the opinion stated "[a] discussion between a board member and a staff member is not, in and of itself, covered by the KOMA." The opinion concluded that a staff member, such as a city manager, can individually brief all board members on an issue and discuss their concerns, if the staff member does not discuss any board member's concerns and comments with other board

members so that a majority of a quorum are made aware of and can respond to each other's concerns outside of the parameters of an open public meeting."

The conclusion to be drawn from all of the above is that there is a 1989 Kansas Supreme Court opinion that directly deals with the issue of serial communications and two 1998 Attorney General opinions that disagree with the state's highest court opinion.

Meetings of Single Members of Various Public Bodies. A meeting called by the mayor of a city and involving single representatives of other public governing bodies, representatives of private business and the press has been said not to come within the purview of KOMA as long as a majority of a quorum of no single governing body attends the meeting. See Op. Att'y Gen. 103 (1984).

Quorum Requirements of Meetings

What Constitutes a Quorum. The KOMA applies whenever a majority of a quorum of a legislative or administrative body meets to discuss the business or affairs of the public entity. The reason for this provision is that a majority of a quorum of a local governing body is the minimum number of such members needed to take binding action. Several issues have arisen regarding the interpretation of the quorum requirement.

One of the key issues is whether the number constituting a quorum may be changed by the public entity subject to KOMA. A county by home rule action may change meeting quorum requirements according to the court in *State, ex rel Stephan v. Board of Sedgwick County Comm'rs,* 244 Kan. 536, 770 P.2d 455 (1989). The court held that a county had the ability to set its own quorum requirement under home rule, that such action did not violate the general public policy underlying KOMA and that neither KSA 77-201 Fourth nor KSA 19-206 established a legal definition for a quorum. In particular, the court said KSA 77-201 Fourth established a voting requirement not a quorum requirement. The court also rejected the notion that KSA 19-206 established an implicit limit on a county's ability to change the quorum requirement and further pointed out the statute was nonuniform in its application to counties and therefore was subject to alteration by counties under home rule in any case. The rule established by the *Stephan* case above applies to cities which also enjoy home rule powers. See Op. Att'y Gen. 6 (1983) which said cities could change quorum requirements under home rule. But the Kansas Dental Board was said not to possess the authority to alter the number of members required to constitute a quorum. See Op. Att'y Gen. 32 (1996).

The Attorney General has issued several opinions which state that the majority of the membership of the entire body constitutes a quorum unless a different requirement is specifically established by statute. Majority means the next whole number greater than half the total number of members. As noted above, this rule may not apply to cities or counties if they alter the rule by their home rule power. See Op. Att'y Gen. 45 (1987), Op. Att'y Gen. 110 (1986) and Op. Att'y Gen. 174 (1983). The Topeka Airport Authority was said not to have authority to change its quorum requirements by amending its bylaws in Op. Att'y Gen. 174 (1983).

Counting the Mayor. In a mayor-council form of city government, the Attorney General has opined that the mayor cannot be counted for purposes of determining the minimum number of persons that constitute a quorum since the mayor is not considered part of the city's governing body. See Op. Att'y Gen. 110 (1986). This means the mayor may meet with a

group of council members constituting one less than a majority of a quorum without triggering KOMA. See also *Municipal Corporations* McQuillin, 3rd, §13.27b which states the rule that, if the mayor is considered a member of the governing body, he is to be counted for purposes of a quorum, otherwise, he is not counted. In commission cities, the mayor is considered part of the city governing body and therefore he or she would be counted for purposes of determining a quorum.

Notice of Meeting Requirements

Notice Content. Notice of the time, place, and date of any special or regular meeting of a public body must be furnished to any person requesting the information subject to three qualifications as follows:

1. If the notice is requested by a petition, one person must be designated to receive the notice on behalf of all persons named;

2. Notice to an executive officer of an employee's organization or trade association is deemed to be notice to the entire membership; and

3. The public body may require an annual request for notice be made to the body but prior to discontinuing the notice, the public body must notify the person that the notice will be discontinued unless another request is made.

Note: the presiding officer of the body or other person calling the meeting is made responsible for providing the notice to those who have requested it. See KSA 75-4318(b) and (c).

The Attorney General has said that a list of names and addresses, all in the same handwriting, submitted to the board of regents requesting notice of meetings can be deemed to be a petition thus permitting notice to one designated person on behalf of all. Further, the notice requirement is met if a single list of scheduled meetings is provided. Additional notice must be provided, however, for changes to the regularly scheduled meetings or the call of special meetings. If individual requests are made, however, then individual notice must be given. See Op. Att'y Gen. 133 (1986). A public body is required to give notice of a new meeting when a discussion of an issue carries forward to a different meeting date, time, or place and the Act is violated if a good faith effort to provide notice is not made. Op. Att'y Gen. 14 (1996).

Notice By Mail or Telephone Required, Newspaper Notice Insufficient. Publication in a newspaper of meeting notices does not comply since individual notice is required. Notice may be by mail or by telephone. See Op. Att'y Gen. 173 (1983). Further, oral requests for notice must be complied with and a city may not require requests be made in writing. See Op. Att'y Gen. 15 (1981).

Agenda Provisions

Agendas are not required to be prepared, published or followed under KSA 75-4318(d) and therefore nothing exists in the law to prevent an amendment to an agenda at the time of a meeting of a school board. See *USD No. 407 v. Fisk,* 232 Kan. 820, 825, 660 P.2d 533

(1983). The Attorney General has said that an agenda, when prepared, must be made available to a requester. Copies of an agenda, however, do not have to be mailed if they can be obtained at a public place. See Op. Att'y Gen. 133 (1986).

The court, in *Stevens v. City of Hutchinson,* 11 K.A.2d 290, 293, 726 P.2d 279 (1986), made a distinction between giving notice of the time, date, and place of meetings versus preparing an agenda. The court said these two separate elements of the KOMA should not be confused since notice was mandatory but preparation of an agenda was not. The court upheld a trial court decision ordering a writ of mandamus to compel the city to list study topics to be discussed following its regular meetings if those topics were known at the time any agenda was prepared for the regular meeting.

Constitutional Rights and KOMA

The KOMA confers no constitutional rights on persons and as a result there is no federal question involved in KOMA violations. Accordingly, a federal district court has no jurisdiction in a civil rights action brought under 42 U.S.C. Section 1983 to determine whether KOMA has been violated. Plaintiffs, who were several students suspended from school for vandalism of school property, alleged that KOMA violations by the local school board had infringed on their liberty interests and prevented them from participating in the political process in violation of their due process rights. See *Boster v. Philpot*, 645 F. Supp. 798, 808 (D. Kan. 1986). See also *Curtis Ambulance v. Shawnee City Bd of Cty Comm'rs*, 811 F.2d 1371 (10th Cir. 1987) where the 10th Circuit Court of Appeals upheld a federal district court's decision to dismiss an alleged KOMA violation claim as a pendent jurisdiction state law claim to various federal constitutional rights claims.

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STATE OF KANSAS

Senate Committee on Elections and Local Government

Testimony on SB 95

Brad Bryant, Deputy Assistant Secretary of State
Elections and Legislative Matters

February ~~6~~ 11, 2003

Madam Chairman and Members of the Committee:

Thank you for the opportunity to testify in support of Senate Bill 95. This bill was proposed by the Secretary of State as a bill dealing with political parties. The bill has two main provisions: (1) it removes unnecessary restrictions on the number of words in the names of parties, and (2) it repeals unconstitutional laws banning seditious political parties.

1. Sections 1 and 2 of the bill deal with the removal of the two-word limit on the names of political parties. Section 1 amends K.S.A. 25-302a to allow the Secretary of State, as the officer with whom party recognition petitions are filed, to make a determination that the name of the party proposed by the petitioners is not unreasonably lengthy or similar to that of an existing recognized party.
Section 2 amends K.S.A. 25-304 to delete language that limits parties' names to two words. This arises from a 2002 court case, *Natural Law Party of Kansas and Nancy Brune vs. Thornburgh*, filed by the Natural Law Party and the American Civil Liberties Union against the Secretary of State. Secretary of State Thornburgh entered into a consent agreement that requires him to propose legislation to make the necessary amendments to the law. The court also issued a temporary injunction prohibiting the Secretary of State from enforcing the existing law.

Our research indicates two reasons for the existing statutory two-word limit on party names: (1) it preserves space on the ballot, and (2) it prevents fusion of parties, such as Democratic-Republican, that might confuse voters.

The Natural Law Party has sought but failed to receive official recognition in Kansas in the past, and party officials have signaled their intention to petition again as the Natural Law Party pending passage of this legislation.

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Attachment 2

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2. Section 3 of the bill contains repealers for K.S.A. 25-116 and 25-117. These statutes (1) ban parties that advocate treasonous activity or overthrow of the government of the United States or Kansas, and (2) require newly organized parties to file a sworn affidavit that they do not engage in these activities. The U.S. Supreme Court ruled similar statutes unconstitutional in a 1974 case, *Communist Party of Indiana vs. Whitcomb*. The Court ruled in *Whitcomb* that states may not require parties to file affidavits that they do not advocate overthrow of the local, state or national government.

We recommend the committee report Senate Bill 95 favorably for passage to repeal unconstitutional laws and to avoid further litigation.

Thank you for your consideration.

Research and Practice Aids:
Judges ⇐ 3.
C.J.S. Judges §§ 12 to 14.

CASE ANNOTATIONS

1. L. 1935, ch. 147, did not create vacancy in supreme court. Glenn v. Ryan, 144 K. 363, 364, 58 P.2d 1077.

25-112.

History: L. 1915, ch. 207, § 3; R.S. 1923, 25-112; Repealed, L. 1968, ch. 406, § 145; April 30.

25-113. Votes for persons who are justices of the supreme court or judges of district courts. (a) All ballots or votes cast at any election for any person holding the office of judge of the district court, or of justice of the supreme court, except as hereinafter provided, shall be deemed and held to be void, and shall not be counted by the judges and clerks at any election, nor by any canvassing board, nor shall any record of the same be made by any canvassing board, nor any certificate of election issued thereon.

(b) Ballots or votes may be cast for persons holding the office of judge of the district court for reelection to such office, or on the question of retention of any such judge in office, or for election to the office of senator or representative in the United States congress.

(c) Ballots or votes may be cast for justices of the supreme court on the question of retention of any such justice in office as provided by article 3, section 5 of the constitution of Kansas.

History: L. 1883, ch. 108, § 1; L. 1909, ch. 137, § 1; R.S. 1923, 25-113; L. 1968, ch. 406, § 63; L. 1974, ch. 137, § 16; L. 1977, ch. 130, § 2; July 1.

Attorney General's Opinions:
Certain limitations on compensation of justices and judges; prohibition on holding other offices. 92-85.

25-114.

History: L. 1883, ch. 108, § 2; R.S. 1923, 25-114; Repealed, L. 1974, ch. 157, § 27; July 1.

25-115.

History: R.S. 1923, 25-115; Repealed, L. 1977, ch. 131, § 1; July 1.

25-116. Certain political parties barred. No political party

(a) which is directly or indirectly affiliated by any means whatsoever with the Communist party of the United States, the Communist international, or any other foreign agency, political party, organization or government; or

(b) which either directly or indirectly advocates, teaches, justifies, aids or abets the overthrow by force or violence, or by any unlawful means, of the government of the United States or this state; or

(c) which directly or indirectly carries on, advocates, teaches, justifies, aids or abets a program of sabotage, force and violence, sedition or treason against the government of the United States or this state, shall be recognized, or qualified to participate, or permitted to have the names of its candidates printed on the ballot, in any election in this state.

History: L. 1941, ch. 231, § 1; June 30.

Research and Practice Aids:
Elections ⇐ 121(1).
C.J.S. Elections § 83 et seq.

25-117. Same; affidavit of newly organized party; filing. No newly organized political party shall be recognized or qualified to participate or permitted to have the names of its candidates printed on the ballot in any election in this state until it has filed an affidavit, by the officers of the party in the state, under oath that

(a) it is not directly or indirectly affiliated by any means whatsoever with the Communist party of the United States, the Communist international, or any other foreign agency, political party, organization or government; or

(b) that it does not either directly or indirectly advocate, teach, justify, aid or abet the overthrow by force or violence, or by any unlawful means, of the government of the United States or this state; or

(c) it does not directly or indirectly carry on, advocate, teach, justify, aid or abet a program of sabotage, force and violence, sedition or treason against the government of the United States or this state.

The affidavit herein provided for shall be filed with the secretary of state and he shall make such investigation as he may deem necessary to determine the character and nature of the political doctrines of such proposed new party, and if he finds that such proposed new party advocates doctrines or has affiliations which are in violation of the provisions of this act, he shall not permit such party to participate in the election.

History: L. 1941, ch. 231, § 2; June 30.

Cross References to Related Sections:
Formation of new political parties, see 25-302a.

2-3

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STATE OF KANSAS

Senate Committee on Elections and Local Government

Testimony on SB 101

Brad Bryant, Deputy Assistant Secretary of State
Elections and Legislative Matters

February 11, 2003

Madam Chairman and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill 101. This bill would cancel the 2004 presidential preference primary. Although we requested introduction of this bill, we do not favor its passage. We favor holding the presidential preference primary as 42 other states did in 2000, and we encourage the legislature to appropriate funds for it. However, realizing the current state of the budget, if funding is not approved we must recommend passage of SB 101.

We offer the following points as a statement of Secretary of State Ron Thornburgh's position regarding the presidential preference primary.

1. As chief state election officer, the Secretary of State has always supported, and continues to support, the presidential preference primary as more democratic and inclusive than the party caucus in expressing the will of Kansas voters in presidential politics.

2. Current law calls for a presidential preference primary to be conducted in 2004. The Secretary of State is seeking an appropriation of $1.75 million to fund the primary. Most of the funding is transferred to counties as reimbursement for their costs in conducting the primary.

3. The Secretary of State acknowledges that in the current state budget climate the funds might not be appropriated by the Legislature.

4. If the primary is not funded, it should be canceled so the counties will not be forced to bear the costs.

5. If cancellation of the primary is the course of action the Legislature chooses, it would be much better to enact Senate Bill 101 in the 2003 session rather than wait until 2004 when some of the cost and effort in planning for the primary will already have occurred.

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Attachment 3

Proposed Amendment to SB 101

If the committee decides to work Senate Bill 101 and consider it for passage, we recommend consideration of an amendment to correct an error we made in drafting the proposed legislation. On page 1, line 16, we recommend striking "2004" and inserting "2008".

Thank you for your consideration.

STATE OF KANSAS

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SENATE CHAMBER

Committee Assignments

INFORMATION TECHNOLOGY, CHAIRMAN
AGRICULTURE, VICE CHAIRMAN
ELECTIONS & LOCAL GOVERNMENT
NATURAL RESOURCES
REAPPORTIONMENT
WAYS & MEANS

Dear Senator Huelskamp:

On behalf of Seward County, I want to express my appreciation for your interest in our cemetery issues. Senate Bill 109 addresses these concerns in large measure. The township boards in many areas of Seward County simply do not operate. Although the donation process might be accomplished through a more dramatic, more time consumer manner under the current law, the elimination of the county size specific requirements in 19-3101 and 19-3102, by reference, make this a much cleaner process. The township board can simply donate the cemetery to the county. The county can choose to accept the donation or not.

In counties, like Seward, that operate cemeteries, the decision to accept the donation is fairly easy. The County is already geared up for cemetery maintenance work. Whereas, a township may not have the means or equipment to undertake the task on a 1 to 5 acre rural cemetery. If the township is required to maintain the cemetery, the purchase of equipment may be unnecessary and costly based on the size of the job. For a graphic illustration of the maintenance woes of a township cemetery, the Blue Bell cemetery, approximately 16 miles east of Liberal, is a good example of poor maintenance. The grass is three feet tall and the fence is in disrepair. In striking contract, Restlawn Cemetery, operated by Seward County, is an award winning, manicured cemetery.

It is a tribute to our ancestors to treat them with respect. The mechanism of township maintenance of cemeteries is not up to this task. As the relatives of our pioneers move from the area or die themselves, the interest in maintaining these areas slips from notice. This bill puts the power in the hands of the township boards and counties. It does not limit either organization's abilities, it simply provides options.

Please accept our sincere appreciation for you and your colleague in their work on this bill.

Sincerely,

C. Edward Young

Senate Elec + Loc Gov
02-11-03
Attachment 4

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STATE OF KANSAS

Senate Committee on Elections and Local Government

Testimony on SB 102

Brad Bryant, Deputy Assistant Secretary of State
Elections and Legislative Matters

February 11, 2003

Madam Chairman and Members of the Committee:

Thank you for the opportunity to testify in support of Senate Bill 102. This bill was proposed by the Secretary of State as a ballot bill. It contains two concepts.

1. Sections 1 and 2 close a loophole in existing law that could allow a voter to cast two ballots, one before the election and one on election day, and have them both count. We have received no reports of this happening, but it is a possibility.

A person could request an advance ballot by mail, then go to the election office during the advance voting period and tell the election officer the ballot was lost, not received or destroyed. The law in K.S.A. 25-1122f allows the person to vote a replacement advance ballot in the election office. If the mailed ballot is subsequently returned by the voter, the election officer voids it.

Acting under a different provision in the law, K.S.A. 25-2908(c), the voter could then go to the precinct on election day, surrender the mailed advance ballot, and voter a regular ballot. Under current law neither the replacement advance ballot nor the ballot at the polling place is required to be a provisional ballot, so they would be commingled with other ballots and irretrievable. The voter's actions are prosecutable but not preventable under current law.

SB 101 seeks to close this loophole by requiring that any such replacement advance ballots cast in the election office and the ballots cast at the polling place upon surrendering the mailed advance ballot be provisional. Provisional ballots are not counted on election night, so the situation can be researched after the election and only one ballot counted in the final tally.

2. Section 3 of the bill requires the counting of partial provisional ballots if a voter casts a ballot in the wrong precinct as long as it is in the same county. This may occur through poll worker error or voter error, but the result is the same. Because of existing laws and recent court decisions requiring canvassers to interpret voter intent and count ballots whenever a vote is cast in a race in which the voter is entitled to vote, we recommend the amendment to K.S.A. 25-3002

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Attachment 5

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contained in SB 102. This section would require the canvassers to count those races on the provisional ballot that are common to both precincts in question—the precinct where the voter resides and the precinct where the provisional ballot was cast in error.

Adoption of this provision in SB 102 would promote consistency of ballot counting procedures among the counties in Kansas and allow votes to be counted for candidates or issues for which the voter is entitled to vote.

We recommend the committee report SB 102 favorably for passage. Thank you for your consideration.