



SENATOR DEMOCRATIC LEADER ANTHONY HENSLEY

TESTIMONY ON SENATE BILL 361

February 2, 2016

Mr. Chairman and Members of the Judiciary Committee,

I appear before you today in support of Senate Bill 361 because changing the state's definition of "public records" is absolutely critical in increasing transparency in state and local government. Public records should include any and all official business, conducted by state and local officials, regardless of whether it is communicated using a public or private email account.

We know the cornerstone of a great democracy is a well informed electorate, and that it is the right of the people to know what their government is doing. But recently, some government officials have lost sight of the fact that they answer first and foremost to the people of Kansas.

Kansans were justifiably outraged last year when the news media reported the Budget Director and members of the Brownback administration communicated with lobbyists about the Governor's budget recommendations using private email accounts to purposefully circumvent the Kansas Open Records Act (KORA).

When I took office 40 years ago KORA and the Kansas Open Meetings Act (KOMA) were held up as the best laws in the land. But, now a recent ranking of transparency and accountability in state government shows that Kansas fell from the top 10 states in 2012, to the bottom 10 in 2015.

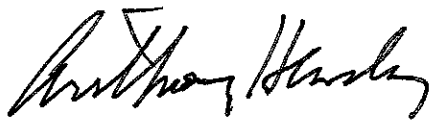
Our state has received a grade of F by the Center for Public Integrity. And while Kansas government is less transparent than before, the peoples' support of open government is stronger than ever.

Unfortunately, the actions of a few have reflected on the majority. So today I join others – both Democrats and Republicans – in urging the committee to pass Senate Bill 361.

What we do in this building as lawmakers and state officials sets an example for other officials across our state. As we address challenges like the budget, taxes, school finance, and so many more it is imperative that we do it in an open way so that our constituents have the opportunity to observe and participate in their government. That is, I truly believe, their fundamental right.

At a time when skepticism of what goes on in government at all levels is at an all-time high, insuring transparent and open state and local government is critical to restoring the public's trust. And that starts this session with the passage of Senate Bill 361.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony Hensley". The signature is fluid and cursive, with the first name "Anthony" written in a larger, more prominent script than the last name "Hensley".

Senator Anthony Hensley
Senate Democratic Leader

POLITICS & GOVERNMENT JANUARY 27, 2015 3:00 PM

Budget director sent e-mail from private account to lobbyists on proposed budget

HIGHLIGHTS

Gov. Sam Brownback's budget director used a private e-mail account to share a working version of the governor's proposed budget with two lobbyists three weeks before it was unveiled to lawmakers.



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BY BRYAN LOWRY

Eagle Topeka bureau

Gov. Sam Brownback's budget director used a private e-mail account to share a working version of the governor's proposed budget with two lobbyists three weeks before it was unveiled to lawmakers.

Budget director Shawn Sullivan sent a draft of the proposal from his Yahoo account two days before Christmas to the private e-mails of several top administration officials and to the governor's former chief of staff, David Kensinger, and his former campaign manager, Mark Dugan, both of whom are lobbyists.

The e-mail was obtained by The Eagle this week from a source outside the governor's office.

In it, Sullivan lays out plans to increase taxes on cigarettes, take \$350 million from the highway fund over 2 1/2 years and change the way the state funds schools in an effort to rein in costs.

Asked why two lobbyists had input into the budget process, Eileen Hawley, the governor's spokeswoman, said, "I think you're digging to find things that aren't there ... we sought the counsel of a lot of people in that process."

Senate Minority Leader Anthony Hensley, D-Topeka, said it was highly inappropriate for lobbyists to be given information on the budget before lawmakers.

"They're not part of the governor's staff," he said.

Kensinger, who left the governor's office in April 2012, works as a lobbyist for the Club for Growth, Kansas City Power & Light and other business and political entities. Democratic lawmakers and some moderates say he continues to wield influence in the administration.

Hensley referred to him as a "shadow chief of staff." Kensinger did not respond to a request for comment.

The governor told The Eagle in October that he rarely speaks to Kensinger about policy, but Sullivan's e-mail thanks the recipients for "helping us work through this budget process."

Last April, the Topeka Capital-Journal reported that Kensinger was the subject of a federal probe for influence peddling at the Capitol.

Dugan also has forged a career as a lobbyist since running the governor's re-election campaign. He would not answer questions Tuesday but e-mailed a statement later: "Governor Brownback seeks input from a wide variety of sources and I'm honored to be one of them."

Rep. Jim Ward, D-Wichita, said the inclusion of lobbyists in budget talks shows the Brownback administration doesn't "seem to know the lines between government public action and private industry."

A 'loophole' in state open records act

The governor was not included on Sullivan's budget e-mail. Sullivan said that's because they spoke about the budget daily during November and December and Brownback did not need the same update.

Other recipients of the e-mail include Hawley; Lt. Gov. Jeff Colyer; Landon Fulmer, who then was the governor's chief of staff; Jon Hummel, who replaced Fulmer; Kenny Wilk, chair of the Kansas Board of Regents; Tim Shallenburger, the governor's legislative liaison; Chuck Knapp, who was appointed Colyer's chief of staff in December; Kim Borchers, the governor's appointments secretary; and Kent Glasscock, president of Kansas State University's Institute for Commercialization.

With the exception of Glasscock, who received the e-mail on his KSU e-mail address, everyone received it on a non-government e-mail address. Although it was government business, Borchers received it on her official Brownback campaign e-mail address.

Sullivan said he accidentally typed in Borchers' campaign address and that he only sent it to private e-mail addresses because many staff members were at home for the holidays.

E-mails sent to and from private e-mail addresses on private computers are not public documents and not subject to the Kansas Open Records Act.

"It's definitely a loophole," said Mike Merriam, a retired Washburn University School of Law professor who serves as general counsel for the Kansas Press Association. "So government officials are able to communicate with each other even on official business as long as they do it at home, and that's plainly not the intent of the law in my opinion."

Sullivan said use of his personal e-mail account was not intended as a way to skirt the open records act.

“Why it was done on personal e-mail was because it was done while I was at home on Christmas,” he said.

Hensley said the private communication was an attempt to avoid public scrutiny. “I would assume that this is par for the course, that this is a method they’ve utilized, I’d assume, for a number of months or not years.”

Hawley and Sullivan would not say directly how often the governor’s staff used private e-mails for public business.

“There’s one e-mail that was sent over a holiday to personal e-mail accounts. I would not say that’s indicative of any trend,” Hawley said.

Personal e-mail addresses are sometimes used to contact members of the government staff during off hours, she said, adding that if she’s at home her personal e-mail goes straight to her phone.

Sen. Jacob LaTurner, R-Pittsburg, said he was concerned about the use of private e-mails.

“If the goal is to hide that from the public, then that’s not right,” said LaTurner, an advocate for government transparency who plans to introduce a bill later this week that would prohibit government agencies from charging exorbitant fees for open records requests.

Ward said the problem with using private e-mails is that “no one can track decision-making.”

Twenty-six states consider e-mails by public officials about public business on private accounts to be subject to open records laws, according to the Reporters Committee for Freedom of the Press. Florida Gov. Rick Scott currently faces a lawsuit that alleges he tried to flout that state’s open record laws through private e-mails.

For his part, Sullivan made light of the e-mail, joking on social media that he would only communicate via Twitter in the future.

Insight into budget challenge

Sullivan’s e-mail gives some insight into the political challenges facing the administration in passing a fix for a \$648 million budget deficit for the fiscal year that begins in July.

While Kensinger and Dugan got to see the budget before the majority of lawmakers, the e-mail discusses talks with some top Republican lawmakers.

“The reaction to this from the House budget and tax leadership has been more positive than from the Senate budget leadership and Sen. Bruce,” Sullivan writes in the e-mail.

Senate Majority Leader Terry Bruce, R-Hutchinson, has been outspoken in his resistance to raising taxes, which is part of the governor’s budget fix. Sullivan would not discuss whether the reference to Senate budget leadership referred to Sen. Ty Masterson, R-Andover, who chairs the Ways and Means Committee.

Bruce laughed when shown the e-mail. “I’ve never shied away from the fact that I think it’s an ugly budget,” he said.

In the e-mail, Sullivan uses the phrase “house of cards” when discussing proposed policy changes to KPERS, the state’s public pensions system. Asked what he meant, he said he was referring to the system’s high cost as part of the larger budget.

“While there is plenty in here for people not to like, we have a proposal that attacks the cost drivers of K-12, KPERS and Medicaid,” he says later in the e-mail.

Sullivan’s e-mail was sent about two months after The Eagle filed an open records request in October for e-mail correspondence and phone communication between Kensinger and the governor’s office since April 2012.

Hawley said the use of personal e-mails had no connection to the records request.

The governor’s office gave The Eagle an initial reply that it was processing the request but did not provide The Eagle with a cost estimate of \$1,235 until Jan. 13, the day after Brownback was sworn in for a second term.

Reach Bryan Lowry at 785-296-3006 or blowry@wichitaeagle.com. Follow him on Twitter: @BryanLowry3.

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- AG Schmidt: Kansas open records law needs updating to reflect modern technology

POLITICS & GOVERNMENT OCTOBER 17, 2015 3:27 PM

State budget director accessed state e-mail account same day he sent lobbyists private e-mail



BY BRYAN LOWRY
Eagle Topeka bureau

Records show that the state's budget director had access to and used his state e-mail during a holiday break last year – despite claiming in January that being out of the office necessitated his use of private e-mail.

The Eagle discovered in January that Gov. Sam Brownback's budget director, Shawn Sullivan, used his private Yahoo account to e-mail a draft of the governor's budget and tax plan to two lobbyists with ties to Brownback two days before Christmas.

Asked in January about the use of private e-mail, Sullivan replied, "why it was done on personal e-mail was because it was done while I was at home on Christmas."

However, records obtained from the governor's office last week through an open records request show that Sullivan had access to his official state e-mail during that period. He also sent a few e-mails on it for mostly mundane purposes. He used his state e-mail the same day he e-mailed lobbyists. The records were requested in mid February but were not released until last week.

Rep. Jim Ward, D-Wichita, said he knew back in January that Sullivan's "lame excuse" wouldn't "hold water" and called the disclosure of these other e-mails "proof that the Brownback administration is acting in secret in the backrooms and wants no public scrutiny of their activities."

"Their explanations never (hold up). When you hear them, they're incredulous. You're like, 'Really, that's the best you can come up with?' " Ward said. "When Shawn said that back in January you knew. I was using my state e-mail account during the Christmas holiday."

Using his state e-mail address Sullivan e-mailed his executive assistant, Sandy Russell, the morning of Dec. 23 to ask if the office had any thank you notes. Russell wrote back that it did not, quipping "I guess we've never had a reason to thank anyone for wanting more money!"

Later that same day Sullivan used his state e-mail to send a photo of himself to KSN reporter Ashley Arnold who needed it for a story.

That evening Sullivan e-mailed the Kansas Highway Patrol, which administers security at the statehouse, to express his concern that Division of Budget staff members would lose access to the Capitol on Jan. 1. Sullivan wanted to make sure Budget staffers retained the same security clearance as the rest of the governor's staff.

But about an hour and half after Sullivan sent his e-mail to the Highway Patrol from his official state account he sent an e-mail to two lobbyists, David Kensinger and Mark Dugan, informing them that the governor planned to sweep money from the state's highway fund, enact a tax hike on cigarettes and slow down future income tax cuts to help fill the state's budget hole.

Kensinger, who previously served as the governor's chief of staff, began lobbying for tobacco giant Reynolds American against the proposed tobacco tax about a month later. Dugan, the governor's former campaign manager, was also active in lobbying on tax policy issues this past session for the Kansas Club for Growth, a group that advocates for limited government and lower taxes.

Sullivan's use of a private e-mail address and private computer likely put the exchanges outside the state's open records act – a loophole Attorney General Derek Schmidt affirmed in an opinion – meaning that there would be no official record despite the fact that the e-mails concerned public business.

The e-mail was sent to the personal or campaign e-mail addresses of Lt. Gov. Jeff Colyer and several top administration staffers.

The Kansas Press Association also expressed concern about the fact that Sullivan sent more substantive e-mails about policy on a private account on the same day he sent more mundane e-mails on his state account.

"I mean if he had a choice of sending it on either one, and he sent it on his private e-mail, it looks as if he's trying to avoid public scrutiny," said Rich Gannon, the Press Association's director of government affairs.

On Friday, Eileen Hawley, the governor's spokeswoman, who responded on Sullivan's behalf, said in an e-mail that the reason Sullivan used a private e-mail to send the budget information had to do with the piece of technology he was using, explaining that the shorter e-mails were sent on his work account using his phone.

"Mr. Sullivan frequently sends and responds to short messages using the work e-mail account on his phone when he is not in the office," she said. "The e-mails you asked about were lengthy messages that included Excel spreadsheets, written when he was away from the office, and he was not able to send these more complex messages from his cell phone."

Hawley also indicated that since the publication of The Eagle's first story in January, Sullivan "now uses a work laptop to send any such messages through his official e-mail account when he is not in the office."

Sullivan later argued in an e-mail that had his message about the budget been sent on his government account it would have been covered by an exemption in the Kansas Open Records Act, which protects policy drafts.

Rep. John Carmichael, D-Wichita, accused the Brownback administration of trying to work behind "an electronic closed door."

Ward and Carmichael both said this highlights the need to close the loophole in the open records act. The Eagle's coverage of the issue has prompted the Kansas Judicial Council – a 10-member board established by the Legislature – to look into the matter and draft a proposal to the Legislature for reforms next session.

Under the current version of that plan, Sullivan's e-mail to the lobbyists would be a public record, according to Ward, who is serving on the Judicial Council's panel.

The question of whether private e-mails from government officials should fall subject to open records acts is one being grappled with in other states and at the national level.

The Chicago Tribune sued Chicago Mayor Rahm Emanuel last month in an effort to force him to release e-mails and texts sent on his private Blackberry that concern government business.

Democratic presidential frontrunner Hillary Clinton has faced scrutiny over her exclusive use of private e-mail during her tenure as secretary of state. President Obama approved changes in the Federal Records Act in 2014 – after Clinton left his administration – that now require federal officials to forward private e-mails on official business to their government accounts.

The Eagle filed its open records request for Sullivan's government e-mails during the holiday break in February, but the governor's office did not produce the records until mid-October. The records were given to The Eagle at no charge.

The eight-month delay raises a question for transparency advocates about the timeliness of disclosure. The open records act requires that public agencies respond to requests within three days and if records can't be provided in that time to provide an explanation.

“That’s really a stretch. That’s a long time,” the Press Association’s Gannon said about the delay. “I can’t believe it would take them that long to come up with this. Jeeze.”

The governor’s office did send The Eagle an initial e-mail confirming that it had received the request in February and that it would process the request. The governor’s office has previously argued that such responses meet the requirements of the act.

The Eagle’s attorney, Lyndon Vix, on the other hand, argues that this falls short.

“The Governor’s office continues to operate under the assumption that the Kansas Open Records Act contains no deadlines for compliance and that an agency can simply sit on a request indefinitely, making no effort to produce the records in a timely manner,” Vix said in an e-mail. “We believe that position is simply wrong.”

Ward, an attorney, said that the open records law provides public agencies with some flexibility about the time it takes to produce documents because some records are difficult to produce and others require scrutinizing to ensure that confidential information is not released.

“But under the Brownback administration that little exception has been abused,” Ward said. “It’s now being used as the reason to hope that you forget about the request or that the story dies down. And the delay is the norm, not the exception and that frustrates the purpose of the law, which is timely disclosure of public decisions so that the public can scrutinize their elected officials.”

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