

BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Shawnee County, Kansas

In the Matter of the)
Paul Snider, Chairman,)
Johnson County)
Park and Recreation)
District Board.)

Case No. 2017-0G-0004

CONSENT ORDER

NOW on this 5th day of October, 2017 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(d)(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, the undersigned hereby knowingly and voluntarily agrees as follows:

1. On or about December 12, 2016, the Attorney General's Office received a complaint alleging that Paul Snider, chairman of the Johnson County Park and Recreation District's Board of Park and Recreation Commissioners (the board) violated the KOMA.

2. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that Mr. Snider engaged in serial communications in violation of K.S.A. 2016 Supp. 75-4318(f), which provides such interactive communications in a series shall be open if they collectively involve a majority of a public body, have a common topic of discussion concerning the business or affairs of the public body, and are intended by any or all or the participants to reach an agreement on a matter that would require binding action to be taken by the public body.

3. The board is a public body that is subject to the requirements of the KOMA and must comply with the KOMA.

4. Investigation and/or statements provided by or on behalf of the board, as described in a letter dated September 19, 2017, to Paul Snider, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violation of the KOMA by a preponderance of the evidence:

- a. Beginning in October 2016 and continuing through early November 2016, board chairman Paul Snider contacted board members Michael Pirner, Chris Carroll, Steven Baru, Nancy Wallerstein and George J. Schlagel individually. Mr. Snider did not contact board members Leslee Rivarola or ex officio member Steve Klika. The purpose for Mr. Snider's contacts was to seek support for his stated desire to serve a second term. Serving a second term deviated from the board's traditional practice of each member serving one term in office and then rotating to another office/position. None of these conversations collectively reached a majority of the membership of the board. On November 9, 2016, Paul Snider sent Michael Pirner a series of Facebook messages in which he indicated that he was going to "proceed with trying to be chair again . . . everyone else is supportive or at least comfortable with it . . . the general sense is people are OK with trying it but not making any commitments that we're moving to two-year terms. . . ." Mr. Snider's message conveyed to Mr. Pirner that he had spoken with virtually the entire board and secured their individual approval for him to seek a second term. The Facebook messages were a serial communication in violation of K.S.A. 2016 Supp. 75-4318(f).

5. Based upon the above information, board chairman Paul Snider, individually admits and agrees that the facts set forth in paragraph 4.a. above and as further described in Exhibit A are true and correct.

6. Paul Snider now fully understands and agrees that he fully intends to comply with the requirements of K.S.A. 2016 Supp. 75-4318(f) concerning serial communications.

7. The Attorney General and Paul Snider mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

8. Paul Snider understands and waives all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings

conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

9. Paul Snider waives any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open meetings (KOMA), and subject to an action for civil penalties or enforcement, and thus they do not have a right to appeal under the KJRA.

10. The Attorney General accepts the waivers and stipulations by Paul Snider.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that board chairman Paul Snider be subject to this Order based on the provisions of K.S.A. 2016 Supp. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body for violation of the KOMA in a Consent Order;

AND WHEREAS the Attorney General and board chairman Paul Snider mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, board chairman Paul Snider consents to the following terms and conditions, and the Attorney General orders that:

11. Paul Snider agrees to and shall:
- a. Ensure that he individually obtains at least one (1.0) hour of training on the provisions of the KOMA to be presented by an attorney experienced in dealing with open meetings issues, on or before November 30, 2017;
 - b. Provide the Attorney General's Office with a written statement confirming that he has obtained the required KOMA training within ten days of receiving the training; and
 - c. Not engage in any future violations of the KOMA.

12. Paul Snider understands and agrees that if he fails to comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 2016 Supp. 75-4320d(c) and amendments thereto.

13. Paul Snider understands and agrees that if he engages in any future violation of the KOMA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

14. Paul Snider agrees and understands that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KOMA may be subject to investigation proceedings as provided by K.S.A. 2016 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

15. In consideration of the admissions and agreements by Paul Snider, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violation of the KOMA set forth herein.

16. Paul Snider agrees that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

17. Except as provided in paragraphs 12, 13 and 14, this Consent Order shall operate as a complete release of all claims board chairman Paul Snider may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Board chairman Paul Snider agrees not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. Board chairman Paul Snider agrees that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

17. Paul Snider understands that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(e) and amendments thereto.

18. This Consent Order shall be a public record in the custody of the Office of the Attorney General.

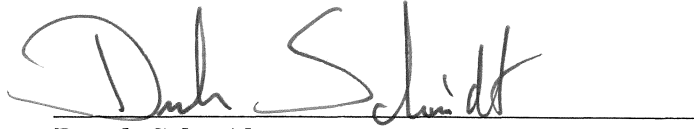
19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

20. This Consent Order shall become effective on the date indicated in the Certificate of Service.

WHEREFORE, the Attorney General and board chairman Paul Snider consent to these provisions.

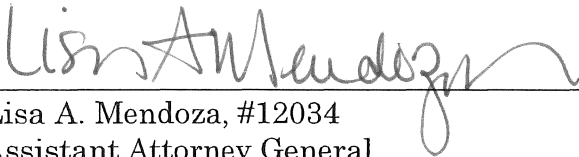
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL



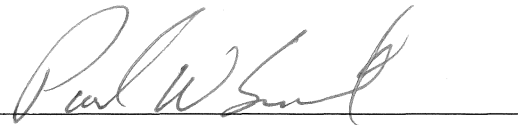
Derek Schmidt
Kansas Attorney General

Prepared By:



Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597

Johnson County Park and Recreation District's Board Chairman:



Paul Snider

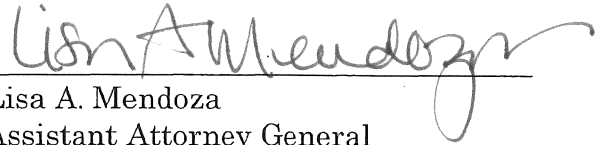
9/20/17

Date

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2017, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Paul Snider
9617 Appleridge Lane
Lenexa, KS 66227



Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
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September 19, 2017

Paul Snider
9617 Appleridge Lane
Lenexa, KS 66227

RE: KOMA Complaint – Johnson County Park and Recreation District’s Board of Park and Recreation Commissioners, and Board Chairman Paul Snider

Dear Mr. Snider:

On December 12, 2016, this office received a complaint from Mike Pirner and Leslee Rivarola alleging that the Johnson County Park and Recreation District’s Board of Park and Recreation Commissioners (the board) and you, in your capacity as board chairman, violated the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, by engaging in serial communications. As a remedy, the complainants sought the following remedy: “[V]oid action . . . Other: Required KOMA training to board [sic].”

We have been advised by board attorney Ernie Ballweg, as well as by you, that Mr. Ballweg does not individually represent you in this matter. You have further advised that you are not represented by counsel, and that all communication concerning this matter should be directed to your attention.

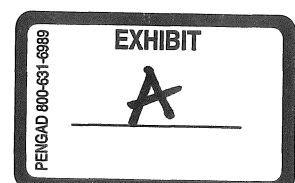
The purpose of this letter is to inform you of the results of our review. We relied on the complaint, the board’s submission, the provisions of the KOMA, caselaw and prior Attorney General Opinions as noted herein, in reviewing this matter.

Following our review, it is clear that the Board is a public body or agency subject to the KOMA,¹ and thus this office has jurisdiction to review any complaint that the KOMA has been violated.²

During our review, we identified one issue that warrants further discussion.

¹ K.S.A. 2016 Supp. 75-4318(a); *see also* K.S.A. 19-2865 (“ . . . The district board shall adopt rules of procedure for its meetings and keep a record of its proceedings. All meetings shall be subject to the provisions of K.S.A. 75-4317 *et seq.*, and all records and accounts of the board shall be public. . . .”).

² *See* K.S.A. 2016 Supp. 75-4320(a), 75-4320b and 75-4320d.



Preliminary Matters

According to the authorizing and implementing statutes for the Johnson County Park and Recreation District, its governing board is comprised of seven members.³ The law also provides that “[a]n ex officio member of the board shall be a member of the board of county commissioners of Johnson county selected by said board of county commissioners. . . .” K.S.A. 19-2865 also provides that, “[F]our members shall constitute a quorum for the transaction of business and a majority vote of the members present when there is a quorum shall decide any question.”

According to the board’s operating rules, “the ex-officio [sic] member/liaison of the JCPRD Board [has] all the rights granted to JCPRD Board Members except that the liaison does not count toward a quorum of the seven Board Members as described in JCPRD Statutes.⁴

Serial communications

a. Complaint allegations

The basis of the complaint is the allegation that you, in your capacity as the board’s chairman, engaged in a series of communications with other board members outside of an open meeting informing them of your intention to seek a second term as chairman, and that these communications constituted serial meetings in violation of the KOMA.

b. What is a meeting under the KOMA?

It is the public policy of Kansas that all meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.⁵ A meeting is defined as “any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a public body or agency subject to [the KOMA] for the purpose of discussing the business or affairs of the public body or agency.”⁶

The definition of “meeting” as set out in the KOMA contains three distinct elements. All must be met in order to constitute a meeting.

³ K.S.A. 19-2863.

⁴ Email from JoAnn Courtney to Steve Baru dated December 17, 2012, at 9:46 a.m., Subject: RE: Board Committee 2013 Assignments.

⁵ K.S.A. 2016 Supp. 75-4317(a).

⁶ K.S.A. 2016 Supp. 75-4317a.

The first element is a “gathering or assembly, in person or through the use of . . . any other medium for *interactive communication*.”⁷ Electronic communication, or email, can be a method of interactive communication, but the communication must be “interactive” to meet this requirement.⁸ For the purposes of the KOMA, “interactive communication” requires a *mutual or reciprocal exchange* between or among members of a body or agency subject to the Act.⁹ “Simply sending a message to other board members [does] not constitute interactive communication within the meaning of the KOMA.”¹⁰ Interactive communication does not occur when a non-member of a public body communicates with a majority of that body and a member responds and shares that response with other members.¹¹

The second element is that a *majority* of the public body is involved in the interactive communication.¹² A majority has been defined as the number greater than half of any total.¹³ For a public body such as the board that has seven members, a majority is four of the seven members.

The third element is that the interactive communication must be *for the purpose of discussing the business or affairs of the body*. Here, the board’s powers are broad, and many matters fall within the business or affairs of this particular public body. This includes the power to finance, operate, improve and maintain the parks and playgrounds of the district;¹⁴ accept gifts, and purchase, lease and condemn real estate for use and parks and playgrounds for the district;¹⁵ levy taxes for the acquisition, improvement and operation of lands, and improvement and maintenance of the parks and playgrounds;¹⁶ issue bonds for acquiring real estate;¹⁷ adopt, promulgate and enforce reasonable rules and regulations for the operation and use of the parks and playgrounds, and the conduct of persons using the same;¹⁸ and to do all other things provided by the act, have all powers prescribed by the act, and carry out and exercise the powers of the district as its governing body.¹⁹ Among the other powers of the board that it is authorized to carry out are holding an annual organizational meeting at the

⁷ *Id.* Emphasis added.

⁸ Attorney General Opinion 95-13, <http://ksag.washburnlaw.edu/opinions/1995/1995-013.htm>, accessed August 16, 2017.

⁹ Attorney General Opinion 2009-22, <http://ksag.washburnlaw.edu/opinions/2009/2009-022.htm>, accessed August 16, 2017.

¹⁰ *Id.*

¹¹ *Id.*

¹² K.S.A. 2016 Supp. 75-4317a.

¹³ Attorney General Opinion 1996-32, <http://ksag.washburnlaw.edu/opinions/1996/1996-032.htm>, accessed August 16, 2017.

¹⁴ K.S.A. 19-2868(a).

¹⁵ K.S.A. 19-2868(b).

¹⁶ K.S.A. 19-2868(d).

¹⁷ K.S.A. 19-2868(e).

¹⁸ K.S.A. 19-2868(g).

¹⁹ K.S.A. 19-2868(l).

first regular session of the board held in December of each year, and electing officers from among its members.²⁰

Typically, the meetings of a public body occur in person. However, a meeting may also occur by means of a serial communication.²¹ Some communications are only one way and do not reach a majority of the public body. In some circumstances, the communications between members on the same topic may be serial, ultimately reaching a majority of the membership of the public body. “This type of communication is subject to the KOMA’s requirement of openness.” Such interactive communications in a series are colloquially known as “serial communications.” “Interactive communications in a series shall be open if they collectively involve a majority of the membership of the public body or agency, share a common topic of discussion concerning the business or affairs of the public body or agency, and are intended by any or all of the participants to reach agreement on matter that would require binding action to be taken by the public body or agency.”²² “Each communication between members of a governing body or agency must be reviewed to determine if the four conditions contained in the definition” of serial communications are met.²³ Thus, whether a series of communications is a violation of the KOMA is very fact specific, and each situation must be decided on its facts.²⁴

With these rules in mind, we turn to the facts of this case, and a review of the communications that were exchanged.

c. Relevant facts

At the time of the complaint, the board’s members and their positions were as follows:

- Paul Snider, Chair
- Nancy Wallerstein, Vice Chair
- Michael Pirner, Secretary
- Steven Baru, Treasurer
- Chris Carroll, Assistant Secretary
- Leslee Rivarola, Assistant Treasurer, and
- George Schlagel, Non-Officer Board Member.

²⁰ K.S.A. 19-2864.

²¹ K.S.A. 2016 Supp. 75-4318(e) (“... interactive communications in a series shall be open if they collectively involve a majority of the membership of the public body or agency, share a common topic of discussion concerning the business or affairs of the public body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the public body or agency.”).

²² K.S.A. 2016 Supp. 75-4318(f).

²³ Attorney General Opinion 2009-22, *supra*.

²⁴ Attorney General Opinion 1998-49, <http://ksag.washburnlaw.edu/opinions/1998/1998-049.htm>, accessed August 16, 2017.

In addition to the above board members, Johnson County Commissioner Steve Klika was appointed by the Johnson County Board of County Commissioners to serve as an ex officio member to the Park and Recreation Board as required by K.S.A. 19-2863.

You became the board's chairman at its annual organizational meeting in December 2015. While K.S.A. 19-2864 requires an annual organizational meeting and the election of a chairperson, vice-chairperson, secretary, assistant secretary, treasurer, and assistant treasurer,²⁵ the board has no formal policy for election of officers. The board's Administrative Services Committee is charged with considering and proposing a slate of officers, which is thereafter placed on the board's consent agenda. By custom, each elected officer serves a year and then moves on to the next position, e.g., the vice-chairperson becomes the chairperson, the secretary becomes the vice-chairperson, and so on. In this way, every board member rotates through all the available offices.

Sometime after your election as chairperson, but prior to October 2016, you state that you recall hearing Mr. Klika comment that the board should consider two year terms for the chairperson position "for better cohesiveness."²⁶ According to Mr. Klika, he recalls commenting that the board should consider longer terms than one year for the chairperson position "as I thought it might allow the chair person [sic] to become better acclimated to the position as it takes some time to become comfortable in the position." Mr. Klika also recalls that you were present when he made this comment. Mr. Klika had no other discussions with you or other board members regarding the slate of officers other than making this comment when you were present.²⁷

On or about October 20, 2016, you called Mr. Pirner to advise him you were "considering running for a second term as chair and inquired of his opinion since he [Mr. Pirner] was in line to be chair in two years under the existing system. He was non-committal but he did express concerns as to the effect on his and Mr. [sic] Rivarola's opportunities to serve as chair."²⁸ According to Mr. Pirner, you informed him of your intention to seek a second term as chairman, and "that would likely 'freeze everyone in place' for the 2017 calendar year."²⁹ Mr. Pirner was non-committal to this idea.³⁰ Mr. Pirner states that you told him you had spoken to Mr. Carroll and Mr. Klika, but apparently did not convey any further information about those conversations.³¹ The next day, Mr. Pirner sent you a Facebook message indicating that he would not support your proposal.³²

²⁵ K.S.A. 19-2864.

²⁶ Affidavit of Paul Snider, paragraph 2.

²⁷ Affidavit of Steven C. Klika, paragraph 3.

²⁸ Affidavit of Paul Snider, paragraph 3.

²⁹ Complaint, p. 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

On or about October 20, 2016, you contacted Mr. Carroll asking for his opinion about you serving a second term.³³ Mr. Carroll told you he “thought it would be fine so long as Ms. Wallerstein did not object.”³⁴ You “advised that he believed she was okay with the idea.”³⁵ You believed that Mr. Carroll “approved of me serving a second term.”³⁶ You and Mr. Carroll have been friends for more than 15 years.³⁷

On October 23, 2016, you had coffee with Mr. Baru, and “mentioned that [you] might like to serve as chairman for a second term.”³⁸ Mr. Baru told you that you “had done a good job and that I might be supportive, although I made no commitment.”³⁹ Mr. Baru had no further discussions or communications with board members regarding the election of officers outside of an open meeting.⁴⁰

On an unknown date, but after speaking with Mr. Baru, you called Ms. Wallerstein. According to Ms. Wallerstein, “Mr. Snider said that he was just beginning to feel comfortable in the chair position and asked if I would mind if he served an additional term. I responded that it was fine with me but that I could not speak for any other board members and I thought he would need their approval.”⁴¹

On November 8, 2016, Ms. Wallerstein and Mr. Carroll met at an election watch function. Mr. Carroll “came up to me and asked if I had been contacted recently by Mr. Snider. I said yes and that I was OK with it. Mr. Carroll said ‘good to know’ and the discussion ended.”⁴² Mr. Carroll and Ms. Wallerstein had no other contact with other board members.⁴³

George Schlagel is the chairperson of the board’s Administrative Services Committee, which is responsible for proposing a slate of officers to be voted on by the board.⁴⁴ On or about November 2, 2016,⁴⁵ you called Mr. Schlagel to “inform[] [him] that [you] would like to serve a second term and that [you were] proposing to ‘freeze’ all board members in their respective positions. I responded that although I considered his proposal unusual, I had no problem with it since he had done a good job. I inquired if Nancy Wallerstein, who was in line for the chair position, was aware of his proposal and my recollection is that he informed me that she had no objection.”⁴⁶

³³ Affidavit of Chris Carroll, paragraph 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Affidavit of Paul Snider, paragraph 4.

³⁷ *Id.*

³⁸ *Id.*, paragraph 5.

³⁹ Unsigned Affidavit of Steven Baru, paragraph 3.

⁴⁰ *Id.*, paragraph 4.

⁴¹ Affidavit of Nancy Wallerstein, paragraphs 2 and 3; *see also* Affidavit of Paul Snider, paragraph 6.

⁴² Affidavit of Nancy Wallerstein, paragraph 4; *see also* Affidavit of Chris Carroll, paragraph 4.

⁴³ Affidavit of Chris Carroll, paragraph 4; *see also* Affidavit of Nancy Wallerstein, paragraph 5.

⁴⁴ Affidavit of George J. Schlagel, paragraph 1.

⁴⁵ Email from Paul Snider to Jill Geller dated November 2, 2016, at 8:41 p.m., Subject: Re: 2017 Slate of Officers.

⁴⁶ Affidavit of George J. Schlagel, paragraph 4.

On November 2, 2016, Jill Geller, the board's executive director, emailed you to determine if you had spoken to Mr. Pirner, Ms. Rivarola and Mr. Schlagel regarding the slate of officers for 2017.⁴⁷ You replied that you "talked to George and I believe he is comfortable with a 2-year chair scenario, but he wanted to think about it some more. He indicated he would have liked to serve two-years [sic] and would like to figure out a way to keep immediate past chairs more involved. However . . . he doesn't want to unilaterally approve a change. So for the packet, I think we should plan to propose a normal rotation. . . ."⁴⁸

On November 4, 2016, you emailed Mr. Schlagel: "Hi, George, I hope you decided you can support keeping the board leadership the same for 2017. . . ."⁴⁹ Mr. Schlagel replied, "I am comfortable advancing to the board without recommendation."⁵⁰ Mr. Schlagel did not speak to any other board members prior to the board's November 2016 meeting.⁵¹

On November 7, 2016, the Administrative Services Committee met. Mr. Schlagel was the only person present at this meeting.⁵² Mr. Pirner, who was also a member of this committee, did not attend the meeting.⁵³ Part of the committee's business at this meeting was to propose a slate of officers to be nominated. Because the entire committee was not present, Mr. Schlagel instructed staff to place the discussion of a proposed slate of officers on the board's regular agenda, rather than the consent agenda, for its November 9, 2016 meeting.⁵⁴

On November 9, 2017, you attempted to call Mr. Pirner; he had to leave a voice mail. You then sent Mr. Pirner a Facebook message:

Paul Snider

Mike, just tried to call. I've decided to proceed with trying to be chair again, but by freezing everyone in place. I know that pushes you back a year (or two if it becomes the norm), but I don't know another workable way to do it, other than not trying. *I haven't talked to Leslee, but everyone else is supportive or at least comfortable with it. George has some concerns about the precedent, but not with me. The general sense is people are OK with trying it but not making any commitments that we're moving to two-year terms.* I think that's appropriate. Give me a call in the next couple of days if you want to discuss.

⁴⁷ Email from Jill Geller to Paul Snider dated November 2, 2016, at 6:59 p.m.

⁴⁸ Email from Paul Snider to Jill Geller dated November 2, 2016, at 8:41 p.m., Subject: Re: 2017 Slate of Officers.

⁴⁹ Email from Paul Snider to George Schlagel dated November 4, 2016, at 4:40 p.m., Subject: 2017 board roles.

⁵⁰ Email from George Schlagel to Paul Snider dated November 4, 2016, at 4:58 p.m., RE: 2017 board roles.

⁵¹ *Id.*, paragraph 6.

⁵² Affidavit of George J. Schlagel, paragraph 5.

⁵³ Complaint, p. 4.

⁵⁴ Affidavit of George J. Schlagel, paragraph 5.

Mike Pirner

I'll be most likely voting no against that, but that's fine. Happy to discuss.

Did it get talked about in committee? I know I wasn't there.

Paul Snider

It was not discussed in committee because George was the only one. So it will be an action item on Wednesday with no committee recommendation.

Mike Pirner

So, if it wasn't discussed I'm concerned about how you're talking to everyone and that not being a KOMA violation. . . .⁵⁵

You do "not disagree with Mr. Pirner's factual recitation of the Facebook message or other communication referred to between [them] in" the complaint.⁵⁶

On November 9, 2016, you requested information from the board's legal counsel to "determine whether there are any KOMA regulations that prevent me from communicating an issue or message individually with a majority of the board. Again, I would be having 1 on 1 discussions. . . ." ⁵⁷ Mr. Ballweg provided you with information concerning the elements of a meeting, and advised that "[Y]ou are not prevented from having a discussion with members on an individual basis on a 1 on 1 as you suggest below. I would discourage however, any repetition of discussion which you might have with member a to member b. In other words keep it 1 on 1 and don't share any other members [sic] opinions to one another. If I am not clear here let me know. ernie [sic]."⁵⁸ On the same day, at 5:56 p.m., Ms. Geller emailed information to you concerning the KOMA, including a link to information contained on the Attorney General's website concerning the KOMA, and a link to a KOMA statue on the Kansas Legislature's website.⁵⁹

You never spoke to Ms. Rivarola about wanting to serve another term as chairman.⁶⁰ Sometime after Mr. Pirner's original conversation with you, Mr. Pirner contacted Ms. Rivarola about your proposal.⁶¹ There is no evidence to suggest that Mr. Pirner shared what Ms. Rivarola thought about your proposal with him. Mr. Pirner contacted Ms.

⁵⁵ Complaint, p. 7 (Emphasis added.)

⁵⁶ Affidavit of Paul Snider, paragraph 8.

⁵⁷ Email from Paul Snider to Ernie Ballweg dated November 9, 2016, at 3:46 p.m., Subject: KOMA.

⁵⁸ Email from Ernie Ballweg to Paul Snider dated November 9, 2016, at 4:04 p.m. Re: KOMA.

⁵⁹ Email from Jill Geller to Paul Snider dated November 9, 2016, at 5:56 p.m., Re: Information.

⁶⁰ Affidavit of Paul Snider, paragraph 9.

⁶¹ Complaint, p. 5.

Rivarola again shortly after he received your last Facebook message.⁶² She had no contact with any other board member.⁶³

You, Mr. Carroll and Mr. Baru have not attended any KOMA training or seminars.⁶⁴ Mr. Schlagel “attended a KOMA seminar put on by the Johnson County District Attorney’s Office within the last 3 years.”⁶⁵ Ms. Wallerstein believes that she has “received some KOMA training, but I cannot recall when that might have occurred.”⁶⁶ While Mr. Pirner has “never attended a formal ‘KOMA class,’ [he] is very aware of the KOMA statute having been involved in politics for two decades, and observing many boards and commissions. . . .”⁶⁷ It is unclear whether Mr. Klika and Ms. Rivarola have ever attended any KOMA training.

On November 16, 2016, the board’s agenda contained the following action item: “K. Consider Approval of a Nominated Slate of 2017 Board Officers for Election in December.”⁶⁸ As instructed by Mr. Schlagel, board staff did not place this item on the consent agenda. Following some discussion, the following motion was made: “Mr. Carroll moved to approve the 2017 slate of officers be nominated as currently listed for the 2016 Board officers, and the nominated officers to be elected at the Regular Board Meeting in December. MOTION CARRIED (Yes-3/Carroll, Klika, Schlagel; No-2/Pirner, Rivarola).”⁶⁹ Board members Baru and Wallerstein were absent; you did not vote.

On December 21, 2016, the board’s agenda contained the following action item: “**OTHER BUSINESS** (*Recorded minutes mark: 01:18:03*) **MOTION: Mr. Carroll moved to approve the nominated slate as the elected slate of Board officers as follows . . . Ms. Wallerstein seconded. MOTION CARRIED (Yes-6/Baru, Carroll, Klika, Schlagel, Snider, Wallerstein; No-2/Pirner, Rivarola).**”⁷⁰ The nominated slate differed slightly from the slate of officers proposed at the board’s November 2016 meeting:

- Paul Snider, Chair
- Nancy Wallerstein, Vice Chair
- Steve Baru, Secretary
- Chris Carroll, Treasurer
- George Schlagel, Assistant Secretary and Assistant Treasurer

⁶² Letter from Ernie Ballweg dated February 22, 2017, p. 1, paragraph 5.

⁶³ *Id.*

⁶⁴ Affidavit of Paul Snider, paragraph 1; Affidavit of Chris Carroll, paragraph 1; and Affidavit of Steven Baru, paragraph 1.

⁶⁵ Affidavit of George J. Schlagel, paragraph 1.

⁶⁶ Affidavit of Nancy Wallerstein, paragraph 1.

⁶⁷ Email from Mike Pirner to Ernie Ballweg dated February 10, 2017, at 2:02 p.m., Subject: RE: KOMA.

⁶⁸ Board of Park and Recreation Commissioners Regular Board Meeting Minutes 11-16-2016, p. 4.

⁶⁹ *Id.*, p. 5.

⁷⁰ Board of Park and Recreation Commissioners Regular Board Meeting Minutes 12-21-2016, p. 5.

- Mike Pirner and Leslee Rivarola to hold positions as Board members.⁷¹

On February 14, 2017, Mr. Ballweg, in his capacity as the board's legal counsel, provided each board member with information concerning the KOMA. The information consisted of a document titled "Frequently Asked Questions about the Kansas Open Meetings Act (KOMA) *Last revised August 12, 2008.*" The source of this document is unclear.

Although the past practice of the board is to nominate a slate of officers at its November meeting, and vote on this slate of officers at its December, at the time of the communications in question, there was no pending agenda item for the discussion of the election of officers nor was there a proposed slate of officers.

No member of the board has ever been found to be in violation of the KOMA.

We will discuss additional facts as necessary to an understanding of our discussion and conclusions.

- d. *Communications between Mr. Klika and Mr. Snider; Mr. Pirner and Ms. Rivarola; Mr. Snider and Mr. Carroll; Mr. Snider and Mr. Baru; Mr. Snider and Ms. Wallerstein; Mr. Snider and Mr. Schlagel; Mr. Carroll and Ms. Wallerstein; and Mr. Snider's initial conversation with Mr. Pirner*

On an unknown date, but prior to October 2016, you were present when Mr. Klika commented that it was his opinion that the board should consider two year terms for the chairperson for better cohesiveness.

This communication does not meet all the elements of a serial communication. It was not interactive; merely being present when a statement is made, without more, is not a mutual or reciprocal exchange of information. Likewise, a majority of board was not ultimately involved in this communication. While it concerned the business or affairs of the body—the term length for the board's chairman—we can discern no intent to reach an agreement on a matter requiring binding action by the board. Because this communication does not meet all of the elements of a serial communication, it does not violate the KOMA.

The remainder of the communications between you and the other board members, and Mr. Pirner and Ms. Rivarola, also do not meet all the elements of a serial communication. While they were all interactive communications sharing a common topic of discussion—you were essentially seeking approval to run for a second term—they did not collectively reach a majority of the board members. At most, the interactive communications reached only two or three of the seven board members at any one time. Arguably, except for the communication between Mr. Pirner and Ms. Rivarola, you

⁷¹ *Id.*

engaged in the communications with the intent to reach an agreement on your ability to run for a second term. At the very least, you had set about to gauge the board's reaction to you wanting to serve another term as chairman, and received positive support. Finally, running for a second term of office would require binding action by the board.

Because each of these interactive communications do not meet all of the elements of a serial communication, they do not violate the KOMA.

- e. *November 9, 2016, Facebook communications between Mr. Snider and Mr. Pirner*

Did your Facebook messages to Mr. Pirner constitute a serial communication in violation of the KOMA? After careful review, we think that they did.

First, it is clear that the Facebook messages were a mutual or reciprocal exchange of information, as you and Mr. Pirner exchanged a series of messages on Facebook. Thus the first element of a serial communication is met.

Second, you do not dispute that you told Mr. Pirner that you had “decided to proceed with trying to be chair again, but by freezing everyone in place . . . I haven't talked to Leslee, but everyone else is supportive or at least comfortable with it. George has some concerns about the precedent, but not with me. The general sense is people are ok with trying it but not making any commitments that we're moving to two-year terms. . . .”⁷² Your Facebook message to Mr. Pirner shared what other board members thought about you trying to be chairman again. At the point you sent the Facebook messages to Mr. Pirner, you had already spoken to at least five members of the board (Pirner, Carroll, Baru, Wallerstein, and Schlagel) to gauge support for you serving a second term as chairman. Including you, this is a total of six board members. This is collectively a majority of the board. The second element of a serial communication is met.

Was there a common topic of discussion? You approached your conversations with each board member in a slightly different fashion:

- Mr. Carroll reports that you “ask[ed] my opinion as to [you] serving a second term as Board chair. I told him I thought it would be fine as long as Ms. Wallerstein did not object.”
- Mr. Baru reports that you “stated to [him] that he might like to serve as chairman for a second term. I responded that he had done a good job and that I might be supportive, although I made no commitment.”
- Ms. Wallerstein reports that you “asked if I would mind if he served a second term. I responded it was fine with me. . . .”

⁷² Complaint, p. 4.

- Mr. Schlagel reports that you “inform[ed] me that he would like to serve a second term and that he was proposing to ‘freeze’ all board members in their respective positions. I responded that although I considered his proposal unusual, I had no problem with it since he had done a good job. . . .”

The common thread to all these conversations is you seeking support for your stated desire to serve a second term as chairman. The length of the board chairperson’s term, who should serve as the chairperson, and the election of officers are certainly matters that concern the business or affairs of the public body. Thus, the third element, a common topic of discussion concerning the business or affairs of the public body, is met.

Was there an intent by any or all of the participants in this interactive communication to reach an agreement on a matter that would require binding action by the board? This is a close call. Your Facebook messages to Mr. Pirner stated that although you had not spoken to Ms. Rivarola, you were going to “proceed with trying to be chair again . . . everyone else is supportive or at least comfortable with it . . . the general sense is people are OK with trying it but not making any commitments that we’re moving to two-year terms. . . .”⁷³ Your messages conveyed to Mr. Pirner that you had spoken with virtually the entire board and secured their individual approval to seek a second term.

Mr. Pirner’s response shows he did not have the intent to reach an agreement: “. . . On the issue itself, I’d just urge you in the strongest possible terms not to proceed . . . I’ll fight this all the way. . . .”⁷⁴

In the end, we find that you intended to reach an agreement on a matter requiring binding action by the board—your nomination and election to another term as board chairman. Your Facebook messages show *your* intent. Although you did not ultimately secure Mr. Pirner’s assent, you did not need it, because the remainder of the board you had spoken to was “supportive or at least comfortable” with you seeking a second term, a fact that you conveyed to Mr. Pirner. Step-by-step, conversation by conversation, you secured the support of a majority of the board to be nominated for and ultimately elected to another term as chairman. Your Facebook messages to Mr. Pirner completed the slide down the slippery slope⁷⁵ to a KOMA violation.

In light of the foregoing, we must conclude that the elements of a serial communication are have been met, and thus your Facebook messages constitute a violation of the KOMA.

⁷³ *Id.*

⁷⁴ Complaint, p. 5

⁷⁵ Attorney General Opinion 2000-64, <http://ksag.washburnlaw.edu/opinions/2000/2000-064.htm>, accessed August 18, 2017.

Although your Facebook messages to Mr. Pirner violate the KOMA, is the entire board responsible for this violation? Here, there is no evidence that all board members were aware that their comments would be or were shared with the others. Although Mr. Carroll and Mr. Schlagel knew what Ms. Wallerstein thought about your proposal, *all* the board members did not know what the rest thought about you being nominated and elected to another term as chairman of the board. It was not until you exchanged a series of Facebook messages with Mr. Pirner that the cumulative positive assessment and approval of you being nominated and elected to another term as board chairman reached a majority of the board. Mr. Pirner was effectively an innocent bystander under these circumstances because the board's collective thoughts were forced upon him; he did not go looking for the information. Because only you were aware of what all the board members thought about you wanting to be nominated and re-elected as board chairman, and only your Facebook messages shared that collective information with a majority, we conclude it was you alone, and not the entire board, that violated the KOMA.

Although we believe you violated the KOMA by engaging in serial communications, our analysis does not end there. We must consider whether this is more than a technical violation⁷⁶ of the KOMA. "Technical violation" is a term of art adopted by courts in discussing KOMA violations. "Our courts will look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted]."⁷⁷

We are mindful of the KOMA's procedural safeguards, and thus cannot condone your one on one communications carried out in an attempt to secure the support of a majority of the board to be nominated for and ultimately elected to another term as chairman. The board's counsel suggests that you opted for this approach to be "considerate of the feelings and opinions of other board members"; you state that it was a "matter of courtesy" to let the other board members know that you were thinking about serving an additional year as chairman and to see what they thought. Although perhaps intended as a courtesy and done in an effort to be considerate, it seems to have had the opposite effect for at least two of the board's members. Perhaps due to a lack of training, you failed to appreciate that "[T]he thrust of the KOMA is openness in the cluster of concepts that flavor the democratic process: discussion, analysis, and decision-making among members of a governing body."⁷⁸ The legislature did not intend for such discussion, analysis and decision-making to occur in secret and undetected.⁷⁹ Your inclination to spare hurt feelings may be understandable, but not at the expense of the public policy

⁷⁶ See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

⁷⁷ *Id.*

⁷⁸ *State ex rel. Stephan v. Board of County Com'rs of Seward County*, 254 Kan. 446, 452, 866 P.2d 1024, 22 Media L. Rep. 1430 (1994).

⁷⁹ *Id.*; see also K.S.A. 2016 Supp. 75-4317(a) (declaring public policy that "meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.").

set out in the KOMA. “Public bodies cannot be allowed to do indirectly what the legislature has forbidden.”⁸⁰

The board’s response also questions “whether the public or any member of the general public, has an interest in the outcome of the selection of officers of [the board] by board members who have been duly appointed by the Johnson County Board of Commissioners. . . .” This misses the point of the KOMA. The legislature has determined that discussion, analysis and decision-making by a public body must occur in the open as a reminder to its members of the obligations imposed by a democratic process. Each member of a public body is responsible for ensuring that the public body complies with the KOMA.

Your actions certainly harmed the spirit and intention of the KOMA. You failed to recognize and appreciate the danger of serial communications. Your apparently belated attempt to seek legal advice on the same day that Mr. Pirner raised the specter of a KOMA violation arguably shows you recognized the danger of discussing the board’s business outside of an open meeting, but seemingly only after it was brought to your attention by Mr. Pirner. Other than Mr. Pirner,⁸¹ no other board member appears to have considered or suggested to you that your conversations might eventually run afoul of the KOMA, and Mr. Pirner’s red flag was too late. Without a doubt, you lacked a solid foundation and understanding of the KOMA’s requirements. This is simply not acceptable from someone who has apparently served on this board for some time.

In mitigation, and notwithstanding your polling of a majority of the board members outside of an open meeting about serving another term as board chairman, at Mr. Schlagel’s direction, the board’s staff placed the nomination discussion on the agenda of an open meeting. The motion to nominate the slate of officers, including you, occurred during an open meeting, as did the vote. The final vote on the slate of officers also was placed on the board’s agenda at a separate meeting, and the board voted on this slate of officers during the course of its open meeting. At each meeting, board members had the opportunity to discuss the nominated slate of officers, its impact on the board, and how each member viewed the proposal. Based on the board’s minutes, the discussions were animated, and views sometimes sharply expressed.⁸² Regardless of what each board member told you before these meetings, each board member had the opportunity to express opinions and even change his or her mind prior to the public votes. Additionally, although you may have been acting in your own interest, we have no evidence that you or the board members routinely engage in serial communications, or that your actions

⁸⁰ *Memorial Hospital Ass’n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

⁸¹ Ms. Rivarola never had the opportunity to raise a concern because you did not contact her to in an attempt to secure her support for him to be nominated and elected to a second term. Likewise, Mr. Klicka was not involved in the serial communications at issue, and thus also never had the opportunity to raise a concern.

⁸² Board of Park and Recreation Commissioners Regular Board Meeting Minutes 11-16-2016, p. 5, Reports, Sec. F.; *see also* Board of Park and Recreation Commissioners Regular Board Meeting Minutes 12-21-2016, Attachment to the Minutes of the JCPRD Meeting Held December 21, 2016.

were meant as a subterfuge to avoid the transaction of business in the public eye, thus defeating the purposes of the KOMA. Finally, the board has been cooperative and forthcoming in its responses to our inquiries.

The intent of the KOMA is to protect the public. The public's right to know is protected when the transaction of governmental business, including the nomination and election of officers for a board that has substantial statutory responsibilities, is conducted in an open meeting. This includes its consideration of whether to change the traditional means of members advancing through various board offices. When such discussions are held outside of an open meeting, there is a danger that there will be no *public* discussion of such matters.

After considering the totality of the circumstances, we find that your action of engaging in serial communications impinges on the public right to know and undermines the foundation of the KOMA. Although perhaps a close call, this is not an instance where a tie can go to the runner. There can be no tie when discussions involving the public's business occur outside of a public meeting. Thus, we believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.⁸³ Additionally, completion of training concerning the requirements of the KOMA may be required.⁸⁴ Any member of a public body subject to the KOMA who knowingly violates any provisions of the act, or intentionally fails to furnish information as required by K.S.A. 2016 Supp. 75-4318(b) concerning notice, may be subject to these penalties. "To 'knowingly' violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific intent to violate the law."⁸⁵ In other words, the violation need not be willful or intentional. Rather, if the KOMA prohibits the action or conduct, and the public body engages in the conduct, that is a knowing violation of the law.⁸⁶ "Ignorance of the law is no excuse."⁸⁷

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that you knowingly violated the KOMA when you engaged in serial communications by sending Facebook

⁸³ K.S.A. 2016 Supp. 75-4320(a).

⁸⁴ See K.S.A. 2016 Supp. 75-4320a(a); see also K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii); and see K.S.A. 2016 Supp. 75-4320f(b).

⁸⁵ K.S.A. 2016 Supp. 75-4320(a); see also *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091 (1982).

⁸⁶ *Id.*, 231 Kan. 536-37.

⁸⁷ *Id.*, 231 Kan. 536.

messages to board member Michael Pirner. We also find that remedial action is required to ensure compliance with the KOMA.

As a remedy, Mr. Pirner and Ms. Rivarola sought to void the board's actions occurring in October and November 2016, including your nomination and election. A district court has the authority to void "any action which is taken at a meeting not in substantial compliance with the provisions of the open meetings act" within 21 days of the meeting in an action brought by the attorney general or county or district attorney.⁸⁸ However, this complaint was not filed until after the 21 days had run. Additionally, avoidance of a governmental action is a drastic remedy, and the threat of it very unsettling to the operation of government. We believe that it should be reserved for the most serious and intentional violations of the KOMA, where, for example, binding action is taken in secret, or a public body deliberately acts to avoid the requirements of the KOMA. After due consideration of all the available facts, we decline to pursue such a remedy.

On the facts of this case, we have determined that the imposition of a civil penalty⁸⁹ as authorized by the KOMA is not warranted. There is no evidence that you have been found in violation of the KOMA on previous occasions, or that your actions were a subterfuge to defeat the purposes of the KOMA.

Mr. Pirner's and Ms. Rivarola's other suggested remedy is "required KOMA training" for the board. We believe this is a reasonable requirement that will help ensure that you understand the significance of your obligations under the Act.

In light of the foregoing, we are seeking your voluntary compliance through the means of a Consent Order as provided for by the KOMA.⁹⁰ We have enclosed the Consent Order for your review. The Consent Order requires you to acknowledge violation of the KOMA and to attend at least one hour of training on the provisions of the KOMA presented by an attorney experienced in dealing with open meetings issues; you must attend this training on or before November 30, 2017. Although not required, we strongly urge you, as the board's chairman, to require the board's executive level staff to attend training as well to help ensure the board complies with the KOMA.

Our offer of a Consent Order as authorized by K.S.A. 2016 Supp. 75-4320d(a)(1) is effective up to **5:00 p.m. on Wednesday, October 4, 2017.**

If the Consent Order is approved, please sign where indicated and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files. You do not need to complete the dates on the first page or the certificate of service on the

⁸⁸ K.S.A. 2016 Supp. 75-4320(a).

⁸⁹ K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii).

⁹⁰ K.S.A. 2016 Supp. 75-4320d(a)(1).

Letter to Paul Snider
September 19, 2017
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last page. We will insert the dates when the Attorney General executes the Consent Order.

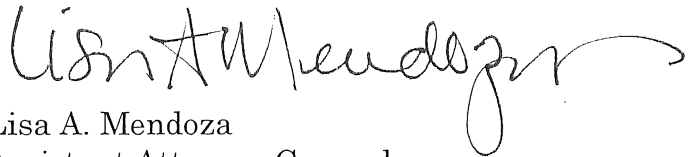
If we do not receive the signed Consent Order by **5:00 p.m. on Wednesday, October 4, 2017**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2016 Supp. 75-4320a, 75-4320d, and/or 75-4320f.

We note that this office is sponsoring KOMA training in the near future. This training is free and open to the public. One of the trainings is within easy traveling distance for you in Topeka on October 6, 2017. You may find more information about the training, including registration details, on our website: <http://ag.ks.gov/open-government/upcoming-training>.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or lisa.mendoza@ag.ks.gov with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
Derek Schmidt

A handwritten signature in black ink that reads "Lisa A. Mendoza". The signature is written in a cursive style with a long, sweeping tail on the letter "z".

Lisa A. Mendoza
Assistant Attorney General
Director, Open Government Enforcement Unit

Enclosure (Consent Order)