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Office of the Chief Counsel

Sam Brownback, Governor

February 3, 2012

Chadwick J. Taylor  
Shawnee County District Attorney's Office  
200 SE 7<sup>th</sup> Street, Ste. 214  
Topeka, KS 66603

**VIA FAX & U.S. MAIL (785-291-4909)**

*Re: Open Meetings Complaint*

Dear Mr. Taylor:

This letter will confirm that I have received your correspondence of February 2, 2012 regarding the complaint filed against certain Kansas legislators by Michael Merriam dated January 31, 2012. Please be assured that the Offices of Governor and Lieutenant Governor will act with diligence and in good faith to preserve all potential evidence that may be relevant to this complaint. Document retention and preservation is already standard practice in our offices and so I do not anticipate great difficulty or inconvenience in this matter.

To assist you initially, I have enclosed with this letter a list of all invitees for each legislative dinner hosted at Cedar Crest this year. As you may know, legislative gathering such as these at Cedar Crest have been a longtime practice of Kansas Governors.

While the "bodies" at issue here are legislative committees rather than the Governor or any entity of the executive branch, it may be helpful for you to understand the precautions that were taken to avoid and prevent any potential violation of the Open Meetings Act. For KOMA to be triggered, three distinct factors must be present: 1) interactive communication; 2) by a majority of a body or agency; 3) for the purpose of discussing the affairs of the body or agency. K.S.A. § 75-4317a.

It is true that a majority of various legislative committees were present at some of the legislative dinners in question. However, majorities of committees are routinely present together at various events during the legislative session and beyond including meals, receptions, honorary events, lobbyist sponsored presentations, and so forth. Simply because the majority of a committee is present at the same event does not give rise to a presumption of an open meetings violation and is



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not justification for an investigation in each instance. Setting this precedent is, in my view, unjustified and dangerous.

Mr. Merriam's complaint of January 31, 2012 does not specifically allege that either of the other two elements—an interactive discussion about the affairs of any specific committee—were present. As such, I cannot concur with your conclusion that “taken as true, the complainant has alleged facts sufficient to find that one or more of these state officials has violated KOMA.” Rather, the complainant has alleged that a majority of certain committees were present when the Governor presented his policy agenda for the session. These facts do not give rise to a *bona fide* allegation of violations of KOMA and should not form the basis of a costly and invasive investigation by your office.

As you can see from the enclosed invitation lists, it is true that a majority of certain committees were present at certain of these dinners (although never exclusively, as there were other legislators present as well). It is also true that at each of these dinners Governor Brownback used the opportunity to either give the legislators a preview or a recap of the high policy points of his State of the State Address. The law does not prohibit this and, in my view, we would be well advised not to create an atmosphere of fear through the presumption that KOMA violations may lurk around every legislative corner.

That being said, it is equally true that lawmakers must remain aware of the necessity for openness in government and of their duties under the law. To that end, at the beginning of each of the legislative dinners in question a clear and correct summary of the open meetings law was presented by Governor Brownback and his staff. All guests were reminded that while they were permitted to gather to hear the Governor's policy agenda for the year, they were prohibited from having any discussions by a majority of any committee about the affairs of that committee. The Governor's clear intent was to prevent any open meetings violations from occurring and to put in place reasonable precautions to warn and guard the legislators against any violation. At some of the dinners the Governor even affirmatively asked members of legislative leadership to help guard against any interactive discussion about the affairs of any committee with a majority present.

Because Kansas courts have not had the opportunity to establish a wide body of precedent concerning the most recent version of KOMA adopted in 2008, the available guidance comes primarily through the opinions and directions of the Kansas Attorney General's Office.

It has been a longstanding rule that the majority of a body “may attend and participate in” events at which “items of general interest are discussed” “so long as members do not use such occasions to discuss among themselves the specific business or affairs of the body.” Kansas Atty. Gen. Op. 82-48; *see also* “Kansas Open Meetings Act (KOMA)” at page 5, guidance document prepared by Michael J. Smith, Assistant Attorney General (August 2009). The Attorney General



reiterates this rule on his website currently under the heading of frequently asked questions as follows: “Can members attend a general interest meeting of another group? Yes, as long as they refrain from any private discussions on the affairs of their body, they may attend conferences where general topics are being presented.” Kansas Attorney General’s Frequently Asked Questions About the Kansas Open Meetings Act, <http://ag.ks.gov/legal-services/open-govt/koma-faq> (accessed February 3, 2012).

After the Legislature adopted the “interactive communication” rubric for KOMA analysis, Attorney General Steve Six clarified the law by opining that interactive communication for the purposes of KOMA “requires a mutual or reciprocal exchange between members of a body or agency subject to KOMA.” Kansas Atty. Gen. Op. 09-22. Therefore, according to the Attorney General, an “interactive communication” “does not occur when a non-member of a body or agency communicates with a majority of that body or agency board.” *Id.* The Attorney General went so far as to say that even if a member of the body “responds [to the non-member of the body] and shares the response with other members” such a communication still does not rise to the threshold of an “interactive communication.” *Id.* Only if there are further discussions “among a majority of the members concerning the business of the body” would there be a violation of KOMA. *Id.*

Certainly given the factual setting, available legal guidance, past practice and precedent, and the reasonable precautions taken, even if certain legislators, without the knowledge of and against the express wishes of Governor Brownback, did interactively discuss the affairs of their committee with a majority present, they did so well within the confines of the KOMA safe harbor created by Kansas courts in *Stevens v. Board of Reno County Comm’rs*, 10 Kan. App. 2d 523 (1985). In *Stevens* the Kansas Court of Appeals recognized that public officials in compliance with the “spirit” of the law are entitled to a safe harbor when “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.” *Id.* at 526.

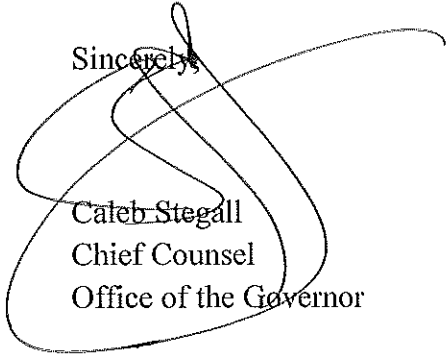
In summary, the Offices of the Governor and Lieutenant Governor are pleased to cooperate with your office during the investigation of this complaint. In my view, the complaint itself is not sufficient to give rise to a *prima facie* case of a KOMA violation even if all the allegations of the complaint are taken as true. Caution is warranted when making such allegations as there exists the danger of creating a chilling effect on lawmakers attempting in good faith to do what their constituents elected them to come to Topeka to do. The dinners hosted by the Governor at Cedar Crest were for the purpose of socializing and to give the Governor an opportunity to inform the legislators as to his policy agenda for the year, and neither of those purposes violates KOMA. Reasonable and proper precautions were taken by the Governor and his staff to prevent and guard



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against any possible KOMA violation. To my knowledge, those precautions were appropriately heeded by legislators. And even if there was some communication that could even arguably be categorized as a violation of KOMA, the totality of the circumstances clearly demonstrate that the “spirit” of KOMA was adhered to and all legislators are entitled to the good faith safe harbor created by the Kansas courts.

Sincerely,



Caleb Stegall  
Chief Counsel  
Office of the Governor

Cc: Speaker of the House, Michael O’Neal  
President of the Senate, Stephen Morris  
Kansas Attorney General, Derek Schmidt

Invitation Lists for Legislative Dinners Hosted at Cedar Crest (2012)\*

January 9\*\*

Rep. John Grange  
Rep. Don Hill  
Rep. Mitch Holmes  
Sen. Terrie Huntington  
Rep. Steven Johnson  
Rep. Jim Kelly  
Sen. Jeff King  
Sen. Jeff Longbine  
Sen. Bob Marshall  
Sen. Ty Masterson  
Rep. Charles Roth  
Rep. Ron Worley  
Sen. Vicki Schmidt  
Sen. Ruth Teichman  
Sen. John Vratil

January 10

Sen. Steve Abrams  
Rep. Tom Arpke  
Rep. Clay Aurand  
Rep. Rick Billinger  
Rep. Barbara Bollier  
Sen. Terry Bruce  
Rep. Terry Calloway  
Rep. Ward Cassidy  
Rep. Pat Colloton  
Rep. Jana Goodman  
Rep. Lana Gordon  
Rep. Amanda Grosserode  
Rep. Jim Howell  
Rep. Steve Huebert  
Sen. Jeff King  
Rep. Brenda Landwehr  
Sen. Bob Marshall  
Rep. Connie O'Brien  
Rep. Leslie Osterman  
Sen. Tim Owens  
Rep. Ronald Ryckman  
Rep. Joseph Scapa  
Sen. Jean Schodorf  
Rep. Sheryl Spalding  
Sen. Ruth Teichman  
Sen. Dwayne Umbarger

Sen. Susan Wagle  
Sen. John Vratil

January 17

Rep. Anthony Brown  
Rep. Rick Billinger  
Rep. Rob Bruchman  
Rep. Steve Brunk  
Rep. Terry Calloway  
Rep. Richard Carlson  
Rep. Jim Denning  
Rep. Owen Donohoe  
Rep. Randy Garber  
Rep. Mario Goico  
Rep. Gary Hayzlett  
Rep. Dennis Hedke  
Rep. Kasha Kelley  
Rep. Dan Kerschen  
Rep. Marvin Kleeb  
Rep. Reynaldo Mesa  
Rep. Leslie Osterman  
Rep. Virgil Peck  
Rep. Larry Powell  
Rep. Willie Prescott  
Rep. Joseph Scapa  
Rep. Don Schroeder  
Rep. Scott Schwab  
Rep. Sharon Schwartz  
Rep. Gene Suellentrop  
Rep. Caryn Tyson  
Rep. Brian Weber

January 18

Sen. Pat Apple  
Sen. Les Donovan  
Sen. Terry Bruce  
Sen. Jay Emler  
Sen. Dick Kelsey  
Sen. Jeff King  
Sen. Jeff Longbine  
Sen. Garrett Love  
Sen. Julia Lynn  
Sen. Bob Marshall  
Sen. Ty Masterson  
Sen. Ray Merrick  
Sen. Robert Olson

Sen. Dennis Pyle  
Sen. Jean Schodorf  
Sen. Chris Steineger  
Sen. Susan Wagle

January 23

Sen. Steve Abrams  
Rep. Tom Arpke  
Rep. Elaine Bowers  
Rep. Bob Brookens  
Sen. Terry Bruce  
Rep. Dan Collins  
Rep. Gary Hayzlett  
Rep. Brett Hildabrand  
Rep. Kyle Hoffman  
Rep. Dan Kerschen  
Sen. Jeff King  
Sen. Garrett Love  
Sen. Steve Morris  
Rep. Tom Moxley  
Rep. Charlotte O'Hara  
Sen. Ralph Ostmeyer  
Rep. Willie Prescott  
Rep. Larry Powell  
Sen. Dennis Pyle  
Rep. Caryn Tyson  
Rep. Brian Weber  
Sen. Mark Taddiken  
Sen. Ruth Teichman

January 24

Rep. Richard Carlson  
Rep. Dave Crum  
Rep. Pete DeGraaf  
Rep. Jim Denning  
Rep. Owen Donohoe  
Rep. Lana Gordon  
Rep. Kasha Kelley  
Rep. Marvin Kleeb  
Rep. Peggy Mast  
Rep. Joe McLeland  
Rep. Virgil Peck  
Rep. Joann Pottorff  
Rep. Marc Rhoades  
Rep. Sharon Schwartz  
Rep. Clark Shultz

Rep. Gene Suellentrop

January 25\*\*\*

Sen. Jay Emler  
Sen. Terrie Huntington  
Sen. Kelly Kultala  
Sen. Ty Masterson  
Sen. Carolyn McGinn  
Sen. Vicki Schmidt  
Sen. Jean Schodorf  
Sen. Mark Taddiken  
Sen. Ruth Teichman  
Sen. Dwayne Umbarger  
Sen. John Vratil  
Sen. Marci Francisco  
Sen. Laura Kelly

February 6

Rep. Stephen Alford  
Rep. Barbara Ballard  
Rep. Bob Bethell  
Rep. Benny Boman  
Rep. Elaine Bowers  
Rep. Mike Burgess  
Rep. Tom Burroughs  
Rep. Sydney Carlin  
Rep. Dan Collins  
Rep. Paul Davis  
Rep. Nile Dilmore  
Rep. Jim Fawcett  
Rep. Bill Fuerborn  
Rep. Gail Finney  
Rep. Geraldine Flaharty  
Rep. Stan Frownfelter  
Rep. Trent Ladoux  
Rep. Doug Gatewood  
Rep. Sean Gatewood  
Rep. Bob Grant  
Rep. TerriLois Gregory  
Rep. Broderick Henderson  
Rep. Jerry Henry  
Rep. Phil Hermanson  
Rep. Don Hineman  
Rep. Carl Holmes  
Rep. Mike Kiegerl  
Rep. Lance Kinzer

Rep. Forrest Knox  
Rep. Annie Kuether  
Rep. Brenda Landwehr  
Rep. Harold Lane  
Rep. Judith Loganbill  
Rep. Anne Mah  
Rep. Melody McCray-Miller  
Rep. Melanie Mier  
Rep. Kelly Meigs  
Rep. Bob Montgomery  
Rep. Tom Moxley  
Sen. Chris Steineger

February 7

Sen. Pete Brungardt  
Sen. Marci Francisco  
Sen. David Haley  
Sen. Anthony Hensley  
Sen. Tom Holland  
Sen. Laura Kelly  
Sen. Kelly Kultala  
Rep. Mike O'Neal  
Rep. Bill Otto  
Rep. Joe Patton  
Rep. Janice Pauls  
Rep. Mike Peterson  
Sen. Mike Petersen  
Rep. Eber Phelps  
Sen. Mary Pilcher-Cook  
Rep. Richard Proehl  
Sen. Roger Reitz  
Rep. John Rubin  
Rep. Louis Ruiz  
Sen. Allan Schmidt  
Rep. Joe Siewert  
Rep. Arlen Siegfried  
Rep. Mike Slattery  
Rep. Tom Sloan  
Rep. Greg Smith  
Rep. Vern Swanson  
Rep. Annie Tietze  
Rep. Ed Trimmer  
Rep. Ponka-We Victors  
Rep. Jim Ward  
Rep. Vince Wetta  
Rep. Jerry Williams  
Rep. Valdenia Winn

Rep. Kay Wolf  
Rep. Bill Wolf  
Rep. Kathy Wolfe Moore

\* All invitations included a spouse or guest. In numerous instances invitees did not attend.

\*\* Senator Steve Morris was in attendance at the January 9 dinner though he was not on the invitation list.

\*\*\* Senators Francisco and Kelly were inadvertently left off the written invitation list for the January 25 dinner but were invited via telephone.