

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Jeff King at 10:40am on Tuesday, February 02, 2016, 346-S of the Capitol.

All members were present

Committee staff present:

Robert Gallimore, Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Natalie Scott, Office of Revisor of Statutes
Lauren Douglass, Legislative Research Department
Natalie Nelson, Legislative Research Department
Suzanne Nelson, Kansas Legislative Committee Assistant

Conferees appearing before the Committee:

Kansas Attorney General Derek Schmidt;
State Senator Molly Baumgardner, 37th District;
State Senator Anthony Hensley, 19th District, Senate Minority Leader;
Kent Cornish, President, Kansas Association of Broadcasters;
Doug Anstaett, Executive Director, Kansas Press Association;
Melissa Wangemann, General Counsel, Kansas Association of Counties;
Mike Kautsch, College Professor, Private Citizen;
Senator Marci Francisco, 2nd District, Assistant Minority Leader;
Alan L. Cowles, M.D., Ph.D, Private Citizen;
Cille King, Voter Service Chair, Kansas League of Women Voters;
Callie Jill Denton, Executive Director, Kansas Association for Justice;

Others in attendance:

[See Attached List](#)

Bill introductions

Chair King called the meeting to order and asked for bill requests or introductions. There were none from the committee members, however Chair King introduced two bills: 1) the open records exemption review bill that the committee must do every year; and 2) a bill on zero-based budgeting and creating a review commission to implement zero-based budgeting. There being no questions or objections, the bills were introduced.

Richard Cram and Michael Hale from the Kansas Department of Revenue rose from the audience to introduce a bill concerning adequate enforcement of and compliance with the Master Tobacco Settlement Agreement. There being no questions or objections, the bill was introduced.

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MINUTES of the Committee on Judiciary at 10:40am on Tuesday, February 02, 2016 in Room 346-S of the Capitol.

The Chair, seeing no other bill requests or introductions, opened the hearing on **SB361**.

Hearing on: SB361 — Open records act; definitions, public agency and public record.

Jason Thompson gave an overview of the bill which amends K.S.A. 45-217, containing the definitions for the open records act. There were no questions.

Attorney General Derek Schmidt testified in support of the bill which proposes to amend the Kansas Open Records Act (KORA) to apply it to otherwise public records on the private email accounts of state employees. General Schmidt noted that communications technology has evolved faster than the law. Because of this, the legal structure that worked when the current provisions of KORA were enacted no longer works today because public employees might use private email accounts to do their public jobs. He also drew attention to his proposed amendment, marked Exhibit H in his attachments. ([Attachment 1](#))

State Senator Molly Baumgardner presented proponent testimony and urged passage. She related that **SB361** builds upon recent legislative efforts to improve accountability and open communications with Kansans. She noted **SB361** also

- places the appropriate emphasis on the content of electronically transmitted "public work" while eliminating the issue of technology ownership;
- emphasizes the recorded information, not the actual location of the information;
- expands the definition of public record to include emails or text messages about public business without unduly affecting the privacy rights of a public employee or official;
- identifies that officers or employees of a public agency who have electronic communication related to the work of the public agency need to conserve those documents, although the manner of conservation is not mandated because this is one technological area that is still developing;
- maintains the existing penalty and remedy language adopted in 2015 HB2256. ([Attachment 2](#))

Senator Anthony Hensley appeared to voice support for passage of **SB361**. He related that changing the definition of "public records" was absolutely critical to increasing transparency in state and local government. He noted that at a time when skepticism of the government at all levels is at an all-time high, ensuring transparent and open state and local government is critical to restoring the public's trust. ([Attachment 3](#))

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Attorney General Schmidt, Senator Baumgardner and Senator Hensley answered questions from Senator Haley and Chair King, and were then excused to go to other appointments.

Kent Cornish appeared on behalf of the Kansas Association of Broadcasters in support of **SB361**. He related that the committee looked at other states and court decisions to produce a comprehensive, yet simple bill. Regardless of how or with what device an officer or public employee conducts state business, it is an open record with certain privacy exceptions. ([Attachment 4](#))

Doug Anstaett testified in support of the bill and thanked the Advisory Committee for attempting to close a significant loophole in the Kansas Open Records Act. He urged the Judiciary Committee to pass this bill. ([Attachment 5](#))

Melissa Wangemann presented proponent testimony on behalf of the Kansas Association of Counties. She believes that **SB361** creates greater transparency for Kansas citizens and noted that the concept of open government should not be dependent upon the location of the public record. ([Attachment 6](#))

Mike Kautsch appeared as a private citizen, rather than in his professional capacity as a Professor at the University of Kansas Law School. He remarked that he served on the Advisory Committee chaired by Senator Baumgardner and outlined how their committee proceeded with the task charged by Chair King. Mr. Kautsch related that **SB361** is consistent with the legal tradition that recognizes recorded information as a public record if it memorializes a public agency's transaction of official business or performance of its official functions. ([Attachment 7](#))

The remaining proponents stood and answered questions from Senators Knox and Haley. Chair King also called the committee's attention to the written-only proponent testimony of Christy Molzen, Staff Attorney with the Kansas Judicial Council ([Attachment 8](#)) and Nicole Proulx Aiken, Deputy General Counsel for the League of Kansas Municipalities. ([Attachment 9](#))

The Chair announced that he intends to work this bill next week and urged the advisory committee reconvene and work out the differences in terms used in a couple of places and by next week arrive with an amendment or substitute bill that contains more consistent terms or terms that have already been interpreted by case law.

Seeing no other questions, Chair King asked for any other written or oral proponent, opponent, or

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neutral testimony. There was none. The Chair closed the hearing on **SB361**.

Chair King turned the committee's attention to **SB360** and opened the hearing.

Hearing on: SB360 — Open meetings; justifications for closing meetings.

Jason Thompson presented a brief overview of **SB360**, a bill regarding open meetings and justifications for closed or executive meetings. He spoke about the items to be changed, repealed, or stricken and some technical corrections to be made. There were no questions from the committee.

Senator Marci Francisco presented testimony in favor of the bill. She related that K.S.A. 75-4319 addresses closed or executive meetings and requires a statement of the justification for closing a meeting, the subjects to be discussed, and the time and place at which the open meeting shall resume, however "justification" and "subjects" are not defined. Additionally, section (b) then provides a list of what seems to be justifications, but calls them subjects, which results in a significant amount of confusion. This bill seeks to clarify allowable subjects with a list of justifications that explain the temporary need for confidentiality. Senator Francisco thanked the committee for their consideration and urged favorable passage. ([Attachment 10](#)) .

Alan Cowles testified in support of the bill. He related that **SB360** is aimed at correcting the unfortunate wording of the current law so that governmental bodies going into executive session will give the public enough information about the subjects to be discussed to enable citizens to know about the actions of their elected officials and to respond appropriately. ([Attachment 11](#))

Cille King presented proponent testimony. She posed that elected officials should always remember they are responsible to the citizens of Kansas. She further related that open government is not a partisan matter and when government is closed, all citizens are denied their right to know and respond appropriately to the actions of their elected officials. ([Attachment 12](#))

Doug Anstaett supported **SB360** and emphasized its attempt to bring more specificity to the process that should be followed for a closed session. He expressed concern over adding the words, "to maintain the confidentiality of" to each of the exceptions, in fear that the language might be misconstrued and would discourage whistleblowing by public servants. ([Attachment 13](#))

Mike Kautsch presented testimony in favor of the bill. He noted that it would clarify the conditions under which public bodies and agencies may move from an open meeting to an executive session. He also expressed his concern about overuse of the phrase, "to maintain confidentiality," and worried that it may give the impression that secrecy is valued over openness. ([Attachment 14](#))

Chairperson King asked for questions to the proponents. There were none.

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Nicole Proulx Aiken presented oral neutral testimony. Her organization strongly supports open government and consistently educates cities on the proper motion, which is contained in the League's *Kansas Open Meetings Manual*, to recess into an executive session. Ms. Aiken also suggested that the bill be amended to remove the word "particular" on page 1, line 12 because it is a new, ambiguous term. ([Attachment 15](#))

Callie Jill Denton submitted written-only opponent testimony, but rose from the audience to speak when Chair King called for any oral opponent testimony. She expressed concern that rather than adding more clarity, certain provisions of **SB360** will add more vagueness to a law that it already confusing. She agreed with several other conferees on the use of ambiguous terms and phrases, and asked the committee to rethink the provisions regarding adjournment into executive session. ([Attachment 16](#))

Chair King asked for questions for the neutral and opponent conferees. Senator Smith asked if Ms. Denton had other language she would recommend as an alternative to the verbiage in question. Ms. Denton indicated that she had been asked by Senator Francisco to join the Advisory Committee and indicated she would be working with the group. The Chair encouraged the Advisory Committee to rework **SB360**, considering the suggestions and concerns expressed today and arrive at a final wordsmithing, particularly using terms that have already been interpreted in other case law.

Senator Bruce drew attention to page 3, subsection 14, dealing with the Kansas Health Policy Authority. He questioned whether this agency still exists and asked that the Staff look at this and make any necessary technical corrections.

The being no other oral or written proponent, opponent, or neutral testimony, and no further questions, the Chair closed the hearing on **SB360**.

Possible action on bills previously heard

No bills were worked in today's meeting.

Chair King announced that tomorrow, the committee will be working some bills heard last week and there will be no meeting on Thursday, February 4, as originally planned. There being no other business for today, the meeting adjourned at 12:10 pm.

The next scheduled meeting will be Wednesday, February 3, 2016 at 10:30 am.