

MINUTES OF THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION & ELECTIONS.

The meeting was called to order by Chairperson Kent Glasscock at 9:00 a.m. on February 23, 1998, in Room 521-S of the Capitol.

All members were present except:

Committee staff present: Mary Galligan, Legislative Research Department
Mike Heim, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Fulva Seufert, Committee Secretary

Conferees appearing before the committee: Mr. Charles Smithson, Legal Counsel, Kansas Commission on Governmental Standards and Conduct
Mr. Bruce Dimmitt, Independent and Lobbyist for Kansans for Life
Mr. Whitney Damron, representing Unified Government of Wyandotte County, Kansas City, Kansas

Others attending: See attached list

Representative Welshimer made a motion to approve the minutes for February 18, 1998, and Representative Powers seconded. Motion passed.

Chairperson Glasscock opened the discussion on SB 410 which is very similar to HB 2663.

SB 410 - Commission on governmental standards and ethics; subpoena powers

HB 2663 - Commission on governmental standards and conduct; relating to the powers and duties

The Chair reported that the Senate has added language that he is proposing to be deleted to make SB 410 more parallel with HB 2663 which was approved by the Subcommittee. Chairperson Glasscock asked Mr. Charles Smithson, Legal Counsel, Kansas Commission on Governmental Standards and Conduct, to explain in more detail. Mr. Smithson said that the reason for the deletion is an attempt to eliminate the 30 day notice (d) lines 35-39. He explained that this is really not an issue since it is already being done. He pointed out that on page 2, lines 6-8, any vote authorizing the issuance of a subpoena or subpoena duces tecum shall be taken at a meeting where the commissioners are in physical presence. He also pointed out line 18 where reference to 30 days gets struck and line 3 on page 3 where the words "criminal penalty or forfeiture" were inserted. (Attachment 1.)

Representative Campbell wanted clarification about the issuance of a subpoena and if one has to get court approval. Mr. Smithson replied, "No." Representative Campbell also wanted to know if a person ignores the subpoena if they could go to court, and the answer was that the judge could rule in favor and issue a contempt of court charge.

Representative Powers asked if what was being attempted was to return SB 410 back to be more like HB 2663. Mr. Smithson said that was correct and that SB 410 would pretty much parallel HB 2663.

Chairperson Glasscock recognized Mr. Bruce Dimmitt, Independent and Lobbyist for Kansans for Life (KFL) whose testimony spoke to the following bills: SB 113, HB 2660, HB 2661, HB 2664, and HB 2666. Mr. Dimmitt opposed these bills on the grounds that they interfere with First Amendment free speech rights under the U.S. Constitution. In regard to the subpoena bill, Mr. Dimmitt recommended two things. First, that the subpoena be referred to Judicial before taking action, and second, that he could support this bill if amended to provide that the Commission issue subpoenas only after obtaining approval to do so from the appropriate court. He stated that he believed the Commission should not have too much autonomous authority

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without outside review before issuing subpoenas and conducting a formal investigation. (Attachment 2.)

Representative Dillon made a motion to accept the deletions for **SB 410** on page 2, lines 39-43, page 3, lines 1-9, and page 4, lines 20-33. Representative Gilbert seconded.

Representative Tomlinson reminded the Committee that these deletions bring it into line with the Subcommittee's recommendation for **HB 2663**. He said that the peanut is that it gives the person who receives the subpoena the opportunity to go through the civil procedures and that by deleting these lines, the bill does not take away any constitutional rights.

The vote was taken and motion passed.

The Chair asked for the Committee's pleasure on **SB 410**.

Representative Benlon made a motion to pass out **SB 410** as amended marked favorable. Representative Welshimer seconded, and motion passed.

Representative Horst made a motion to pass out **HB 2730** marked favorable and being of a non-controversial nature, that it be placed on the Consent Calendar. Representative Wells seconded, and motion passed.

Chairperson Glasscock opened discussion on **HB 2883**.

HB 2883 -Cities; relating to the rehabilitation of abandoned property

The Chair welcomed Mr. Whitney B. Damron who spoke on behalf of the Unified Government of Wyandotte County, Kansas City, Kansas and as an opponent of **HB 2883**. He stated that the County believes the Unified Government of Wyandotte County/Kansas City, Kansas is best suited to address rehabilitation issues rather than through the vehicle of this bill. (Attachment 3.)

Representative Cox inquired if this legislation applied to Edwardsville and Bonner Springs, and the answer was, "yes."

Representative Horst asked Mr. Damron if he saw any benefit at all in case the government would decide they would like to proceed in this manner. Mr. Damron said that the Unified Government is not supportive of the new tax.

Representative Welshimer asked Mr. Damron if he had any idea what the city now spends to raise a two bedroom house, and Mr. Damron said that it was somewhere in the neighborhood of \$3,000 to \$5,000.

Representative Wells said that he had a question of clarification in the third paragraph on page 2 concerning the local control issue. Mr. Damron responded that he believed the problems can best be accomplished at the local level rather than through state legislation.

The Chair directed the Committee's attention toward a discussion of conspiracy and aiding and abetting.

Representative Tomlinson spoke to **HB 2654- Governmental ethics; relating to certain violations**. Representative Tomlinson said that the Subcommittee had made some amendment recommendations. He defined conspiracy as requiring an illegal act and the person's actual assisting in planning, etc. He said that aiding and abetting requires two criminal acts, and that what the bill does is to extend the criminal aiding and abetting statutes to governmental and ethics laws. He added that if one assists in a criminal activity, then that is aiding and abetting. The Subcommittee recommendations are for tightening up the proof of intent suggesting that they would have to prove the intent of the person they are charging. He said that no one would be charged with conspiracy unless it can be proved that he or she intentionally knew that the action was criminal. Representative Tomlinson said that criminal and aiding and abetting currently do not apply to ethics laws governed by the Commission on Governmental Standards and Conduct.

The Chair announced that he would like the Committee to work **HB 2883**.

Representative Haley said that **HB 2883** was very close to his heart and that he certainly hoped the Committee would pass it out favorably. He mentioned that Representative Ray had a minor amendment. He also said that in looking at Mr. Damron's testimony, he noticed that Mr. Damron suggested that they are making every effort to take care of abandoned houses, but Representative Haley said he believed that when you bring it back home, it is very difficult to determine the fine lines of who is responsible. Representative Haley said that he was also concerned about not doing as much as he could for his district and that he had an

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ultimate desire to improve his district. He said that his constituents are looking for solutions, answers, and help. Representative Haley said that Representative Ray's amendment is on the first page, lines 25-28, adding the words "not for profit" before corporation.

Representative Haley made a motion to amend **HB 2883** by inserting not for profit before the word corporation on page 1, line 27. Representative Benlon seconded.

Representative Dillon comment that he could see nothing that would prevent a person from creating a not for profit organization.

Representative Welshimer said that she thought the bill was more geared toward individuals.

Representative Haley reminded the Committee that he was talking about houses that had been abandoned for a long period of time.

As a point of clarification, Mr. Don Moler said that this entire law makes the law non uniform.

The vote was taken on Representative Haley's amendment, and the motion passed.

The Chair told the Committee that discussion was back on the now amended **HB 2883**.

Representative Cox commented that the bill was flawed and that Bonner Springs does not want this.

Representative Campbell asked if since this was specific to Wyandotte County if the County could turn around and home rule out. The answer was, "yes." Representative Haley said that the County would have the option to charter out, but that the County would have yet another vehicle where the County could have a 4 person authority to decide which places would be torn down or renovated.

Representative Wells made a motion to amend **HB 2663** on page 2, line 15, and on page 6, line 25, to add Sedgwick County. Representative Tomlinson seconded.

Representative Tomlinson made a substitute motion to table **HB 2663**. Representative Welshimer seconded, and motion passed.

The meeting adjourned at 10:35 a.m.

The next meeting is scheduled for February 24, 1998.

January 26, 1998

STATE AGENCIES' SUBPOENA POWER

Summary. The following brief description of subpoena power of state agencies is based upon a discussion of this topic in Professor David Ryan's book, *Kansas Administrative Law*, Kansas Bar Association, (1991). The attached tables display state entities that have subpoena power, the purpose for which that power is granted in statute, procedural limitations on the authority, and bills introduced in the 1998 Legislature that would alter subpoena power of some agencies.

A subpoena is a written order to appear at a specific time and place to provide testimony on a particular matter. A *subpoena duces tecum* demands that the recipient make certain books and records or other items available. In Kansas, many administrative agencies in addition to courts and some legislative committees have subpoena powers. An agency only has subpoena power if it is specifically authorized in statute. The *United States Constitution*, the rules of civil procedure, and the Kansas Administrative Procedure Act (KAPA), and some of the authorizing statutes, all place limitations on the use of subpoena power by state agencies.

Briefly, one must satisfy three elements for relevancy of subpoenas:

1. The agency must be authorized to make the inquiry.
2. The demand must be specific.
3. The information sought must be reasonably relevant.

Statutes granting power of subpoena are generally liberally construed to permit inquiry. The trial court has discretion to:

1. modify subpoenas,
2. quash subpoenas,
3. weigh reasonableness, and
4. require showing of relevancy.

United States Constitution. The Fourth Amendment to the *United States Constitution* provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated." This amendment is not limited to law enforcement officers. It also provides protection from searches and seizures by

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administrative agencies. Furthermore, the Fourth Amendment does not require a criminal investigation or arrest relative to searches or inspections for administrative or fact gathering purposes by agency inspectors or regulatory control officers. In short, no exceptions are stated in the amendment except that the search must be reasonable. "Reasonableness" has generally come to mean the presence of a warrant for inspections, and a protection against unreasonable subpoena requests.

The Fifth Amendment protection against self-incrimination also limits agency subpoena powers. However, the self-incrimination defense is subject to significant limitations. The defense is *not* available to a corporation or a union. Additionally, the custodian of records for a corporation or a union may not refuse to produce documents. But the custodian may have his or her own privilege to refuse to answer specific questions. In an appropriate case an agency may compel testimony by granting immunity from prosecutions.

Statutory Authority. The basic method of satisfying the government's need for information where an individual or business will not voluntarily comply is the use of the subpoena to compel the production of documentary evidence, witnesses, or materials. The subpoena power is generally not implied. If the enabling act is silent on subpoena, no subpoena power exists. There is currently no indication Kansas common law is any different for state-level and local agencies not covered under KAPA. (*Yellow Freight v. KCCR*, 214 Kan. 120, 519 P. 2d 1092 (1974); *Kansas Department of Revenue v. Coca Cola Company*, 240 Kan. 548, 731 P. 2d 273 (1987); See also, *Olathe Community Hosp. v. Kansas Corporation Commission*, 652 P.2d 726, 232 Kan. 161 (1982); *Woods v. Midwest Conveyor Co., Inc.*, 648 P.2d 234, 231 Kan. 763, appeal after remand 697 P.2d 52, 236 Kan. 734 (1982); and more recently, *Patel v. Kansas State Board of Healing Arts*, 920 P. 2d 477, 22 Kan. App. 2d 712 (1996), review denied; *Appeal of Alex R. Masson, Inc.*, 909 P. 2d 673, 21 Kan. App. 2d 863 (1995); *Cline v Meas.*, 905 P. 2d 1072, 21 Kan.App2d 622 (1995), review denied.)

Subpoenas are authorized for all agencies that are covered by KAPA at K.S.A. 77-522. A number of state-level agencies have statutory subpoena power which the attached table reflects. In addition to procedures that may be articulated in authorizing statutes, subpoenas generally must be issued in accordance with the Rules of Civil Procedure (K.S.A. 60-245 and 60-245a).

Reasonableness. Kansas common law does not require the agency to know of wrongdoing before a subpoena is issued. Basically, the test is one of "reasonableness" and not "probable cause." Kansas courts apply the test used in *Yellow Freight* for judicial review of agency subpoena issuance. That is, if there is a possibility of relevancy in documents subpoenaed and there is no showing that the subpoena is unreasonable or oppressive, then the statutes granting subpoena power will be liberally construed to permit inquiry.

Three questions should be asked in reference to the issuance of subpoenas by state agencies:

1. Is the subpoena authorized?
2. Is the subpoena within the agency's scope of authority?
3. Is the subpoena "reasonable"?

Enforcement. While the agency issues the subpoena, a court must enforce it. Enforcement is generally considered to require such interference with liberty or property as to be a purely judicial type power, constitutionally limited to the judiciary in most jurisdictions. Consequently, courts must enforce agency subpoenas.

The standard of "reasonableness" incorporates "seizure" and "due process," constitutional limitations on agency power. The scope of the request may not be unreasonable which means among other things, that the agency cannot impose an undue burden for production of documents.

A subpoena that is so vague that the respondent does not know what document or material is requested will not be enforced by a court. Subpoenas are frequently challenged because of vagueness. If the court feels that the burden of compliance is too great, it may compel the agency to reduce its request. The court may also request the agency to treat information received as confidential, or require the agency to inspect documents where they are located.

Kansas Case Law. Kansas opinions have generally held that the agency is free to use its investigative powers, subject to the standard court review test for enforcement.

- In *Kansas Commission on Civil Rights v. Carlton*, 216 Kan. 735 (1975) and *Atchison, Topeka & S.F. Railway v. Lopez*, 216 Kan. 108 (1975), the court recognized that if the KCCR subpoena was "oppressive or unreasonable" it was subject to modification or quashing by the district court.
- *KCCR v. Sedgwick County Mental Health Clinic*, 220 Kan. 653 (1976) held the limits of subpoena power are subject to the sound discretion of the court.
- *Cessna Aircraft Co. v. KCCR*, 229 Kan. 15 (1981) found that in determining whether the subpoena is oppressive or unreasonable, the court must apply the statute liberally. Some showing of relevancy must be made. Due process places limitations upon the agency powers and "it cannot exercise unbridled power based purely on whim and speculation."
- *Matter of Collingwood Grain Inc.*, 891 P.2d 422, 257 Kan. 237(1995) found that the Board of Tax Appeals (a quasi-judicial entity) has discretion in the enforcement of a subpoena filed by the Department of Revenue. Such subpoenas are subject to the Rules of Civil Procedure, must be relevant, and not unreasonable or oppressive.

Enforcement of many state-level agency subpoenas is under the Judicial Review and Civil Enforcement of Agency Action Act (K.S.A. 77-624). That Act allows a private party to a proceeding to bring a subpoena, discovery order, or protective order enforcement by bringing a Petition for Civil Enforcement in district court. For agencies outside the Judicial Review Act, most subpoena enforcement is by court issuance of its own subpoena when requested by the agency, thereby utilizing the standard court enforcement and judicial subpoena procedures.

AGENCIES WITH SUBPOENA POWER

Agency/Official	Purpose	Special Procedures ¹
Any agency head or designee serving as a presiding officer in accordance with the Kansas Administrative Procedure Act (KAPA)	Conduct of hearings governed by KAPA (K.S.A. 77-522)	None
Kansas Commission on Governmental Standards and Conduct	Investigations under campaign finance laws (K.S.A. 25-4158)	Must be authorized by affirmative vote of at least three-fourths of the Commission after the subject has had 30 days to respond to written allegations
	Investigations under ethics laws (K.S.A. 46-260)	
	At the request of any party to a campaign finance or ethics hearing (K.S.A. 25-4163, 46-257)	None
Healing Arts Board	Enforcement of laws under its jurisdiction (K.S.A. 65-2839a)	Within five days of service recipient may petition the board to revoke, limit, or modify the subpoena
Healing Arts Board—Disciplinary Counsel	Investigation of matters that may result in action against a licensee (K.S.A. 65-2840a)	Must apply to court for issuance of subpoena
Professional Practices Commission (appointed by the State Board of Education)	Investigating cases related to the State Board's rules and regulations governing certification of teachers and school administrators (K.S.A. 72-8507)	In accordance with an order of the State Board of Education
Interstate Grain Marketing Commission	Enforcement of compact under K.S.A. 2-3101	Majority vote of Commission and then application to any state or federal court for a subpoena
Child Death Review Board	Investigations of certain child deaths (K.S.A. 22a-243)	Apply to district court for subpoena.

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Agency/Official	Purpose	Special Procedures ¹
District Judges	Summoning witnesses under Uniform Act to Secure Attendance of Witnesses From Without State (K.S.A. 22-4202)	Hearing required
	Inquisitions in certain criminal cases (K.S.A. 22-3101)	Action initiated by filing of application by Attorney General, County or District Attorney
Secretary of SRS or law enforcement officer	Child abuse or neglect investigations—request for disclosure of child abuse documents under K.S.A. 38-1523	Application to the district court for a subpoena or order
	Child in need of care hearing—interested party entitled to subpoena for witnesses' attendance (K.S.A. 38-1537)	None
	Juvenile offender hearing—party entitled to subpoena for witnesses (K.S.A. 38-1633)	None
Secretary of SRS	In any Title IV-D (child support enforcement) case in order to obtain information about a parent's whereabouts or finances (K.S.A. 39-7,144)	Respondent has 14 days to comply; served only by personal service; subject to an administrative hearing or a <i>de novo</i> review by court
	In connection with investigations of claims and vouchers and persons and businesses who provide services to the Department or to its clients, and eligibility of clients and vendors (K.S.A. 75-3306)	None
Legislative Investigating Committees	Investigations of authorized subjects of inquiry (K.S.A. 46-1001, <i>et seq.</i>)	If to compel attendance at a hearing, must be served at least three days prior to the hearing
Secretary of Health and Environment	Hearings under the food and drug law (K.S.A. 65-673)	None

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Agency/Official	Purpose	Special Procedures ¹
	Hearings regarding enrichment of flour and bread (K.S.A. 65-2305)	None
	Food and lodging licensee hearings (K.S.A.36-509)	None
	Hearings and investigations under the mined land conservation laws (K.S.A. 49-405)	None
Dairy Commissioner	Enforcement of milk and dairy product laws (K.S.A. 65-702)	None
Dental Board	Enforcement of dental regulatory laws (K.S.A. 65-1452)	None
Barber Board	Enforcement of barber regulatory law (K.S.A. 65-1824)	None
Board of Adult Care Home Administrators	Enforcement of laws under its jurisdiction (K.S.A. 65-3503)	None
Emergency Medical Services Board	Enforcement of laws under its jurisdiction (K.S.A. 65-6130)	None
Corporation Commission	Hearings of complaints about municipal utilities (K.S.A. 66-133)	None
	Hearings under laws governing the production and sale of oil and gas (K.S.A. 55-605, 55-706, 55-1310)	None
State Board of Education and any state facility providing special education services	In connection with a hearing or review under the special education laws (K.S.A. 72-975)	None
Board of Nursing	Investigations and proceedings under its jurisdiction (K.S.A. 74-1106)	None
Board of Examiners in Optometry	Enforcement of laws under its jurisdiction (K.S.A. 74-1504)	None

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Agency/Official	Purpose	Special Procedures ¹
Board of Mortuary Arts	Enforcement of laws under its jurisdiction (K.S.A. 74-1704)	None
Board of Tax Appeals	Enforcement of laws under its jurisdiction (K.S.A. 74-2437a)	None
Abstracters' Board of Examiners	Enforcement of laws under its jurisdiction (K.S.A. 74-3902)	None
Law Enforcement Training Commission	Enforcement of laws under its jurisdiction (K.S.A. 74-5607)	None
Crime Victims Compensation Board	Enforcement of laws under its jurisdiction (K.S.A. 74-7304)	None
Behavioral Sciences Regulatory Board	Enforcement of laws under its jurisdiction (K.S.A. 74-7508)	None
Lottery	Enforcement of laws under its jurisdiction (K.S.A. 74-8704)	None
Racing and Gaming Commission	Enforcement of laws under its jurisdiction (K.S.A. 74-8804)	None
State Gaming Agency	Enforcement of laws under its jurisdiction (K.S.A. 74-9805)	None
Board of Accountancy	Enforcement of laws governing licensed municipal accountants (K.S.A. 75-1119)	None
Public Employee Relations Board	Enforcement of laws under its jurisdiction (K.S.A. 75-4323, 75-4332)	None
Secretary of Corrections	Investigations of alleged improper conduct of department employees (K.S.A. 75-5251)	None

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Agency/Official	Purpose	Special Procedures ¹
Secretary on Aging (Long-Term Care Program)	In connection with investigations of claims and vouchers and persons and entities providing services to the department or to its clients and eligibility of clients and vendors (K.S.A. 75-5945)	None
Director of Taxation	Enforcement of tax laws under the director's jurisdiction (K.S.A. 79-908, 79-3419, 79-4224, 79-5207)	None
Secretary of Revenue	Enforcement of tax income laws (K.S.A. 79-3233)	None
	Enforcement of bingo laws (K.S.A. 79-4705a)	None
Director of Division of Motor Vehicles	Suspension of driving privileges under K.S.A. 8-255	None
	Commercial motor vehicle licensee may request director to issue subpoena for witnesses on his or her behalf in license suspension hearing under K.S.A. 8-2,145	None
	Alcohol or drug test refusal or failure hearing under K.S.A. 8-1002 where licensee requests subpoena of witnesses	None
Secretary of Agriculture	Hearings regarding pest control licensure (K.S.A. 2-2463)	None
	Enforcement of Kansas Chemigation Safety Law (K.S.A. 2-3316)	None
Consumer Credit Commissioner	Investigation of certain licensees' business practices under K.S.A. 16a-2-305	None
	Investigation of prohibited acts under K.S.A. 16a-6-106	None
Kansas Securities Commissioner	Kansas Securities Act investigations (K.S.A. 17-1265)	None

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Agency/Official	Purpose	Special Procedures ¹
Attorney General	Investigations of Medicaid fraud and abuse (K.S.A. 21-3852)	None
	Investigations of suspected violations of laws regarding unfair trade practices (K.S.A. 50-153)	None
	Investigations of suspected violations of consumer protection or odometer fraud laws (K.S.A. 50-631, 50-653a)	None
	Enforcement of laws governing private investigators (K.S.A. 75-7b15)	None
Attorney General or County or District Attorney	Investigation of violations of the Charitable Organizations and Solicitations Act under K.S.A. 17-1767	None
	Investigations under the Kansas Standard Asset Seizure and Forfeiture Act (K.S.A. 60-4118)	None
	Inquisitions in certain criminal cases (K.S.A. 22-3101)	None
Prosecutor and Person Charged	To obtain attendance of witnesses in accordance with criminal procedure (K.S.A. 22-3214)	None
Credit Union Administrator	investigation of credit union business under K.S.A. 17-2206	None
Kansas Parole Board	Hearings under K.S.A. 22-3720	None
Coroner	Inquest under K.S.A. 22a-230	None
Court Trustee	Child support enforcement under K.S.A. 23-496	None
State Fire Marshal	Hearings regarding orders of the Fire Marshal under K.S.A. 31-141	None
Secretary of Kansas State Grain Inspection Department	Examine licensee books and records under K.S.A. 34-230a	None

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Agency/Official	Purpose	Special Procedures ¹
Secretary of Senate	Impeachment proceedings under K.S.A. 37-106	None
Insurance Commissioner	Hearings related to insurance under K.S.A. 40-281	None
	Liquidation of insurance company under K.S.A. 40-3625	None
Director of Division of Alcohol Beverage Control	Licensure hearings under K.S.A. 41-209	None
Secretary of Department of Revenue	Licensure appeal under liquor laws (K.S.A. 41-322)	None
Director of Workers Compensation and the Board	Hearings under K.S.A. 44-549	None
Workers Compensation Administrative Law Judges	Powers listed under K.S.A. 44-551	None
Secretary of Human Resources	Investigations of employer-worker disputes under K.S.A. 44-611 and 44-635	None
	Enforcement of laws governing teacher contracts (K.S.A. 72-5432, 72-5442)	None
Secretary of Human Resources, Chairs of Appeal Tribunals, or Appeal Referees	Hearings under the unemployment law (K.S.A. 44-714)	None
Agricultural Labor Relations Board	Implementation of the law under its jurisdiction (K.S.A. 44-820)	None
Human Rights Commission	Implementation of the law under its jurisdiction (K.S.A. 44-1004)	None
Secretary of State	Enforcement of the Kansas Athlete Agent Act (K.S.A. 44-1514)	None
Adjutant General	Gathering information under the emergency preparedness laws (K.S.A. 48-912)	None

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Agency/Official	Purpose	Special Procedures ¹
Military Judge of a Court Martial or a Summary Court Officer, Military Courts	In connection with proceedings under the Kansas Code of Military Justice (K.S.A. 48-2711, 48-3107)	None
Securities Commissioner	Hearings and investigations under the securities laws (K.S.A. 50-1009)	None
	Hearings and investigations under the Uniform Land Sales Practices Act (K.S.A. 58-3311)	None

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BILLS ADDRESSING STATE AGENCY SUBPOENA POWER

Bill No.	Agency	Change to Subpoena Power*	Status of Bill (1-26-98)
S.B. 248	Board of Healing Arts	The bill would expand existing subpoena authority and apply existing procedures to all entities licensed by the Board. The bill also would require hearings related to actions against a license issued by the Board be conducted in accordance with the Kansas Administrative Procedure Act (KAPA). The Board would be authorized to use emergency proceedings in accordance with KAPA when a licensee fails to comply with a subpoena or protective order.	In Senate Committee on Public Health and Welfare (carried over from 1997)
S.B. 283	Attorney General	The bill would require approval by the Attorney General when a nonprofit health care organization transfers assets to a for-profit organization. The Attorney General would be authorized to subpoena information and witnesses, administer oaths, and require sworn statements prior to making a decision on the nonprofit's application.	In Senate Committee on Public Health and Welfare (carried over from 1997)
S.B. 372	Secretary of Health and Environment and the Attorney General	The bill would require a for-profit entity engaged in the acquisition of a nonprofit hospital to receive approval of the Secretary of Health and Environment and, in some cases, the Attorney General. Both officials would be authorized to subpoena additional information or witnesses, require and administer oaths, require sworn statements, take depositions and use related discovery procedures for purposes of the Act.	In Senate Committee on Financial Institutions and Insurance (carried over from 1997)
S.B. 341	Commission on Governmental Standards and Conduct	The bill would authorize the Commission to issue subpoenas by the affirmative vote of 3/4 of its members if it finds a reasonable suspicion that a violation of the Campaign Finance Act has occurred. Current law requires the Commission to first communicate in writing with the person being investigated and allow the person 30 days to respond to allegations, and then, if more information is needed, the Commission may issue a subpoena.	In Senate Committee on Elections and Local Government (carried over from 1997)
S.B. 390 S.B. 410	Commission on Governmental Standards and Conduct	The bill would remove the requirement that before a subpoena can be issued the Commission find there is reasonable suspicion that a violation of the campaign finance or ethics laws have occurred; that the commission communicates its allegations to the person being investigated; and that the person be allowed 30 days to respond. The existing requirements that all subpoenas be issued upon the affirmative vote of 3/4 of the Commission and that subpoenas for records be relevant to any alleged violations of the acts would be retained in statute.	Both in Senate Committee on Elections and Local Government
S.B. 348	Kansas Tax Review Commission	The bill would abolish the State Board of Tax Appeals and create the Kansas Tax Review Commission. The Commission would have the same subpoena authority as the State Board of Tax Appeals.	In Senate Committee on Assessment and Taxation (carried over from 1997)

Bill No.	Agency	Change to Subpoena Power*	Status of Bill (1-26-98)
H.B. 2602	Kansas Tax Appeals Commission	The bill would create the Kansas Tax Appeals Commission to replace the Board of Tax Appeals. The Commission would have the same subpoena powers as the Board.	In the House Committee on Taxation
S.B. 378	Insurance Commissioner	The bill would enact the "Fraudulent Insurance Act." The Act would authorize the Insurance Commissioner, the Commissioner's designee, and special investigators in the Insurance Department to subpoena witnesses and any books, papers, correspondence, memoranda, agreements, or other documents or records relevant to an investigation under the Act.	In Senate Judiciary Committee (carried over from 1997)
<p>* In many of these bills, changes to subpoena authority or procedures are incidental to the primary purpose of the bill. One exception is S.B. 390, the major purpose of which is to alter the subpoena procedures that apply to the Commission on Governmental Standards and Conduct.</p>			

STATEMENT OF BRUCE DIMMITT
TO HOUSE GOVERNMENT AND ELECTIONS
COMMITTEE

REGARDING
SB 113, HB 2660, HB 2661,
HB 2664, HB 2666,
HB 2657 AND HB 2663
February 18 , 1998

Mr. Chairman and members of the committee, I appreciate the opportunity to present my views concerning the above bills. I am registered as a lobbyist for Kansans for Life (KFL) and as an Independent. Therefore, I will speak for KFL, and where they have not adopted a position, I will speak as an independent representing myself and those who are like-minded.

I speak in opposition to SB 113, HB 2660, HB 2661, HB 2664, and HB 2666 on the grounds that they interfere with First Amendment free speech rights under the US Constitution.

All of the above bills are similar or interrelated. They deal with political advertisements.

HB 2660, for example, would make it a corrupt political advertisement to publish any flier, brochure or other political fact sheet which is "designed" to aid, injure or defeat any candidate unless such matter is followed by the name of the chairperson or treasurer of the organization, or the name of the individual, putting out the material.

HB 2664 would require that if any person (including individuals, organizations and associations) spends more than a thousand dollars a year to provide information which has the effect of directly or indirectly influencing the nomination or election of any candidate, the person must register at least seven days in advance with the secretary of state (and in some cases also a county clerk), and report:

- the name and address of the person
- the name and address of the chairperson of the organization
- the full name and address of any organization with which the person is connected or the individual's trade profession or primary interest, and

maintain the name and address of each person who has made any contribution toward the information distribution. Having to register in advance is prior restraint. That is definitely unconstitutional interference with first amendment free speech rights.

HB 2666 would make it a corrupt political advertisement to publish any brochure, flier or other political fact sheet which is designed or tends to aid, injure or defeat any candidate unless such matter is followed by the name and city and state of the individual (spending \$100 or more) or the chairperson or treasurer of the organization, putting out such publication

SB 113 has provisions very similar to one or more of the above.

HB 2661 defines "to directly or indirectly influence the nomination or election of a candidate" to include not only express advocacy (where the publication clearly identifies the candidate to vote for or against) **but also includes issue advocacy** (educational literature which may, for example, merely tell the voting record of one or more candidates) **where it may be only subjectively construed to encourage the election or defeat of a candidate.**

The entities covered by the above bills apparently would include associations and organizations that are politically non-partisan tax-exempt organizations such as unions, churches, environmental organizations, newsletters of many kinds published in the public interest, league of women voters, etc. And such entities would apparently be covered even if they addressed one or more issues of public interest without expressly advocating the election or defeat of a candidate or party.

In *Buckley v. Valeo*, 424 U.S. 1 (p.656); L.Ed.2d 659; 96 S.Ct. 612 (1976), the court majority said: "---But **we have repeatedly found that compelled disclosure in itself, can seriously infringe on**

privacy of association and belief guaranteed by the First Amendment.---" This was confirmed by *McIntyre v. Ohio Elections Commission*, (see attached copy of Kansas Lawyer Article). *Buckley*, at p. 657, goes on to say "---group association is protected because it enhances '(e)ffective advocacy.' --- The right to join together 'for the advancement of beliefs and ideas,' --- is diluted if it does not include the right to pool money through contribution, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'

In *McIntyre* the court held that **political speech is the essence of First Amendment expression and no form of speech is entitled to greater constitutional protection. It further held that anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent; anonymity is a shield from the tyranny of the majority.**

The infringement on First Amendment rights could concededly be justified if there is a compelling governmental interest such as to prevent corruption and to ensure the purity and openness of the election process. But, the burden of showing the existence of sufficient corruption to outweigh infringement of First Amendment rights is a very serious and heavy burden and it would have to be clearly met by those supporting the adoption of any of these bills.

That burden is not met.

Merely to seek to inhibit the publication of false information does not meet that burden because in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), the U.S. Supreme court held that even false statements of a political nature about a public official are protected speech under the First Amendment. Laws do not require an organization's political speech to be free of libel, falsity or fraud. The tenets of one man are the terror of another. Name-calling or insults are not illegal. The reputation of politicians is vulnerable to vigorous attack, subject only to proof of actual malice.

The effect of the bills discussed above would be to harass and intimidate participants in their grassroots-level participation in civic matters. The rate of participation in many elections is at an embarrassingly low level already

(compared for example, to citizen involvement rates of new and emerging democracies around the world) **To require the kind of reporting and disclosure by organizations and associations that these bills require would clearly have a chilling affect on citizen participation levels.**

Such chilling is exactly the wrong outcome that we need. Low citizen involvement is due at least in part to the feeling that self-interested, elite, big-money interests are in control and that grassroots-level involvement of ordinary citizens is futile.

But the answer to lack of citizen involvement in the political process is to mitigate the significance of contributions from the most affluent elements of our society by stimulating more involvement by ordinary citizens at the grassroots level - the voters.

(Continued on next page)

HB 2657. I strongly support this bill. It would prevent a revolving door from government service to becoming a lobbyist within a year after serving in the government. Even though there may not have been a case of actual scandal involving former employees becoming lobbyists, this bill is greatly needed to increase public confidence in the integrity of government.

HB 2663. This bill gives the Kansas Commission on Governmental Standards and Conduct the authority to issue subpoenas without having to first extend such individual an opportunity to show that no illegal action was taken. It also eliminates the 30 day period that current law requires before a subpoena can be issued. The Commission believes this change is needed to prevent individuals from destroying or creating documents or arranging testimony.

I would recommend that this bill be referred to the lawyer committee (Judiciary), for review, before action by this committee.

But in any case, **KFL would support this bill if amended to provide that the Commission could issue subpoenas only after obtaining approval to do so from the appropriate court.** We believe the commission should not have too much autonomous authority without outside review before issuing subpoenas and conducting a formal investigation.

POSITIONS OF KANSANS FOR LIFE AND DIMMITT ON BILLS AT
 COMMITTEE HEARING ON WEDNESDAY, FEBRUARY 18, 1998
 HOUSE GOVERNMENT ORGANIZATION AND ELECTIONS COMMITTEE

BILL NO.	SUMMARY	KFL POSITION	DIMMITT INDEPENDANT POSITION	WRITTEN STATEMENT SUBMITTED
2813	Public Works Bonds	NO POSITION	NO POSITION	NO
112	Changing name of commission	NO POSITION	NO PROBLEM	NO
113	Expands definition of corrupt political ad.	UNCONSTITUTIONAL	UNCONSTITUTIONAL	YES
2658	Only individuals may make contributions to state senate/house political committees	NO POSITION	NO PROBLEM	NO
2659	Prohibits use of state capitol to solicit or accept political contributions.	NO POSITION	NO PROBLEM	NO
2660	Expands definition of corrupt political ad.	UNCONSTITUTIONAL	UNCONSTITUTIONAL	YES
2661	Defines direct/indirect influence on election	UNCONSTITUTIONAL	UNCONSTITUTIONAL	YES
2664	Registration to do issue advocacy	UNCONSTITUTIONAL	UNCONSTITUTIONAL	YES
2666	Expands definition of corrupt political ad.	UNCONSTITUTIONAL	UNCONSTITUTIONAL	YES
2728	Where notice must be filed re spending less than \$500	NO POSITION	NO POSITION	NO
2812	Restriction on use of campaign contributions	NO POSITION	NO PROBLEM	NO
2657	Restriction of revolving doors for officers & employees	NO POSITION	SUPPORT	NO
2654	Makes conspiracy to violate ethics law a crime and makes it a crime to aid, abet etc. another to violate act.	NO POSITION	NO POSITION	NO
2663	Gives Commisssion stronger subpoena powers	RECOMMEND AMENDMENT	RECOMMEND AMENDMENT	YES
2883	Rehabilitation of abandoned property	NO POSITION	NO POSITION	NO
2769	Regarding water districts	NO POSITION	NO POSITION	NO

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**TO: The Honorable Kent Glasscock, Chairman
and Members of the
House Government Organization and Elections Committee**

**FROM: Whitney Damron
on behalf of the
Unified Government of Wyandotte County/Kansas City, Kansas**

**RE: HB 2883 An act concerning cities; relating to the rehabilitation of
abandoned property.**

DATE: February 20, 1998

Mr. Chairman and Members of the Committee, on behalf of the Unified Government of Wyandotte County/Kansas City, Kansas, I thank you for the opportunity to appear before you this morning regarding our position on HB 2883.

Many of you on this Committee may recall legislation which has been considered by the Committee during the last two legislative sessions regarding consolidation of city/county services in Wyandotte County. As a result of your favorable actions on that legislation, I am before you today representing the new Unified Government which is in its first year of governance of Wyandotte County/Kansas City, Kansas.

In past years, the issue of abandoned housing and their demolition was handled by both city and county agencies, depending upon jurisdiction. This issue is certainly an area of concern to the Unified Government and they are currently reviewing this issue at the local level in efforts to develop a comprehensive plan for abandoned housing and problems associated with them. We do not believe HB 2883 is the answer and cannot support this legislation.

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Attachment 3

If enacted, we would have serious local control issues regarding our ability to respond to problems with abandoned houses which may arise through extenuating circumstances, such as a safety concern. We believe much of what is contained in the bill could be done through local initiatives, if it is believed to be the best course of action for dealing with the abandoned housing situation in Wyandotte County. Although the mortgage tax contained in the bill to fund this program would require legislative action, other components would not.

Quite simply, we believe the Unified Government of Wyandotte County/Kansas City, Kansas is best suited to address this issue rather than by the adoption of HB 2883 or similar legislation.

On behalf of the Unified Government, I thank you for your time and would be pleased to respond to questions.