

MINUTES OF THE SENATE ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairman Senator Janice Hardenburger at 1:00 p.m. on March 29, 2000, in Room 245-N of the Capitol.

- All members were present except: Senator Petty
Senator Huelskamp
- Committee staff present: Dennis Hodgins, Legislative Research Department
Mike Heim, Legislative Research Department
Ken Wilke, Revisor of Statutes
Graceanna Wood, Committee Secretary
- Conferees appearing before the committee: David Furnas, Kansas Press Association
Harriet Lang, Pres. & Exec. Director Kansas Association of Broadcasters
Don Moler, Exec. Director, League of Kansas Municipalities
Randy Allen, Executive Director Kansas Association of Counties
Mike Taylor, Gov. Relations Director, City of Wichita
Mark Tallman, Asst. Exec. Director for Advocacy, Kansas Association School Boards
Melissa Wangemann, Legal Counsel, Deputy Assistant Secretary of State
Steve Phillips, Assistant Attorney General
Clyde Graeber, Secretary Department of Health & Environment
Sally Finney, Executive Director Kansas Public Health Association, Inc. (Written Testimony)
- Others attending: See attached list

Chairman Hardenburger continued the hearing on **S Sub HB 2864 concerning the open records act; concerning the open meetings act; establishing the position of public information officers; prescribing the powers and duties and repealing the existing sections**, and introduced David Furnas of the Kansas Press Association.

Mr. Furnas testified in favor of **S Sub HB 2864** as recommended by the House Local Government Committee, and said there were some good provisions of the bill that was passed by the House. He also distributed copies of a publication by Hurst Laviana of *the Wichita Eagle* regarding requests for public records. (Attachment #1) (Attachment #2)

Harriet Lange, President and Executive Director of Kansas Association of Broadcasters, in support of **S Sub HB 2864** said that Kansas currently has good basic laws related to open records and open meetings. However, a few changes in each would enhance the process of government and the public's access. (Attachment #3)

Don Moler, Executive Director, League of Kansas Municipalities, presented testimony in opposition to **S Sub HB 2864**, and said that the Kansas Open Records Act and portions of the Kansas Open Meetings Act have been substantially modified. (Attachment #4)

Chairman Hardenburger said that she is not supportive about signs, because many times they are in language that is difficult for the general public to understand. She said she would like to encourage the public to seek information. She requested the development of a brochure that would be placed in the state's municipalities that would be accessible, easily picked up, and educate the public on how they can obtain information. She asked Mr. Moler if the League of Municipalities would be willing, as well as the

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Kansas Association of Counties, to develop the brochure if the Committee decides to replace signs with a pamphlet or a handout. She said that she needed to have someone to pilot the process. Also funding may be another problem, as it would be an unfunded mandate upon the counties.

Mr. Moler said they would be glad to participate in a process by the counties to develop an easy to read brochure for the public, so the public would have an easy access for knowing their rights under the Open Records Act.

Chairman Hardenburger told the Committee, using her own experience, when she was Freedom of Information Officer for a federal agency, the request came directly to her. If she had doubts whether the record could be released, she had a regional attorney to advise her. She said, the city clerk has a city attorney, the county clerk has a county attorney to seek advice on what should be released. There would be one entry point for that request to be made rather than requesting from county or city officials who have no idea what they can release. This would simplify the process, protect the information as far as privacy and provide more streamline process for requests.

Randy Allen, Executive Director of the Kansas Association of Counties, expressed concerns to the Committee regarding **S Sub HB 2864**. He said that the County officials are continually educated in the application of both the Kansas Open Records and Open Meetings Acts through extensive education programs offered by the KAC as well as several KAC affiliate organizations, such as the Kansas County Clerks and Election Officials Association. (Attachment #5)

Mike Taylor, Government Relations Director, City of Wichita spoke in opposition to the bill. He said as public employees we should spend our time making information about government available to citizens, letting them know what we are doing with their tax dollars and why. (Attachment #6)

Mark Tallman, Assistant Executive Director for Advocacy, Kansas Association of School Boards, in opposition to **S Sub HB 2864**, said a number of changes to the original bill were made on the floor of the House, and feels that those were improvements, but still do not address all the questions for local government bodies. Mr. Tallman also included a list of those questions to his testimony. (Attachment #7)

Senator Gooch asked if there would be a fine against an individual for releasing private information. Mr. Tallman said there would be a fine for failure to comply with the Open Records Act. The bill passed in the House set a fine for violating the Open Records Act, but the fine would be levied against the public agency, not the individual.

Chairman Hardenburger asked the question: Is not the employee a part of the public agency? She said the public agency can always punish the employee by dismissal, by putting something in that employee's evaluation report. That person is the public agency, employees do not work separately as individuals being employed as a public agency.

Melissa Wangemann, Legal Counsel, Deputy Assistant Secretary of State, gave testimony opposing **S Sub HB 2864**. She said as the state's chief custodian of records, the Secretary of State has always supported open access to public records. She also said their office generally performs ministerial filing duties and has little authority to regulate entities or enforce laws. (Attachment #8)

Steve Phillips, Assistant Attorney General, gave testimony on behalf of Attorney General Carla Stovall. He said the bill started out as a proposal by Governor Bill Graves and Attorney General Carla Stovall for strengthening enforcement of the Open Records and Open Meetings Acts by providing additional enforcement mechanisms for their office, county and district attorneys, the courts and private individuals. The main thrust was creation of a hearing officer who could hear complaints through administrative proceedings brought by an assistant Attorney General, a county or district attorney, or a private individual or entity. (Attachment #9)

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Clyde Graeber, Secretary of Kansas Department of Health & Environment, appeared before the Committee to support the concerns expressed by the Kansas Public Health Association. He said that the provision that allows a sunset of the exemption for access to public health records should be removed from this legislation. (Attachment #10)

Chairman Hardenburger informed the Committee that there was written testimony from Sally Finney, Executive Director of Kansas Public Health Association, Inc. (Attachment #11)

Chairman Hardenburger requested that all parties get together, create a bill, and bring it to the Committee. She said that she would like to have the House bill gutted. She feels the current law is good, but if it needs to be improved to help the public understand the law, and to assist our government officials to meet the requirements of the law. This would be the end result.

Meeting was adjourned at 2:00 p.m. Next meeting April 5, 2000.

ELECTIONS & LOCAL GOVERNMENT COMMITTEE GUEST LIST

DATE: MARCH 29, 2000

NAME	REPRESENTING
Don Moler	LKM
Clyde Graeber	KDHE
Sally Finney	Ks. Public Health Assn.
Melissa Wangemann	Sec. of State
Joe Fund	KDHE
Steve Phillips	A. G.
RON APPLETOFT	WATER DIST. No. 1 of Jo. Co.
Judy Moler	Ks. Assn of Counties
Beth Lange	SRS
Dick Bauman	KDOT
Randy Allen	Kansas Association of Counties
Lee WRIGHT	Farmers Ins.
DAVID HANSON	Ks INSUR ASSNS
Kevin Davis	Am. Family Ins
Kelley Kuitala	City of Overland Park
DICK CARTER	TIAR
Mark Tallman	KASB
Danielle Neff	S of A
Anna Factor	Johnson County



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Testimony on Substitute for HB 2864
Tuesday, March 28, 2000

By
David Furnas
Kansas Press Association

Substitute for House Bill 2864, as recommended by the House Local Government Committee after more than a month of hearings and discussion, is a good bill. It included elements of bills introduced and supported by both political parties.

On the House floor, some elements of the bill offered by the committee were deleted, perhaps with unintended consequences. Still, the fundamentals of sound public policy are included in the bill.

Kansas Press Association and its members would like to see a bill – a statement of public policy supporting open government – passed this session.

The good provisions of the bill passed by the House include:

- Creation of a public information officer in the Attorney General's office that would help citizens and government officials clarify the complexities of the open records and open meetings laws.
- Creation of a penalty to encourage compliance with the open records law.
- Required posting of information about the open records and open meetings laws.
- Establishment of a sunset provision that would, over the next five years, provide for studied analysis of the many exemptions to the open records act. During the process this session, for example, it was learned that one of the exemptions was not necessary.
- And while cumbersome, the amendments provide for a check and balance of the elective Attorney General's office by providing for review in the Secretary of State's office.

At the same time, the amendments in the House send a negative signal to citizens who must wonder if government is working against them.

For example:

- The amendments in the House removed a citizen's right of redress by removing the ability of a private citizen to seek civil remedy. Historically, this has been one of the few mechanisms for citizens – and the media – to obtain records. And, when a governmental agency has blatantly denied access, the courts have been able to award attorney's fees to the plaintiffs.

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Attachment # 1-1

Those sections dealing with those policy issues need to be changed back to the original version of the House committee bill, or back to existing law.

Our recommendation is to restore, in Section 2, subsection (f)(1) and subsection (j) and the words "Any person, the" to Sec. 13 (a) and to Sec. 24 (a)

This would allow citizens to work through their county or district attorney, the public information officer or to seek regress independently.

- The amendments in the House included a series of changes that assumed the recording of executive sessions. A subsequent amendment in the House then prohibited the recording of closed or executive sessions.

First, Kansas Press Association would hope this committee and the full Senate would restore the taping of executive sessions. It is clear that some local units of government are discussing issues in closed session which are outside the purview of the law. Knowing the sessions are being taped, and could be viewed in camera by a judge, would keep boards and commissions mindful of their responsibilities. It is doubtful such tapes would ever be heard since it is the taping that will motivate compliance with the law.

At the very minimum, the House amendment prohibiting taping should be removed, allowing local units of government the same rights they have under current law.

After hearings and testimony on the need for developing a mechanism to assure violations of the open meetings act were not occurring in executive session, the House committee thoughtfully – and with protection for privacy – placed in the bill a provision for taping executive sessions.

With concerns about specific issues, the House tweaked that provision to better ensure privacy. Totally removing the taping provision has gone too far. It is a needed provision and our organization would ask this committee to restore and support that original element of the bill.

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Attachment # 1-2

Press Clipping Division
Kansas Press Assn., Inc.
5423 SW 7th Street
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KANSAS
Topeka Capital Journal
D. 66,432

MAR 28 2000

EDITORIALS

OPEN RECORDS

Going backward?

You've got to hand it to the Kansas House of Representatives, which has actually passed an open records reform bill that in some ways may make records less open — and may prevent citizens from doing anything about it.

Last year, reporters from 19 Kansas newspapers, including The Capital-Journal, tested the public's ability to access records in the state's 105 counties. More than 30 times, legitimate and legal requests were denied, and many more times the person making the request was asked unnecessary questions about his or her reasons for requesting the records.

Thus, an effort was initiated this legislative session to ensure greater access.

The bill as originally written was a sincere and more-than-useful attempt to clarify for public officials in Kansas the fact that they've got to give the public access to its records. It identified a public access officer in the attorney general's office to resolve disputes and answer questions about public records; it established a \$500 fine for agencies that illegally withhold

■ An effort to gain greater access to public records has been turned around by the House.

public records; and it put a five-year sunset on exceptions to the law, meaning those 40-some exceptions will expire in five years without further legislative action.

But then the House watered it down with amendments. For one thing, the amended bill would allow government officials to deny an open records request if they deemed it "an unreasonable burden" or if they felt it was "intended to disrupt other essential functions."

In short, public officials would have to make records available to the public if they felt like it. That's hardly an improvement in the law.

Even worse, the bill would prevent citizens from being able to sue to obtain the records.

The result looks like a cynical effort by some lawmakers to make records harder to get, rather than easier. What a shame.

If you can't improve on openness in government, legislators, at least don't make it worse.

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Attachment # 1-3

Kansans who want public records can expect obstacles

Unfriendly access

By Hurst Laviana

The Wichita Eagle

Ask for a public record in Kansas, and you'll probably get what you want.

But don't be surprised if your request generates blank stares, suspicious looks and a demand to provide a lot more information about yourself than the law requires.

If you want to know what your schools spend on salaries, expect to be asked why, and who you work for.

If you want to check on a local crime, you may be questioned by police and you may have to submit to a criminal background check. In Harper County, you may even be detained if you don't explain who you are and why you want to see the crime reports. In several counties, copies will cost \$5 a page.

Those are some of the conclusions of a project that involved reporters and editors from 19 Kansas newspapers. They went to city halls, county courthouses and school district offices in all 105 counties in late September in a search of public records.

While most of the requests were granted, dozens were denied in whole or in part. And more than half the government agencies asked more questions than the law allows.

Many agencies defended their reluctance to disclose information that Kansas law says is open to everyone. Some officials said they withheld records out of concern for the privacy or safety of those named in the documents.

Those concerns, while well-intentioned, are rarely warranted and ultimately threaten the American way of life, say advocates of open government. The danger, they say, is that citizens will be shut out of the democratic process.

The Kansas Open Records Act is intended to make sure voters can monitor elected officials and see how their tax dollars are spent, said

Topeka attorney Brad Smoot, who was in the Kansas attorney general's office when the law was enacted.

"It's an element of democracy, and therefore it's something that everyone ought to be interested in," Smoot said. "You can't know what your government is doing unless you have access to that information."

A growing number of Kansans are seeking the state's help with questions about public records or meetings. The Kansas attorney general's office handled 625 inquiries about public records and open meetings in fiscal 1999. The year before, the office responded to 325. Assistant Attorney General Steve Phillips says he thinks "cynicism and mistrust" of government are leading more people to seek records. Jack Turner, a Wichita lawyer who often requests public records to monitor local governments, said he wasn't surprised by the survey's results. While most government workers are helpful, Turner said, some are predisposed to keep government records a secret.

"It's a them-and-us, deal," he said. "If you're in the city, county or state government, it's us. If you're a member of the public, you're them."

How the project worked

Without volunteering their occupations, the Kansas journalists asked for:

- County commission meeting minutes.
- A list of bills approved for payment by city councils.
- Records that detail total compensation for high school football coaches.
- Crime reports from sheriff's offices.

The newspapers chose those records because they are open for public inspection under Kansas law and could be of interest to many citizens. Although most of the 420 records requests were granted, some with a smile and cup of coffee, 35 were flatly denied. Thirty-six were granted in part: Agencies supplied information rather than the records, or would allow the records to be read but not copied.

More than half the public agencies asked for more personal information than the law requires citizens to disclose. Statewide, 89 sheriff's offices, 71 school districts, 62 city offices and 22 county clerk's offices asked who their visitors worked for or why they wanted a public record. More than half of the sheriff's offices asked both questions.

Government agencies in Kansas can require that public records requests be put in writing, but they cannot require more than a name and address.

The 35 denials appeared to be clear violations of the 1984 Kansas Open Records Act, which begins, "It is declared to be the public policy of the state that public records shall be open for inspection by any

person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

Kansas Attorney General Carla Stovall said the survey suggests that many government workers lack a basic understanding of the open records law.

"Clearly, education is what needs to happen," she said.

After hearing the survey results last month, Stovall sent letters to three law enforcement organizations, the Kansas Sheriff's Association, the Kansas Peace Officers, Association and the Kansas Association of Chiefs of Police, reminding them of their obligation to comply with open records laws and offering to conduct training sessions.

Former Kansas Attorney General Bob Stephan said he was surprised to hear that 35 requests for public records had been denied.

"The public records law has been there a long time," Stephan said. "If people are not aware of what open records are, they're not being educated very well."

Crime reports hard to get

The Kansas project was patterned after similar surveys in a half-dozen other states. Reporters in each of those states also found numerous open records violations.

As was the case with those other efforts, the Kansas project found that law enforcement agencies put up the most obstacles.

In all, 29 sheriff's offices refused to release copies of recent crime reports that are clearly marked "open public record." Reporters who walked into an office and asked to see the reports were often greeted with suspicion.

"What for?" Greenwood County Sheriff Lowell Parker asked.

"You're with?" Logan County Sheriff Pat Parsons asked.

"Depends on what you need it for," Comanche County Sheriff Dave Timmons said.

The requests for information generated the most suspicion in smaller towns, where a stranger visiting four government offices in one day can draw a lot of attention.

"It's your attitude," Harper County Undersheriff Richard Happ told a Wichita Eagle reporter who had asked for several public records in the town of Anthony.

The reporter provided her name and hometown when asked, but declined to answer questions about who she worked for and why she wanted the records. Happ briefly held her against her will for questioning, then released her after calling her editor to complain that she was being "demanding."

Happ's boss, Harper County Sheriff Dan Eslinger, later said that asking for records without explanation can make people suspicious. "It raises a red flag to us," he said.

Sheriff Janet Harrington of Elk County, who until late October was president of the Kansas Sheriffs Association, said the project was a big topic among sheriffs at the association's conference last month in Salina.

"They were just kind of frustrated because when they asked questions, nobody wanted to give any answers," she said.

Phillips, the assistant attorney general, said sheriffs probably were justified in asking a cursory question about why a person would want to look at a crime report.

Police can withhold the names and addresses of crime victims when their release would constitute "a clearly unwarranted invasion of personal privacy" that would subject the victim to some "unusual danger," the attorney general's office said in an opinion last year.

But persistent questioning of someone seeking a record is not appropriate, Phillips said. Unless the person says something overtly threatening, the records should be released.

Former Attorney General Stephan said the government needs more than a casual suspicion to warrant questioning someone who is simply seeking a public record.

"I'm not disturbed by asking, but if someone says, 'I'd just like to know what's going on' that ought to be the end of it," he said.

High school coaches

Journalists also sought records detailing high school football coaches' salaries, information that could be of interest to taxpayers.

Eighty percent of 105 school districts complied, although requests typically were diverted to the superintendent's office. Many districts offered salary information but would not supply copies of documents that would verify the figures. In a few cases, the requests were simply denied.

Richard Flores, superintendent of schools in Oakley, said he can't release salary information to anyone who doesn't live in the district.

"If you were a patron of the district, I could give it to you," he said.

"The other main concern I have, is Why?,"

Wallace County schools Superintendent Rex Bruce insisted that the high school football coach's contract is not a public document.

"You can take me to court on that," he said. "I'll spend as much money as I have to."

In Wichita, a clerk in the East High personnel department said the information could not be disclosed without a signed release from the employee.

That later prompted Superintendent Winston Brooks to order the personnel director to review with the staff what records are open to the public.

"We take this as a lesson to be learned, and I think that's the bottom line," he said.

The Kansas Association of School Boards tells members who are unsure about a particular record to withhold it until they can determine whether it is open.

A mistake could lead to a lawsuit or trouble with the teachers union, said Donna Whiteman, assistant executive director and an attorney with the organization.

Assistant Attorney General Phillips, however, said there is no reason for public officials to withhold salary information. His office concluded recently that public employees' contracts generally are open.

"Salaries of government officials are so clearly open under the Open Records Act that they should be easily obtained as a matter of routine," he said.

Contributing: Kendrick Blackwood
of the Lawrence Journal-World



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March 29, 2000

Testimony before Senate Committee on Elections and Local Government
Substitute for HB 2864

Madam Chairman and Members of the Committee, I am Harriet Lange, president and executive director of Kansas Association of Broadcasters (KAB). KAB is a trade association serving a membership of radio and television stations in Kansas. We appreciate the opportunity to appear before you today to discuss how Kansas open records and open meetings laws can be improved.

We all can agree that if the people's business is done in secret, it only increases the chances for misdeeds, mistrust and misinformation and increases the level of cynicism directed at government at all levels, by the voting public.

Kansas currently has good basic laws related to open records and open meetings. However, a few changes in each will enhance the process of government and the public's access.

We support, with some minor exceptions, Substitute for HB 2864 as it came out of the House Committee on Local Government. What happened to HB 2864 on the House floor creates cynicism in the legislature's sincerity in passing meaningful open government legislation.

The provisions in Substitute for HB 2864-BEFORE it was amended on the House floor -which we think should be part of any open government legislation, includes:

- Enforcement and penalty provisions which require awarding of attorney fees in actions brought under both the Kansas Open Meetings Act (KOMA) and Kansas Open Records Act (KORA); and fines for agencies which violate KORA.

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Attachment # 3 -1

- Sunset exceptions on a date certain unless the legislature acts to retain them; and require that all subsequent exceptions to KORA meet a three part test and if added to the law, be reviewed every five years.
- Establish in the Attorney General's office a public information officer to assist in resolving disputes, issue advisory opinions at the request of any person, and educating agencies and the public about KORA and KOMA.
- Provide the public an option to file a civil suit in district court (as in current law) OR bring an action before the public information officer.
- Establish a time frame for producing the required records.
- Require taping of closed meetings; tape not considered a public record unless a violation of the KOMA has occurred.
- Direct a "liberal construction" to KOMA, as is currently the case with KORA.

Thank you for your consideration and your interest in improving the public's access to their government at all levels.



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To: Senate Elections and Local Government Committee
From: Don Moler, Executive Director
Re: Kansas Open Records Act
Date: March 28, 2000

First I would like to thank the Committee for allowing me to appear today on behalf of the League of Kansas Municipalities to discuss issues relating to the Kansas Open Records Act. As I am sure you are all aware, the League has been involved at all stages in the development of the Kansas Open Records Act (KORA) and amendments to the KORA since its initial passage in the early 1980's. The League has also, for many years, published a manual entitled the *Kansas Open Records Act, Reference Publication for Local Government Officials*. This manual has been published by the League to help local government officials understand the intricacies of the (KORA) and to assist us in our training of local government officials in the area of open records.

I believe the League to be the single entity in Kansas which provides the most training on a year-to-year basis on the Kansas Open Records Act and Kansas Open Meetings Act. Virtually no League meeting or seminar goes by without some aspect of it being devoted to one or both of these issues. The League is very proud of its ongoing educational approach to the Kansas Open Records Act and the Kansas Open Meetings Act.

Current Language of Sub. HB 2864

Which brings us to Sub. HB 2864. Numerous sections of the Kansas Open Records Act, and portions of the Kansas Open Meetings Act have been substantially modified in this piece of legislation. The League is pleased to finally have the ability to comment directly on this legislation and to offer some alternatives to it. Key provisions included in the current Sub. HB 2864 include the creation of a public information officer position within the office of the Attorney General (AG). This individual would have the power to conduct hearings, impose fines and penalties, and to promulgate rules and regulations relating to KORA and KOMA. Sub. HB 2864 also gives the AG the ability to investigate violations; subpoena witnesses, evidence, documents or other materials; take testimony under oath; examine any documents of whatever nature relevant to the alleged violation; require attendance during the examination of documents or materials; and serve interrogatories. The bill also sunsets all exceptions to KORA on July 1, 2005. Any exceptions to the act maintained after that date would have to be reenacted by the state legislature. Sub. HB

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2864 also modifies the personnel matters exception for executive sessions under the Kansas Open Meetings Act to change the current language of "personnel matters of non-elected personnel" to "hiring, termination of employment and other forms of discipline, performance evaluations and complaints and grievances against such personnel."

Problems with Sub. HB 2864

- **Creates \$250,000 per year bureaucracy**

Sub. HB 2864 in its current form creates yet another bureaucracy at the state level. Let us not fool ourselves. It is quite clear that the position being contemplated would create a state level bureaucracy which has been estimated as having a fiscal note as high as \$250,000 per year. The clear purpose of this proposed bureaucracy is one of prosecution, not education. We feel this is an inappropriate direction for this legislation.

- **Impacts Privacy Rights of Kansas Citizens**

Another issue which one must focus on when discussing the current piece of legislation is the privacy of the individual. Not nearly enough time has been spent discussing how the repeal of all of the exceptions to the Kansas Open Records Act will impact the privacy of the citizens of Kansas. In this ever increasingly technological age, we must be vigilant that the personal records of individuals and businesses are protected so that they can maintain their personal freedoms and liberties. All of the exemptions currently in the law have been the result of legitimate concerns raised about the effect of releasing certain types of records. All of the exceptions have been subjected to the scrutiny of the legislature and found to be necessary to balance competing interests. To make a wholesale deletion of these exemptions is totally unwarranted at this point. At a briefing I attended at the National League of Cities Conference a couple of weeks ago, the entire focus of the discussion centered on the fact that the federal government is looking into more, rather than fewer, restrictions on the release of personal information because of the proliferation of electronic data bases. This is an issue that goes not only to personal privacy rights but also the very freedoms that we all enjoy.

Suggested New Open Records Act Language

As you can tell from my preceding testimony, I believe there are a number of problems with the current piece of legislation. The League, however, believes that open government is a cornerstone of good government. As a result we are suggesting substitute language for that found in the current Sub. HB 2864. You will find our suggested new language attached to this testimony. It has three basic components.

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- **Local Freedom of Information Officer**

The first section requires all local units of government which maintain public records to designate a local freedom of information officer. The local freedom of information officer would as part of their duties: (1) prepare and provide educational materials and information concerning the Open Records Act; (2) be available to assist the local government and members of the general public to resolve disputes relating to the Open Records Act; (3) respond to inquiries relating to the Open Records Act; (4) issue advisory opinions, when requested, concerning specific open records requests; and (5) establish the requirements for signs which would be required to be displayed under the Open Records Act.

- **Open Records Signs**

The second prong of the proposed language would require official custodians of public information to prominently display signs as prescribed by the local freedom of information officer that contain basic information about the rights of an open records requester, the responsibilities of the public agency maintaining the record, and the procedures for inspecting or obtaining a copy of public records under KORA. We believe these signs are a low cost method to allow all parties involved to have basic information concerning the rights of the requester and the duties of the public entity which is maintaining the record.

- **\$500 Fine**

Finally, we are suggesting that there be a penalty of up to \$500 which may be assessed against a public agency which inappropriately denies access to a public record under KORA without a reasonable basis in fact or law to make the denial. The penalty would be enforceable by the attorney general or any county or district attorney, and would be brought before the appropriate district court in the jurisdiction in which the local unit is located.

Conclusion

We believe this suggested new language is a reasonable and measured response to the concerns which have been raised in this area. It provides for local freedom of information officers, appropriate signage where public records are maintained, and a reasonable fine. What it does not do is create a new state bureaucracy, cause the expenditure of a quarter of a million dollars a year of public funds, nor endanger the privacy of citizens of the State of Kansas. We very much believe it is an appropriate response and would strongly urge the Committee to consider using this alternative language. Thank you.

Senate Substitute for Sub. for House Bill No. 2864

AN ACT concerning public records; providing for local freedom of information officers; prescribing the powers and duties thereof; amending K.S.A. 45-223 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section. 1. (a) The governing body of every local government in Kansas which maintains public records shall designate a local freedom of information officer.

(b) The local freedom of information officer or the local freedom of information officer's designee shall:

(1) Prepare and provide educational materials and information concerning the open records act.

(2) Be available to assist the local government and members of the general public to resolve disputes relating to the open records act.

(3) Respond to inquiries relating to the open records act.

(4) Issue advisory opinions, when requested, concerning specific open records requests.

(5) Establish the requirements for the content, size, shape and other physical characteristics of a sign required to be displayed under the open records act. In establishing such requirements for the content of the sign, the local freedom of information officer shall include plainly written basic information about the rights of a requestor, the responsibilities of a public agency, and the procedures for inspecting and obtaining a copy of public records under the open records act.

New Sec. 2. An official custodian for public information shall prominently display a sign in the form prescribed by the local freedom of information officer that contains basic information about the rights of a requestor, the responsibilities of a public agency, and the procedures for inspecting or obtaining a copy of public records under the open records act. The official custodian shall display the sign at one or more places in the administrative offices of the governmental body where it is plainly visible to: (1) Members of the public who request public information in person under this act; and (2) employees of the governmental body whose duties include receiving or responding to requests under this act.

Sec. 3. K.S.A. 45-223 is hereby amended to read as follows: 45-223.
~~No public agency nor any officer or employee of a public agency shall be liable for damages resulting from the failure to provide access to a public record in violation of this act. Any public agency which denies access to a public record under the open records act without a reasonable basis in~~

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fact or law to make such denial, and with the specific intent to violate this act, shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed \$500 for each violation.

Sec. 4. K.S.A. 45-223 is hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.



KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY

concerning Sub. For HB 2864

Presented to Senate Elections & Local Government Committee

March 28, 2000

Madam Chair and members of the committee, my name is Randy Allen, Executive Director of the Kansas Association of Counties. I am here today to express concerns about Substitute for HB 2864.

Kansas counties value open government and other philosophical underpinnings of the Kansas Open Records and Open Meetings Acts. County officials are continually educated in the application of both laws through extensive education programs offered by the KAC as well as several KAC affiliate organizations, such as the Kansas County Clerks and Election Officials Association. In designing our annual conferences and other statewide meetings, we never pass up an opportunity to include educational sessions or roundtable discussion tables about the Open Records or Open Meetings Acts. Similar to other statewide associations, our staff fields questions from county officials on open records and open meetings questions on a continuing basis.

Kansas and Kansans have a long-established tradition of relying upon education to advance good government and public understanding. We subscribe to the notion that the "carrot" is better than the "stick" in terms of bringing effective compliance with federal, state or local law. This is why we believe Substitute for HB 2864 is overly extreme in its good faith attempt to make government better. For example, we believe that building a common understanding of the importance of openness in our democratic society (as well as the inevitable tensions between openness and individual privacy concerns) is infinitely more effective than building a new staff agency at the state level. We have enjoyed a good working relationship with the various attorneys in the Attorney General's office who have, over the years, enforced the provisions of both acts. There is no reason that this cannot continue.

Very specifically, we object to the narrowing of the list of subjects which can be discussed in a closed or executive session - Section 22 (b) (1) on page 23 - from the existing language ("personnel matters of nonelected personnel") to a narrower list. Under the proposed language, for example, a board of county commissioners could not conduct a closed session discussion about the level of salary adjustment it would consider granting a department director (e.g. appraiser, county engineer, community health director) prior to taking action in an open session. Delineating the specific sub-topics of "personnel matters" may have unintended consequences. We urge caution in this regard.

When the legislature contemplates sweeping changes to existing laws on the order of those contemplated in Substitute for HB 2864, it sometimes utilizes the interim study process to broaden and deepen understanding of all parties. We're not convinced that Kansas' open records and open meetings laws are severely broken. However, good ideas for improvements can be subjected to scrutiny of a thorough interim study without enacting sunset provisions. As such, we urge the committee to report Substitute for HB 2864 unfavorably and allow education efforts of various associations and organizations to continue. If you have any questions, I would be happy to address them at this time.

The Kansas Association of Counties, an instrumentality of its 105 member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services. Inquiries concerning this testimony should be directed to Randy Allen or Judy Moler by calling (785) 272-2585.

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TESTIMONY

City of Wichita

Mike Taylor, Government Relations Director

455 N Main, Wichita, KS. 67202

Phone: 316-268-4351 Fax: 316-268-4519

House Bill 2864 Open Records/Open Meetings

**Delivered March 29, 2000 to
Senate Elections and Local Government Committee**

I am Government Relations Director for the City of Wichita. Part of my job is to oversee public information efforts. I work with reporters and citizens to provide information about what City government. I also conduct media training for City and County employees. Before taking the job with the City, I spent nearly 20 years as a journalist covering City, County and State government. I hope I can offer some perspectives from both viewpoints.

The training I conduct for City and County employees has a simple theme: Public Information is everything we do. As public employees, we should spend our time making information about government available to citizens, letting them know what we are doing with their tax dollars and why. If you don't have anything to hide, then don't.

In the City of Wichita, I haven't seen any evidence that journalists or citizens have problems obtaining records or information. In fact, through press releases, news conferences, weekly media briefings with the City Manger, daily briefings with Police officials, the City WebPage and the City television channel, we provide far more information than most reporters and most citizens care to know. I and my staff spend a good part of many days helping journalists and citizens track down information and get answers to their questions. In many cases its not a matter of simply responding to a request for a specific document, it's a matter of helping that journalist or citizen figure out exactly what it is they are asking for so we can help them get the information. I become their advocate, directing them to the right department or staff member, telling them what page of the budget to look at, or even creating and compiling new documents to make that information public.

I frequently find a common feeling among many public employees and journalists. The media doesn't trust government and the government doesn't trust the media. Perhaps not surprisingly, a great many citizens don't trust either one. Nurturing trust and openness between government and media, and ultimately with citizens, is not going to be accomplished by imposing a \$500 fine. I don't oppose a stiff fine for public officials who willfully and blatantly violate the law, but the way to ensure openness, is education about the law to make sure government employees, journalists and citizens understand it. Training by the League of Municipalities and Kansas Association of Counties and the training we do in Wichita are helping accomplish that. But I would also propose a partnership with the Kansas Press Association, the Association of Broadcasters and other journalism groups to help foster a better understanding of the open records and open meetings laws and why they are important.

There is certainly room for improvement in efforts to make public information public, but from my perspective in the City of Wichita, the substitute language proposed by the League of Kansas Municipalities serves that purpose without creating the cumbersome bureaucracy created by the version of House Bill 2864 which is now before you.

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TO: Senate Committee on Elections and Local Government
FROM: Mark Tallman, Assistant Executive Director for Advocacy
Also representing United School Administrators, Schools for Quality Education
DATE: March 28, 2000
RE: Testimony on Substitute for House Bill 2864

Madam Chair and Committee members, thank you for the opportunity to speak on Substitute for house Bill 2864.

The impetus for the introduction of this bill appears to be a series of newspaper articles published in Kansas papers last fall. While that series may indicate a need for greater education of those charged with compliance with the Kansas Open Records Act, (KORA) it did NOT reveal widespread intentional violations.

Substitute for House Bill 2864 was amended to include drastic changes in the Kansas Open Meetings Act (KOMA), as well. There was even less evidence of the need for changes in KOMA.

KASB strongly believes in open government. We conduct a number of activities to educate local school officials on these laws. We do not believe that major changes in either KORA or KOMA are called for at this time.

The Attorney General's office and County and District Attorneys' offices throughout the State already deal with enforcement issues and questions of an advisory nature.

A number of changes to the original bill were made on the floor of the House last week. We feel that those were improvements, but still do not address all of the questions for local government bodies. A list of some of those is attached to my testimony.

If changes are needed, in either KORA or KOMA, or new enforcement is needed, those decisions need to be made after careful study and discussion by all of those involved and affected; not by a rushed process in which the affected parties have no time to respond. No action should be taken until all questions are resolved.

We hope you will reject Substitute for House Bill 2864 and allow the entire issue to be dealt with more thoughtfully.

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Substitute for House Bill 2864
As amended by the
House Committee of the Whole

Issues remaining after House Amendments:

1. New Section 2, p.4, lines 9-13. Shouldn't the fine be available only if there is a knowing or willful violation, not a good faith mistake?
2. New Section 4, p. 4, lines 26-30. If a public body complies with an advisory opinion, which is later held to be in error, are the public body and its employees shielded from liability to third parties?
3. Section 14, p. 19, lines 32-34. Again, fines should be awarded only for knowing or intentional failure to provide access.
4. Fines should be levied against individuals who knowingly violate the law, not the elected body who are not themselves the custodians of the records.
5. New Section 15, pp. 19-21 and New Section 25, p. 26. The investigative powers of the Attorney General or County Attorney pose some difficulty in that they would also be the prosecutors in any actions brought under KORA or KOMA. Is there a conflict here?
6. Section 22 (b.) (1), p.23, line 15. It is difficult to enumerate all the private information regarding non-elected personnel that may arise. The current law protects the individual. The new language doesn't address all the personal circumstances that could arise. Health issues? Mental or physical? Awards, recognitions? Criminal investigations or charges? These are just some examples.
7. Sections 24 (f).pp. 25-26. Same as (2) above. If a public body complies with an advisory opinion, is it shielded from liability to third parties?
8. Fiscal note for local government?

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Date: 3-29-00
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RON THORNBURGH
Secretary of State



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STATE OF KANSAS

TESTIMONY OF THE SECRETARY OF STATE TO THE SENATE ELECTIONS AND LOCAL GOVERNMENT COMMITTEE MARCH 29, 2000

As the state's chief custodian of records, the Secretary of State has always supported open access to public records. I appreciate the opportunity today to comment on this important piece of legislation.

HB 2864 names the Attorney General's Office as the public information officer, charged with the duties of enforcing the open records act. The House Committee of the Whole added an amendment that directs the Secretary of State to prosecute and enforce the open records laws against the Attorney General. My testimony is limited to discussion of this amendment.

New Section 18 states, if there is an alleged violation of the open records act by the Attorney General, the Secretary of State shall have the same powers, duties and functions of a county or district attorney to investigate and prosecute the Attorney General.

The Secretary of State testified to the House Local Government committee that our office generally performs ministerial filing duties and has little authority to regulate entities or enforce laws. Assuming the role of a prosecutor would be unlike any other duty our office performs.

The Attorney General serves as the chief enforcer of state law. Her office is also directed by Kansas statute to represent the state in legal actions (K.S.A. 75-702). This jurisdiction covers executive offices, including the Secretary of State's Office. Our office often seeks representation and advice from the Attorney General, especially on matters in litigation. Because the Attorney General has expertise in the area of open record issues, we frequently seek her advice on this

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issue. Requiring the Secretary of State to prosecute our legal representative creates a conflict of interest.

The Secretary of State currently has one attorney position serving all divisions of the agency. Expertise on the subject of open records is not a requirement for the attorney position because, historically, we have not interpreted or enforced this law. The position of legal counsel in the Secretary of State's Office is an in-house position that advises the office on all statutory functions performed by the Secretary of State, including the areas of elections, corporations, trademarks, and the uniform commercial code. This position does not require litigation experience because the Attorney General represents our office in litigated matters. Therefore it would be necessary for the Secretary of State to hire outside counsel, most likely a special prosecutor, to investigate and prosecute the Attorney General for violations of the open records laws.

I appreciate the opportunity to comment on HB 2864. If the committee has any questions, I would be happy to answer them.

Melissa Wangemann, Legal Counsel
Deputy Assistant Secretary of State

Senate Elections & Local Government
Date: 3-29-00
Attachment # 8-2



State of Kansas

Office of the Attorney General

120 S.W. 10th Avenue, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215

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**SENATE COMMITTEE ON ELECTIONS AND LOCAL GOVERNMENT
ASSISTANT ATTORNEY GENERAL STEVE PHILLIPS
TESTIMONY ON SUBSTITUTE FOR HOUSE BILL NO. 2864
March 29, 2000**

My name is Steve Phillips. I'm an Assistant Attorney General appearing on behalf of Attorney General Carla Stovall.

House Bill 2864 started out as a proposal by Governor Bill Graves and Attorney General Carla Stovall for strengthening enforcement of the Open Records and Open Meetings Acts by providing additional enforcement mechanisms for our office, county and district attorneys, the courts and private individuals. The main thrust was creation of a hearing officer who could hear complaints through administrative proceedings brought by an assistant Attorney General, a county or district attorney, or a private individual or entity.

The hearing officer was proposed as a way to move adjudication of open government complaints from the time consuming and expensive judicial process to the relatively quicker and cheaper administrative process, as has been done recently in a few other states. The hearing officer could also speed resolution of disputes through issuance of advisory opinions that would trigger assessment of attorneys fees by the Officer or a court if the public agency failed to comply with the opinion. The Bill envisioned these functions as an addition to, not a replacement of, the Attorney General's prosecutorial role.

Thus, a second goal of the original Bill was to add sufficient personnel to the Attorney General's office to be able to hear cases and at the same time assume responsibility for increased open government prosecutions. Currently, reliance must be placed on county and district attorneys for enforcement of the KORA and KOMA. Some county attorneys are more enthusiastic than others about bringing such cases, and all are faced with a dilemma in prosecuting violations against county commissions that determine their budgets.

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A third goal of the original Bill was to provide sufficient investigatory and enforcement tools for prosecution of open government cases, similar to what other administrative agencies and prosecutors have. Investigative subpoena powers are necessary to be able to accumulate enough information to determine whether a case should be filed. Currently, we are often unable to do anything with KORA and KOMA complaints because of our inability to gather sufficient evidence.

Fine authority was added to the KORA to provide teeth to its provisions, as well as a requirement that public bodies post signs advising the public of their basic KORA or KOMA rights.

In the House Committee on Local Government, this bill was combined with 2-3 others, thus creating Substitute for House Bill No. 2864. With the addition of these other bills, the Substitute Bill provided for a sunset of the exceptions to the KORA unless the Legislature reviewed them and took action to keep them; required production of records more quickly; and required taping of executive sessions for purposes of determining whether improper topics had been discussed.

Committee amendments also included requiring that the Public Information Officer be appointed from existing staff. It required the Public Information Officer to do the informal resolution of complaints as opposed to that being handled by a second person within the office. It provided another avenue of recourse so that private individuals, the Attorney General or county or district attorney could either go through the administrative process with the Public Information Officer, or could go directly to district court.

The Committee voted to eliminate the KORA exception for bidders lists and proposed making open those records of private entities dealing with receipt of public funding. The Committee voted to give the Public Information Officer, as well as the courts, authority to impose fines.

When the Bill was worked by the House Committee of the Whole, it was drastically amended to:

- 1) preclude private citizens and entities from bringing cases in district court;
- 2) prevent the Attorney General's office from bringing cases before the Public Information Officer;
- 3) changed the language on timely production of records, arguably removing any time line by with records that are kept on site must be produced;
- 4) close all financial records of private entities; and
- 5) preclude taping of executive sessions, rather than requiring it.

The implications of these new amendments are as follows:

- 1) From a due process perspective, the Public Information Officer cannot function as both the informal mediator and the formal hearing officer in the same case—one role requires an advocate, the other an impartial third party. Thus, the private individual or entity is faced

with the dilemma of choosing between the two, and if the informal process is chosen, they are denied any further recourse because the complaint cannot be brought before the Public Information Officer because the Officer would be tainted, and the bill now precludes a private individual or entity from going to district court;

2) While it is not entirely clear, the bill appears to prohibit the Attorney General from bringing administrative proceedings before the Public Information Officer. Unless the private individual or entity can get the county or district attorney to take their case, or chooses to retain an attorney to assist with filing a complaint, they may have difficulty complying with administrative procedure act requirements;

3) Instead of tightening the time lines for producing records that are readily available, the bill now provides no time line—records requests must be "processed" immediately, but there is no requirement that they be produced within any certain time;

4) The bill completely closes certain financial records of private organizations, regardless of the circumstances surrounding government funding, which is a change from existing law;

5) Instead of requiring taping of executive sessions, the bill prohibits such taping.

We believe that the bill in its current form creates more obstacles to enforcement of the KOMA and KORA than are present in existing law, and limits rather than expands the public's access to open government. We do not support the bill as it now stands.

We do believe that enforcement problems exist, and that a well designed administrative hearing process could speed resolution of open government disputes. Additionally, we ask that prosecutors be given the investigation and enforcement tools they need to properly handle open government complaints.

Thank You.



KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Clyde D. Graeber, Secretary

Testimony on HB 2864
to the
Senate Committee on Elections and Local Government
by
Secretary Clyde D. Graeber

March 29, 2000

Chairman and members of the Committee, thank you for the opportunity to appear before you today to comment on HB 2864. I am here to support the concerns expressed in the testimony submitted by the Kansas Public Health Association.

Removal of the current exemption of public health records from the Kansas Open Records Act will increase reluctance of persons infected with certain diseases about pursuing medical attention to diagnose and treat the disease, thus increasing the likely hood of transmitting the disease to other persons.

KDHE requests the Committee reconsider New Section 12 (b) which allows the automatic sunset of exceptions to KORA. Certain public health records are exempted from KORA and the possibility that these records could be subject to release could severely impede the state's capacity to detect and prevent outbreaks of certain infectious diseases such as Sexually Transmitted Diseases and tuberculosis.

(d) the meaning of (d) in the same section requires clarification.

The provision that allows a sunset of the exemption for access to public health records should be removed from this legislation.

Thank you again for this opportunity.

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Attachment # 10

**KANSAS
PUBLIC
HEALTH
ASSOCIATION, INC.**

KANSAS PUBLIC HEALTH ASSOCIATION, INC.

AFFILIATED WITH THE AMERICAN PUBLIC HEALTH ASSOCIATION

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Testimony submitted to
Senate Committee on Elections and Local Government
by Sally Finney, Executive Director

I am submitting this testimony to the Committee on behalf of the members of the Kansas Public Health Association.

Regarding the matter of the Kansas Open Records Act and the Kansas Open Meetings Act, KPHA believes the existing laws are good ones. We recognize, however, there may be inconsistencies in their application due to a lack of understanding by the individuals responsible for carrying out the law. Therefore, **we ask that you support legislation aimed at encouraging awareness of the current open records and open meetings laws rather than consider major revisions undertaken without benefit of in-depth study of the unintended consequences of such changes.**

Regarding Sub HB 2864, the ability of the public health system to effectively prevent the spread of infectious disease rests in part on the fact that public health patient records are not subject to public review. Removing the current KORA exemption for public health records will increase reluctance of persons infected with certain diseases about seeking diagnosis and treatment, thereby placing others at risk. Our capacity to quickly deal with outbreaks of such conditions as sexually transmitted diseases (i.e. syphilis, and gonorrhea), tuberculosis, and other preventable conditions will be impaired. Therefore, **we ask that you remove the provision from Sub HB 2864 that would sunset the current exemption for public health records as part of the Kansas Open Records Act.**

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Date: 3-29-00
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