Approved: March 23, 2004
Date

MINUTES OF THE HOUSE LOCAL GOVERNMENT COMMITTEE

The meeting was called to order by Chairman Jene Vickrey at 3:30 p.m. on March 18, 2004 in Room 519-S of the Capitol.

All members were present.

Committee staff present:
Martha Dorsey, Legislative Research Department
Mike Heim Legislative Research Department
Theresa Kiernan, Office of the Revisor of Statutes
Maureen Stinson, Committee Secretary

Conferees appearing before the committee:
Judy Moler, Kansas Association of Counties
Jim Edwards, Kansas Association of School Boards
Susan Cunningham, Kansas Corporation Commission
Ron Smith, Kansas Department of Commerce
Amy Bertrand, Department of Administration
Danielle Noe, Johnson County
Don Moler, League of Kansas Municipalities
A.J. Kotich, Department of Human Resources
Mary Prewitt, Kansas Board of Regents

Others attending:
See Attached List.

The Chairman opened the hearing on:

HB 2922 public records; exceptions to disclosure

Judy Moler, Kansas Association of Counties, testified in opposition to the bill (Attachment 1). She said the bill contains language that could not be agreed upon in the compromise meetings that took place between the Kansas Press Association and interested parties on the Kansas Open Records Act. She stated that the bill also contains language from the compromises contained in **HB 2889**. She informed that the Kansas Association of Counties supports the language agreed upon in **HB 2889**; however, not the additional language found in **HB 2992**.

Jim Edwards, Kansas Association of School Boards (KASB), testified in opposition to the bill (Attachment 2). He said they disagree with items in the bill as follows:

- Section 1 (4) - Schools are already required to provide information to the print media once a year on salaries and benefits to senior district employees. In addition, all contracts between the district's board and the employee must be made at an open meeting. In addition, schools must report to the Kansas State Board of Education any employment separation brought about by certain acts.
- Section 1 (14) - This is probably much too broad and far reaching.
- Section 1 (20) - In working with boards, whether they are private, governmental or not-for-profit, one of the most important things an administrator can do is to keep the members of the board informed. In addition, how will this section impact what you do and what you request of legislative research or other state entities as it relates to "proposed legislation?"
- Section 1 (27) - KASB's legal department believes that current case law is sufficient.

Susan Cunningham, Kansas Corporation Commission (KCC), testified in opposition to the bill (Attachment 3). She said the KCC opposes the change proposed for K.S.A. 45-221 (a)(26) pertaining to

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

public utility records. She informed that the KCC supports the testimonies presented by the other state agency chiefs/general counsels. She explained that the proposed amendment to subsection (26) seeks to eliminate the KCC's ability to protect otherwise personal, private residential customer information from public disclosure.

Ron Smith, Kansas Department of Commerce, testified in opposition to the bill (Attachment 4). He said proposed changes to subsection (20) make open records out of private written advice and counsel from members of the public when, instead, confidential candor by advisors is necessary for the Executive Branch to function efficiently.

Amy Bertrand, Department of Administration, testified in opposition to the bill (Attachment 5). She addressed concerns with the proposed amendments to subsection (4). She explained that the amendment appears to expand the circumstances when an individual employee's personnel records would be available for public inspection. She said the amendment could be construed to include settlement agreements between an agency and an employee.

Danielle Noe, Johnson County, testified in opposition to the bill (Attachment 6). She said that the amendments in the bill will make the interpretation of KORA more complicated not less. She explained that in many cases the amendments use vague or broad terms that are capable of multiple interpretations. She stated that the amendments encourage bringing a court action to determine whether a record should be open under a particular set of facts.

Don Moler, League of Kansas Municipalities, testified in opposition to the bill (Attachment 7). He said the League of Kansas Municipalities opposes changes in the following:

- Personnel Exception - proposed changes would allow for the disclosure of employee records, and they believe would not only infringe on the privacy interests of public employees, but would also open up all public sector employers to possible lawsuits from employees whose records were divulged.
- Utility Exemption - proposed change would require all records of a public utility, including information concerning individual customers, be open to the public. The League believes harm could be done with the disclosure of other privileged information which might be included with the application for utility service.
- Personal Privacy Exception - proposed change would have the Attorney General issue rules and regulations regarding when the privacy exception could be utilized by governmental officials. The League believes that changes to this exception are not warranted at this time.

A.J. Kotich, Department of Human Resources, testified in opposition to the bill (Attachment 8). He said they have concerns with the proposed amendments to subsection (a)(4). He stated the proposed changes would appear to allow access to all personnel records of any public officer or employee disciplined for reasons involving public trust. Mr. Kotich said another concern is with subsection (a)(30) which would require the attorney general to promulgate separate rules and regulations by which it would be determined whether a record contains information of a personal nature that disclosure would be a clearly unwarranted invasion of privacy. He said since these determinations would still be subject to common law principles of privacy, and subject to a K.S.A. 45-222 hearing. He suggested the additional language should not be added and the exemption to remain subject to the Court's discretion.

Written testimony in opposition to the bill was submitted by:

- Mike Pepoon, Sedgwick County (Attachment 9)
- Tammy Williams, City of Overland Park (Attachment 10)
- Dianne Gjerstad, Wichita Public Schools (Attachment 11)

Mary Prewitt, Kansas Board of Regents, provided neutral testimony on the bill (Attachment 12). She informed the Committee that the Board of Regents has not taken an official position on the bill and does not support or oppose the bill. She explained that her testimony is intended to inform the Committee of some considerations that have been expressed by those at the state universities who deal with provisions

of the Open Records Act on a regular basis and wish the Committee to be fully informed before it decides whether to act on the legislation before it. She said the state universities are concerned about the effect of opening all agreements concerning or involving state employees to public scrutiny. Ms. Prewitt said there is little public policy justification for disclosing employment compensation that is derived from private sources, particularly when an employee is not a state employee but an employee of a not for profit corporation that supports a state agency. She explained that private supplements to some employment contracts are essential to keep the state in a competitive position for some important and highly qualified applicants. Ms. Prewitt informed that *The Lawrence Journal World* has sued the University of Kansas for disclosure of the terms of the contract of the new Athletic Director. She said action by the Legislature on this amendment would definitely impact that litigation.

The Chairman closed the hearing on: **HB 2922**

HB 2889 KORA; records not required to be open

Copies of a letter received by Chairman Vickrey from Sandy Praeger, Commissioner of Insurance, were distributed to Committee members (Attachment 13). Commissioner Praeger said that the various Insurance Code statutes mentioned in the bill all have their own privacy provisions. She said it is her belief that the bill does not impact any of the privacy protections contained within the Insurance Code. She stated that is her clear understanding that the Attorney General shares this opinion.

Minutes

Rep. Yonally made a motion for the approval of the minutes of the March 16, 2004 meeting. Rep. Toelkes seconded the motion. The motion carried.

The meeting adjourned at 4:45 p.m.

The next meeting is scheduled for March 23, 2004.

HOUSE LOCAL GOVERNMENT

DATE 3-18-04

NAME	REPRESENTING
Fred Mertz	Self
[illegible]	KDOC
Susan Cunningham	KCC
A.J. Kotich	KDNR
Doug Anstaett.	KPA
Jim Edwards	KASB
Judy Moler	KAC
Danielle Noe	Johnson County
Karen Watney	DofA
Amy Bertrand	DofA
Justin Dragosani	KSHS
Amy Campbell	KABR
Christina Collins	KMS
Heather Grace	Damron & Associates
Mary Brant	KBOR
Dennis Highberger	KDHE
Beth Lange	SRS
Natalie Haag	Security Benefit
WADE A. Bassi	JJA
[illegible]	KACCT
Debra Pridgeon	FHSU
ERIC SEXTON	WSU

HOUSE LOCAL GOVERNMENT

DATE 3-18-04

NAME	REPRESENTING
SUE PETERSEN	K-STATE
Kip Peterson	Board of Regents
Mark Wagyda	
Ron Applehoff	water DIST. No 1 of JoCo
Ron Seeber	Hein Law Firm
TOM DAY	KCC
BUD BURKE	City of Olathe
AJ KOTICH	KNP

KANSAS
ASSOCIATION OF
COUNTIES

Testimony on HB 2922
Before the House Local Government Committee
By Judy A. Moler
General Counsel/Legislative Services Director
March 18, 2004

The Kansas Association of Counties thanks the Committee for the opportunity to speak on HB 2922. This bill contains language that could not be agreed upon in the compromise meetings that took place between the Kansas Press Association and interested parties on the Kansas Open Records Act. This bill also contains language from that compromise contained in HB 2889. The Kansas Association of Counties supports the language agreed upon in HB 2889; however, not the additional language found in this bill.

The portions that the KAC objects to in this bill are as follows:

Subsection (a) (4) of K.S.A. 45-221: The language that states "the district court may impose" does not make sense to us. What is it they may impose? Additionally, the added language allows for the invasion of privacy rights of public employees. Is it fair that working for a public agency strips employees of their rights? Probably not and this would decided in the lawsuits brought against counties for the sharing of their employees' private records.

We also oppose the elimination of subsection (a) (26) which would require that records of a public utility be open. During the negotiations with the Kansas Press Association over language, they could provide no legitimate reason why individual customer names and addresses should be available to the public.

Finally, we would raise objections to the language added in subsection (a) (27). The "guidelines" provided by the Attorney General would unnecessarily politicize this exemption as Attorney Generals with differing views of privacy could change these guidelines each time a new AG is elected. It would be a changing standard.

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email kac@ink.org

House Local Government
Date: 3-18-04
Attachment # 1

The Kansas Association of Counties respectfully requests that the Committee reject HB 2922.

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

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony on **HB 2922**
before the
House Local Government Committee

by

Jim Edwards, Governmental Relations Specialist
Kansas Association of School Boards

March 18, 2004

Chairman Vickrey and members of the Committee:

I thank you for the opportunity to appear before you today to express KASB's opposition to **HB 2922**, a measure that proposes to delete several current exceptions included in the Kansas Open Records Act (KORA).

Some of our specific disagreements with items included in **HB 2922** are as follows:

Section 1 (4) – Schools are already required to provide information to the print media once a year on salaries and benefits provided to senior district employees. In addition, all contracts between the district's board and the employee must be made at an open meeting. In addition, schools must report to the Kansas State Board of Education any employment separation brought about by certain acts. (See attachment.)

Section 1 (14) – This is probably much too broad and far reaching.

Section 1 (20) – In working with boards, whether they be private, governmental or not-for-profit, one of the most important things an administrator can do is to keep the members of the board informed. In addition, how will this section impact what you do and what you request of legislative research or other state entities as it relates to "proposed legislation"?

Section 1 (27) – KASB's legal department believes that current case law is sufficient. (See attachment.)

In addition to the above, I would remind this committee that all of the items in question received exception from open records by the Legislature for good reason. This is not saying that there should not be a review to determine a continued justification for the exception. I also remind you that the exceptions to the KORA statute apply to all. Yes, they prohibit responsible use by the media but they also prohibit irresponsible use by persons with criminal intentions, marketing ploys and child endangering activities. Because of this, we urge your opposition of this measure.

I thank you for the opportunity to appear before you today and would be happy to answer any questions you might have.

House Local Government
Date: 3-18-04
Attachment # 2

91-22-1a. Denial, suspension, or revocation of license; public censure; grounds; report. (a) Any license issued by the state board may be suspended or revoked, or the license holder may be publicly censured by the state board for misconduct or other just cause, including any of the following:

(1) Conviction of any crime punishable as a felony;

(2) conviction of any crime involving a minor;

(3) conviction of any misdemeanor involving theft;

(4) conviction of any misdemeanor involving drug-related conduct;

(5) conviction of any act defined in any section of article 36 of chapter 21 of the Kansas statutes annotated;

(6) conviction of an attempt under K.S.A. 21-3301, and amendments thereto, to commit any act specified in this subsection;

(7) commission or omission of any act that injures the health or welfare of a minor through physical or sexual abuse or exploitation;

(8) engaging in any sexual activity with a student;

(9) breach of an employment contract with an education agency by abandonment of the position;

(10) conduct resulting in a finding of contempt of court in a child support proceeding;

(11) entry into a criminal diversion agreement after being charged with any offense or act described in this subsection;

(12) obtaining, or attempting to obtain, a license by fraudulent means or through misrepresentation of material facts; or

(13) denial, revocation, cancellation, or suspension of a license in another state on grounds similar to any of the grounds described in this subsection.

(b) A license may be denied by the state board to any person who fails to meet the licensure requirements of the state board or for any act for which a license may be suspended or revoked pursuant to subsection (a).

(c) A certified copy of a journal entry of conviction or other court document indicating that an applicant or license holder has been adjudged guilty of, or has entered a plea of guilty or nolo contendere to, a crime shall be conclusive evidence of the commission of that crime in any proceeding instituted against the applicant or license holder to deny, suspend, or revoke a license.

(d) In any proceeding instituted against an applicant or license holder to deny, suspend, or revoke a license for conduct described in subsection (a) of this regulation, the fact that the applicant or license holder has appealed a conviction shall not operate to bar or otherwise stay the proceeding concerning denial, suspension, or revocation of the license.

(e) (1) Suspension or revocation of a license shall suspend or revoke all endorsements on the license.

(2) Suspension of a license shall be for a definite period of time. A suspended license shall be automatically reinstated at the end of the suspension period if the license did not expire during the period of suspension. If the license expired during the period of suspension, the individual may make an application for a new license at the end of the suspension period.

(3) Revocation of a license shall be permanent, except as provided in subsection (g) of this regulation.

(f) Any applicant for licensure whose license has been suspended, canceled, revoked, or surrendered in another state shall not be eligible for licensure in Kansas until the applicant is eligible for licensure in the state in which the suspension, cancellation, revocation, or surrender occurred.

(g) (1) Except as provided in K.S.A. 72-1397 and amendments thereto, any person who has been denied a license or who has had a license revoked for conduct described in subsection (a) of this regulation may apply for a license by completing an application for a license and submitting evidence of rehabilitation to the Kansas professional practices commission. The evidence shall demonstrate that the grounds for denial or revocation have ceased to be a factor in the fitness of the person seeking licensure. Factors relevant to a determination as to rehabilitation shall include the following:

(A) The nature and seriousness of the conduct that resulted in the denial or revocation of a license;

(B) the extent to which a license may offer an opportunity to engage in conduct of a similar type that resulted in the denial or revocation;

(C) the present fitness of the person to be a member of the profession;

(D) the actions of the person after the denial or revocation;

(E) the time elapsed since the denial or revocation;

(F) the age and maturity of the person at the time of the conduct resulting in the denial or revocation;

(G) the number of incidents of improper conduct; and

(H) discharge from probation, pardon, or expungement.

(2) A person who has been denied a license or who has had a license revoked for conduct described in subsection (a) of this regulation shall not be eligible to apply for a license until at least five years have elapsed from the date of conviction of the offense or commission of the act or acts resulting in the denial or revocation or, in the case of a person who has entered into a criminal diversion agreement, until the person has satisfied the terms and conditions of the agreement.

(h) Before any license is denied, suspended, or revoked by the state board for any act described in subsection (a) of this regulation, the person shall be given notice and an opportunity for a hearing to be conducted before the professional practices commission in accordance with the provisions of the Kansas administrative procedure act.

(i) The chief administrative officer of a public or private school accredited by the state board shall promptly notify the commissioner of education of the name, address, and license number of any license holder who is dismissed, resigns, or is otherwise separated from employment with a school for any act described in subsection (a) of this regulation. (Authorized by article 6, section 2 of the Kansas Constitution; implementing article 6, section 2 of the Kansas Constitution and K.S.A. 72-8506; effective May 19, 2000.)

notify

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Invasion of Privacy

Kansas courts have recognized the tort of invasion of privacy. *Rawlins v. Hutchinson Pub. Co.*, 218 Kan. 295 (1975), citing *Froelich v. Adair*, 213 Kan. 357 (1973) and *Dotson v. McLaughlin*, 216 Kan. 201 (1975). Following the Restatement (Second) of Torts, Kansas recognizes four distinct types of invasion of privacy.

Intrusion Upon Seclusion

One's right to privacy is invaded if another intentionally intrudes, physically or otherwise, upon one's solitude or seclusion and if the intrusion would be highly offensive to an ordinary person. *Smith v. Welch*, 265 Kan. 868 (Kan. 1998). A claim for an invasion of privacy under §652B of the Restatement (Second) of Torts for the unreasonable intrusion upon seclusion of another requires something in the nature of an intentional interference in the solitude or seclusion of a person's physical being, or prying into his private affairs or concerns.

There is no liability for intrusion upon seclusion unless the interference with the person's seclusion is substantial, of a kind that would be highly offensive to an ordinary reasonable person and a result of conduct to which a reasonable person would strongly object. *Finlay v. Finlay*, 18 Kan.App.2d 479 (1993). Mere embarrassment or humiliation is insufficient to establish an invasion of privacy. *Henderson v. Ripperger*, 3 Kan.App.2d 303 (Kan.App. 1979)

Not every invasion into another person's private quarters constitutes actionable invasion of privacy. It is only when the invasion is so outrageous that the traditional remedies of trespass, nuisance, intentional infliction of mental distress, etc., will not adequately compensate a plaintiff for the insult to his individual dignity that an invasion of privacy action will lie. The intrusion itself must be patently offensive. The totality of the intruder's conduct must be extreme, intentional and outrageous; so offensive that it would cause mental harm or anguish in a person of ordinary sensibilities. An unauthorized test for HIV status on a blood sample obtained with consent for other testing was found to be an invasion of privacy in *Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060 (Colo. App. 1998). However, in *Trout v. Umatilla County School Dist. UH3*, 712 P.2d 814 (Or. App. 1985), the action failed because the place into which the intrusion occurs must be private. *Trout* involved actions taken against teachers for their involvement in a drinking party and an automobile accident. Both events were deemed to be public events by the court.

Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. Restatement (Second) of Torts §625C. The primary defense in appropariation actions is consent. While these cases are rare in the education context, schools should be careful to secure releases from employees or students whose names or likenesses will be used in promotional materials or other forms of advertising for the school.

In *Jarrett v. Butts*, 379 S.E. 2d 583 (Ga. App. 1989), the court found a teacher's photographs of students taken in the classroom and hallways of the school did not invade the student's privacy, largely because the photos did not reveal anything not readily visible to anyone who saw the student on the day the photos were taken and the teacher did not attempt to use the photos for his own benefit.

Publicity Given to Private Life

One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable person, is subject to liability to the other for invasion of his or her privacy. Restatement (Second) of Torts §652D. This tort involves public disclosure of intimate details of one's private life which is outside the reach of legitimate public interest. *Baca v. Moreno Valley Unified School Dist., 936 F. Supp.* 719 (C.D. Cal. 1996).

To establish invasion of privacy based on publicity given to private life, the publicity in question cannot be of legitimate concern to the public. *Werner v. Kliewer*, 238 Kan. 289 (Kan. 1985). Publication of private facts is not an invasion of privacy if the facts are also of public concern. Therefore, the court in *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501 (Fla. App. 1993), concluded the television broadcast of a story indicating a school bus driver had done time for a criminal offense was not an invasion of privacy.

Publicity Placing One in a False Light

One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy. Restatement (Second) of Torts §652E. False light invasion of privacy requires a showing of publication to a third party and a false representation of the person. A "false light" privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation; however, truth and privilege are defenses

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available in both causes of action. *Dominguez v. Davidson*, 266 Kan. 926 (Kan. 1999). Liability for "false light" publicity can occur only if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388 (Kan. 1997)

Invasion of Privacy and Defamation

Invasion of privacy and defamation are separate and distinct torts, even though they share some of the same elements and often arise out of the same acts. Invasion of privacy is a cause of action based upon injury to emotions and mental suffering; defamation is a remedy for injury to reputation.

Elements of the Four Invasion of Privacy Actions

The four forms of invasion of privacy are distinct, and based on different elements. Intrusion and disclosure of private facts require the invasion of something that is secret, secluded or private pertaining to the plaintiff; false light and appropriation do not. Disclosure and false light require publicity; the other two do not. Publicity is different from the term "publication" within the purview of the elements of defamation in that "publication" is a work of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. *Ali v. Douglas Cable Communications*, 929 F.Supp. 1362, 1383 (D.Kan.1996). False light requires falsity or fiction; the other three do not. See, *Godby v. Montgomery County Bd. of Educ.*, 996 F. Supp. 1390 (M.D. Ala. 1998) (in false light plaintiff must show defendant had knowledge or acted with reckless disregard as to the falsity of the publicized matter). Appropriation requires a use for the defendant's advantage, the other three do not.

Absolute and qualified privileges may be extended to invasion of privacy actions. The right of privacy does not prohibit communication of any matter though of a private nature when publication is made under circumstances which would render it a privileged communication according to the law of libel and slander. *Munsell v. Ideal Food Stores*, 208 Kan. 909 (Kan. 1972).

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The common denominator among the four categories of common law invasion of privacy is improper interference, usually by means of observation or communication, with aspects of life consigned to the realm of the personal and confidential by strong and widely shared norms. *Hill v. National Collegiate Athletic Ass'n.*, 865 P.2d 633 (Cal. 1994). Factors to consider include:

(1) The degree of intrusion;

(2) The context in which the intrusion occurs;

(3) The conduct;

(4) The circumstances surrounding the intrusion;

(5) The intruder's motives and objectives;

(6) The setting into which the intrusion occurs;

(7) The expectations of those whose interests are invaded.

Electronic Communications Privacy Act

Title I of the Electronic Communications Privacy Act of 1986 prohibits unlawful, intentional interception of wire, oral and electronic communications including employee e-mail. 18 U.S.C §2511. Title II prohibits unlawful intentional access to such communications while they are in electronic storage. 18 U.S.C. §2701 (a). Victims of illegal surveillance may be entitled to actual and punitive damages.

However, exceptions in the law may allow a school to monitor employee e-mail or phone calls on the school computer or telephone systems. The federal law allows for interception or retrieval of stored communications when one of the parties has given prior consent to the monitoring. Mere disclosure of a monitoring practice is probably insufficient to constitute consent. A clear policy and an explanation of the application of the policy to the employee may be sufficient. *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979). However, a statement signed by the employee, indicating he or she has read the policy and agrees to the terms of the policy is probably the best practice, and will likely make proving consent easier if monitoring is challenged.

The business use exception may also apply in the school context. This provision permits interceptions when telephone or telegraph equipment or components are used in the ordinary course of business. Under this exception, telephone calls may be monitored only to determine if the call is personal or business in nature. Once the transmission is deemed personal, monitoring must cease.

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Testimony Before the
House Local Government Committee
House Bill 2922
Susan B. Cunningham, General Counsel
Kansas Corporation Commission

March 18, 2004

Chairman Vickrey and Members of the Committee:

Thank you for the opportunity to present testimony concerning House Bill 2922 which contemplates certain changes to the Kansas Open Records Act (KORA). My name is Susan Cunningham and I am here today on behalf of the Kansas Corporation Commission (Commission) to specifically oppose the change proposed for K.S.A. 45-221(a)(26) pertaining to public utility records and also to note the Commission's support for the testimony presented by the other state agency chief/general counsels today.

With regard to K.S.A. 45-221(a)(26), current law allows the Commission to afford confidential treatment to public utility records in the possession of the Commission that pertain to individually identifiable residential customers. Contained within that KORA exception is the caveat that the Commission has no discretion to afford confidential treatment to billing information for specific individual customers named by the requester. The proposed amendment to subsection (26) seeks to eliminate the Commission's ability to protect otherwise personal, private residential customer information from public disclosure.

It is long-standing Commission policy to protect the personal and private information of specifically identifiable residential customers from public disclosure. Such information could include name, telephone number, address, social security number and utility account number. The Commission has always deemed that the public's right to know does not outweigh an individual's right to privacy on these issues. It should be noted that the typical circumstance under which the Commission would even have access to such information is in the context of an informal customer complaint. The Commission is concerned that if it were required to release the personal information provided pursuant to the informal complaint process, it would produce a chilling effect on a customer's decision to contact the Commission for help in resolving a legitimate utility dispute.

The billing information for specific individual customers named by a requester is not currently protected under KORA. Such billing information could include total monthly bill, specific usage, monthly customer charge, price per kWh or mcf, etc. Billing information is established by publicly filed tariffs and is uniformly applied to similarly situated customers. As a result, the same degree of protection is not needed or warranted for that information.

Because the KORA exception related to public utility records is already so narrow, the Commission is confounded by the desire to eliminate its ability to protect the personal, private

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information of residential utility customers from public disclosure and respectfully requests that the Committee maintain this narrow, but important, protection.

In addition to subsection (26), the Commission also opposes the proposed changes to subsections (4), (20), (21), (22) and (27), as more fully discussed by the other agency presenters.

Again, thank you for the opportunity to present testimony on behalf of the Kansas Corporation Commission. I'm available at your convenience to answer questions about this bill.

Testimony Before The
House Local Government Committee
House Bill 2922
Ron Smith, CDBG Attorney
Kansas Department of Commerce
March 18, 2004

Chairperson Vickery, Members of the Committee:

My name is Ron Smith, and I am the attorney for the Department of Commerce in the Community Development division. It is a pleasure to be here today. I'm speaking here only to subsection (20), but I am speaking on behalf of not only my own agency but other departments of this Administration with concerns with this subsection.

I listened Tuesday as Mr. Merriam described Subsection 20 as a minor cleanup of subsections 20, 21 and 22. We wish this vision were so.

Subsection (20) regulates the heart of the deliberative processes of the executive branch – the frank and candid documents and data that are sought, exchanged, collected, expanded and used to make policy decisions. In 2003, when Governor elect Sebelius was sued by newspapers over the confidential deliberations of her BEST teams, she told the Associated Press that she was trying to balance the need for openness with the need for frank discussions about government. "I don't think there is a lot of doubt that having every comment recorded and played back in a media forum can have a chilling effect on people's willingness to be very blunt and candid" in the advice they give the Executive Branch.

It is not new state policy. That has been the policy of all governors since 1974 when the KOMA and KORA were enacted. The amendments do not just merge the concepts in subsections 20, 21 and 22, as Mr. Merriam suggests. It changes the trigger for accessing the information.

Currently, to trigger a duty to release "notes, preliminary drafts, research data in the process of analysis, etc." the documents must be cited at, or identified on the agenda of, a public meeting. The new trigger in the amendment is much broader: the act of "distributing" documents to a "majority of a quorum of any body which … makes recommendations to the public agency" can trigger a request for the documents. If we construe KORA liberally, as the law says, Mr. Merriam can argue this amendment seeks access to the private notes and documents of private advisory groups to the executive branch. Since the phrase is "any body which has authority to take action or make recommendations", this phrase could make working papers of private think tanks providing information to the governor "public" documents, and accessible.

In essence, subsection (20) makes open records out of private written advice and counsel from members of the public when, instead, confidential candor by advisors is necessary for the Executive Branch to function efficiently.

The Commerce Department has many advisory boards, some authorized by the legislature. Just this session, you are sending us:

- a Boxing Commission Athletic Board,

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- the Center for Entrepreneurship, which has an advisory board, and
- transferring from Human Resources the Workforce Employment Advisory groups and
- various Disability Advisory Groups.

Each of these entities will discuss policy both with private persons and public employees. They will be privy to documents and proposals that are not yet ready to be adopted as public policy. Under K.S.A. 2002 Supp. 75-4318(a), if an advisory board is created by law or executive order it must have open meetings. What subsection (20) does is change KORA to make the working papers of these advisory boards available when distributed to two-fifths or three-sevenths of a body's membership even if that board's full membership only advises on policy. That is a far reaching change.

KSA 75-4317a defines a majority of a quorum of a body subject to KOMA as two-fifths of a commission. Do advisory groups that are not a "body" come under this subsection (20) language? For example, in the Department of Commerce, corporations seeking Community Development economic development grants give us a lot of information in their applications. This information is reviewed by an economic development team of five. This sort of information in the application is seen only by bankers or CPAs. Some of it, by separate law, cannot be disclosed at all – such as credit reports and income tax returns. The corporations do not want their competitors having this information. Competitors cannot get this information from the bank or the CPA. If the information is cited or released at a city commission meeting and not otherwise closed by law, is accessible. Under the proposed amendment, we must give the information up once it hits two of the five members of our economic development team. The Lt. Governor has not even seen the proposal at that stage. If these are our new rules, few companies will seek the economic development assistance from the Department of Commerce.

The Juvenile Justice Agency, for example, has some advisory committees that audit grant recipients. As part of the auditing function, onsite visits obtain confidential and privileged medical and mental health records of some offenders. These records appear to be available under subsection (20), unless closed by other law.

Another problem with preliminary drafts and notes being available for dissemination occurs in the Department of Corrections. In preparation of procedures for executing criminals, KDOC visits a number of other states to discuss that state's execution and operational procedures. Those states specifically allow KDOC access to that information if kept confidential. They will not provide information to KDOC if some peculiarity in the Kansas Open Records Act would cause that information to be public. In fact, in State v. Carr, capital defendants sought such preliminary records and notes until a court ruled only the protocols – not the background deliberative materials -- were subject to release under KORA, Under subsection (20) the confidential material from other states would have been available.

This amendment will cause great mischief because it is drafted in a manner that creates new uncertainty. For all these reasons, we oppose the change in lines 40-43 in subsection (20). Thank you.

Testimony - Amy Bertrand

Kansas Department of Administration
Howard Fricke, Secretary

Curtis State Office Building
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Topeka, Kansas 66612-1268

For additional information contact:

Legislative Liaison
Gavin Young

Phone: 785/296-3011 **Fax:** 785/296-2702

Local Government Committee, 519-S
Thursday, March 18, 2004

Testimony on HB 2922

Department of Administration, Legal Section
Amy Bertrand, Chief Attorney
(785) 291-3013

House Local Government
Date: 3-18-04
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Kansas Department of Administration
Howard Fricke, Secretary

Local Government Committee, 519-S
Thursday, March 18, 2004

Testimony on HB 2922

Good afternoon Chairman and Committee Members. My name is Amy Bertrand and I am Chief Counsel for the Department of Administration. I am here today to present testimony regarding House Bill 2922 and its impact on the Kansas Open Records Act. Although I will speak directly to concerns of the Department of Administration, the views I will express are shared by many of the other Executive Branch agencies, and were discussed in a recent meeting of agency counsel.

First I would like to address concerns with the proposed amendments to subsection (4). The amendment, although the language is unclear, appears to expand the circumstances when an individual employee's personnel records would be available for public inspection. We have several concerns related to this expansion.

The amendment could be construed to include settlement agreements between an agency and an employee. Often these agreements contain a confidentiality clause. If agencies or employees stop using the settlement process because such agreements are subject to public inspection, the state could be subject to increased employment-related litigation and damage awards.

The amendment could be construed to include performance evaluations, disciplinary actions, or similar information that normally is considered confidential. With the possibility these records could be subject to public inspection, open communication and the counseling process between employers and employees could become restricted. If disciplinary action is ultimately imposed and an employee challenges that action before the Civil Service Board, the agency may have less complete documentation of progressive discipline because of the chilling effect of this amendment. Further, there are often times when an employee is disciplined but then shows improvement and becomes a valued employee. It seems inappropriate to open the part disciplinary record when the disciplinary issue has been resolved.

Public employees are accustomed to and have relied on the current law that provides that only name, position, salary, and length of service are open records. Morale of the state workforce may be negatively affected by the proposed change. State employees should not be expected to give up privacy rights in order to accept public sector employment. The amendment could have a negative effect on recruitment and retention in state employment.

I would also like to briefly comment on new subsection (27), which is subsection (30) in the current law. This amendment would add, "as determined by rules adopted by the attorney general," to the exception protecting personal information where its disclosure would constitute an invasion of personal privacy. We are concerned that addition of this language will take away

necessary discretion from the agencies, and that the resulting process would not adequately address the unique nature of these types of circumstances.

In conclusion, I respectfully request that the amendments to subsection (4) and subsection (30) be stricken.

I would be happy to answer any questions you may have.

Johnson County, Kansas

BOARD OF COUNTY COMMISSIONERS

Testimony in opposition to **HB 2922**

presented to the

House Local Government Committee

by
Danielle Noe
Intergovernmental Relations Manager

March 18, 2004

Mr. Chairman,

Thank you for the opportunity to testify in opposition to HB 2922 enacting changes to the Kansas Open Records Act.

Johnson County believes that the amendments in HB 2922 will make the interpretation of KORA more complicated not less. In many cases the amendments use vague or broad terms that are capable of multiple interpretations, which ultimately leads to more lawsuits. We believe that KORA should be as clear as possible and should be drafted in such a manner that governmental entities and those persons or agencies which seek disclosure of records are able to interpret, understand and give effect to its provisions without resorting to the courts. Furthermore, the amendments in HB 2922 encourage bringing a court action to determine whether a record should be open under a particular set of facts. This will mean greater costs for local governments, in both time and money spent litigating; it also means that we will end up with less certainty as to what records are encompassed by the KORA exceptions.

Our specific concerns are set forth as follows:

Section 4. We do not mind the addition of "employment contracts or agreements;" Johnson County believes that these records are already open. However, we are unsure about the purpose of adding the term "actual compensation." Is this language intended to provide access to health insurance and related benefits information? If so, then this should be clearly spelled out. If not, then what does this term add?

Also in Section 4, we are concerned about the granting of authority to the courts to determine whether the release of this information is in the public interest. This language goes beyond the original intent of K.S.A. 45-222 (enforcement provisions of KORA) and the framework of KORA as a whole. As I previously mentioned, this sort of case-by-case review is costly and inconsistent and will create a chilling effect. Organizations, managers and supervisors will inevitably be driven to minimize documentation to avoid application of the law.

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111 S. Cherry, Suite 3300 • Olathe, Kansas 66061 • (913) 715-0725 • (913) 715-0727 fax

Subsection 10. The new paragraph at the end of this section (lines 28-31) is unnecessary because the written citation already exists in K.S.A. 45-218(d). This statute (K.S.A. 45-218) provides that if access to a record is denied, then upon request, the custodian must provide a written statement of the grounds of denial citing the specific provision of law under which accessed is denied. The proposed amendment is redundant and therefore, unnecessary.

Section 14. The changes here are confusing and unclear. We are unsure what the word "official" adds to the statute. We do not have "unofficial" correspondence. More importantly, it is often unclear who initiates correspondence. If a county employee provides written follow up to a telephone call from a citizen, who initiated the correspondence and what documentation will be required to as evidence of who was the initiator? Furthermore, terms like "favor" and "benefit" could be interpreted very broadly and are not clearly defined in the bill.

Sections 20, 21 and 22. While we understand the intent of combining these sections, we do not believe that Section 20 should be combined with Sections 21 and 22. Including Section 20 in the combined new section results in notes, preliminary drafts, and research material becoming open to the public if they are distributed to a majority of a quorum. The existing exception facilitates government effectiveness and efficiency and ideally should be preserved in its current form.

Section 26. Deleting this subsection will result in the lists of residential utility customers becoming open to the public. Under K.S.A. 45-220(c) and 45-230(a), such lists cannot be used to sell property or services to those customers on the lists. Unfortunately, based on our experiences, the primary reason for requests of any list of names is for solicitation purposes. Deletion of Section 26 creates an inconsistency since other statutes strictly limit the most likely use for such lists.

Section 27. The new language gives the Attorney General rulemaking power without any clear direction of what is intended. Interpreting KORA and other statutes protecting records has become excessively complicated. It is difficult for most record custodians, let alone the public, to determine what records are open and closed. Requiring the Attorney General to adopt a set of rules to interpret what one exception encompasses means that custodians and those seeking disclosure will have to locate those rules (which will not be a part of KORA), be familiar with such rules, and be alert for any changes. If the legislature wishes to define or limit the personal privacy exception, those limits should be included within the KORA act itself.

Johnson County believes that openness in county government is essential to building public confidence. Nevertheless, there are times when privacy or other legitimate reasons require executive sessions or the closing of certain records. Johnson County feels that any amendments to KORA should be clearly defined and help make KORA more understandable for custodians, as well as, those persons or agencies seeking disclosure. We appreciate the opportunity to provide our comments on HB 2922 and respectfully request that you do not pass this bill.

6-2

LKM
League of Kansas Municipalities

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Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

TO: House Local Government Committee

FROM: Don Moler, Executive Director

RE: Opposition to HB 2922

DATE: March 18, 2004

First, I would like to thank the Committee for allowing the League to testify today in opposition to HB 2922. As the Committee is aware, the League has been involved over the past summer and fall in negotiations with the Kansas Press Association, and others, involving modifications to the Kansas Open Records Act. The modifications which were agreed to by the League are found in HB 2889 which passed this Committee, and the House, and is now being considered in the Senate Judiciary Committee. Those changes found in HB 2922, which are different from HB 2889, represent those items which the League, and others, rejected as amendments to the Kansas Open Records Act. Specifically, there are three changes which the League adamantly opposes and which I will now highlight for the Committee.

- **Personnel Exception.** The League is opposing the personnel exception changes which are found in subsection (a)(4) of K.S.A. 45-221. These proposed changes would allow for the disclosure of employee records, and we believe would not only infringe on the privacy interests of public employees, but would also open up all public sector employers to possible lawsuits from employees whose records were divulged. These liberty interest lawsuits, which could be brought under federal law, raise very significant legal questions and could cost the taxpayers of Kansas thousands, if not millions of dollars, in potential losses. The League would suggest that if the state amends this portion of the KORA, that cities, counties, and other local units of government be indemnified by the State for potential losses occurring as a result of this statutory change.

- **Utility Exemption.** We also oppose the repeal of the utility exception, which is found in subsection (a)(26) which would require that all records of a public utility, including information concerning individual customers, be open to the public. The amount of mischief which could occur, should this exception be approved, can only be estimated at this point. Certainly we have issues involving individuals being stalked and the utility records being used as the method for locating potential victims. Also, harm could be done with the disclosure of other privileged information which might be included within the application for utility service. Examples of information which could be included on a municipal utility account could include: names, addresses, telephone numbers, e-mail addresses, credit information, and social security numbers. It is important to recognize that the information protected by this exemption is not information about the operations of public utilities. Rather, it is information about individual citizens who are customers of public utilities. We would respectfully suggest that good public policy in Kansas would not open this private information to the general public.

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- **Personal Privacy Exception.** Finally, we vehemently oppose the changes suggested to the privacy exception found in subsection (a)(27) in which the Attorney General would issue rules and regulations regarding when the privacy exception could be utilized by governmental officials. We would suggest that this is also a road we do wish to travel down at this time. Quite frankly, the privacy exception protects a wide variety of personal information which is held by government entities in Kansas. This could include such things as names and addresses of children and youth in schools, city-run youth programs, health information, etc., and any number of other areas where personal information is held by government on behalf of both private citizens and businesses. Changes to this exemption should be undertaken only with the greatest care as any changes could lead to the disclosure of information concerning private citizens and businesses. As a result we believe that changes to this exception are not warranted at this time and should be rejected by the Committee.

In conclusion the League would urge this Committee to reject to the changes found in HB 2922 as unwarranted and unnecessary at this time. We would further argue that the changes very likely could be harmful to the citizens of the State of Kansas and would have far reaching consequences which can only be guessed at from this point in time. Thank you for allowing the League to testify today. I would be happy to answer any questions you may have.

7-2

Testimony before the
House Local Government Committee
House Bill 2922
A. J. Kotich, Chief Counsel
Kansas Department of Human Resources
March 18, 2004

Chairman Vickrey and Members of the Committee:

Thank you for the opportunity to present testimony concerning HB 2922 relating to amendments to the Kansas Open Records Act. My name is A. J. Kotich, and I am here today as one of the representatives of the General/Chief Counsels of the various departments within the Executive Branch.

Our initial concern with HB 2922 is found in the proposed amendments to subsection (a)(4), found on page 1, beginning at line 31.

> *In an action brought pursuant to K.S.A. 45-222, and amendments thereto, the district court may impose. If the Court finds that disclosure is in the public interest and that the records pertain to a public officer or employee who, in such officer's or employee's official capacity, handles public money, works with children or sets public policy, when such officer or employee has resigned, been terminated or otherwise has been disciplined for reasons involving such matters of public trust.*

The language is unclear as to what is intended by this proposed amendment. This amendment would appear to allow access to <u>all</u> personnel records of any public officer or employee disciplined for reasons involving public trust. Discipline can range from an informal counseling to termination and various stages in between. Who is to determine whether the Discipline reasons <u>involved</u> public trust? Of course someone who is terminated for stealing public funds would be a clear example, however this amendment is broad enough that it could cover a much wider range of conduct and Discipline .

Even in the example I gave, the question remains as to whether this individual should be exposed to having his or her entire personnel record subject to public scrutiny. These records contain

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very personal data, including but not limited to medical information, disability information, and social security information as well as information concerning family members. This appears to be vague as to the type of information that would be released.

Our next concern with HB 2922 is found in the proposed amendments to subsection (a)(30), (renumbered 27) found on page 5, at line 17. This would require the attorney general to promulgate separate rules and regulations by which it would be determined whether a record contains information of a personal nature that disclosure would be a clearly unwarranted invasion of privacy. It would be a monumental task to establish rules and regulations to determine at what point a release of information would become "clearly unwarranted"? Since these determinations would still be subject to common law principles of privacy, and subject to a K.S.A. 45-222 hearing, we believe this additional language should not be added, and the exemption remain subject to the Court's discretion.

CONCLUSION

We would ask that the proposed language to subsection (a)(4) at page 1, lines 31 - 37, and subsection (a)(30) at page 5, lines 19 - 20 be stricken from HB 2922.

Again, thank you for the opportunity to appear and express my thoughts. I will be glad to stand for any questions you may have.

GOVERNMENT RELATIONS

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Michael D. Pepoon
Director

TESTIMONY ON HB 2922
Before The House Committee on Local Government
March 18, 2004

Chairman Vickrey and members of the committee, I appreciate the opportunity to submit written testimony in opposition to HB 2922 on behalf of the Board of County Commissioners of Sedgwick County. This bill would amend several key sections to the Kansas Open Records Act (KORA), in particular, K.S.A. 45-221, by opening up a number of records that have not previously been subject to disclosure. The following are some of our objections to the proposed amendments as contained in HB 2922:

Section 4. This proposed new language opens up the personnel exemption to include disclosure of disciplinary matters and other employment actions taken against a public employee. This section encourages litigation by creating a new avenue to have district court judges intervene in the process. Furthermore, public employers should be encouraged to discipline employees and fully document such actions without the chilling effect that this section would impose. We will be much less likely to discipline an employee or state the specific reasons for termination if we know to these records will be made public. Why should public employees lose their privacy rights simply by virtue of being a public employee?

Section 10. This proposed language is redundant and unnecessary. Such protections are already contained in K.S.A. 45-218 (d).

Section 14. This proposed language is ambiguous and would be subject to numerous interpretations. What is a favor or benefit? What is an "official" correspondence? We believe the current provisions in statute are adequate to address this exemption.

Section 20. This proposed language would subject notes, preliminary drafts, and other memoranda where opinions are expressed or proposed to be subject to disclosure if distributed to a majority of a quorum of the body. This would again create a chilling effect on the open communication of ideas within our organization—essential to the efficient operation of government. It would also essentially mean that staff ideas and recommendations would never be presented in writing to an elected body, which would have the effect of making their decision process more difficult.

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Deleted Section 26. The deletion of this section has the effect of opening up the utility records of an agency, including the billing address of identifiable individuals, to any person who would want this information. The obvious beneficiary of this information would marketers wanting to sell their product by mail. This would open up our citizens to unwanted junk mail and would completely nullify the provisions of K.S.A. 45-230, which prohibits such disclosure.

Section 27. This section amends the current section 30 in K.S.A. 45-221 dealing with the unwarranted invasion of personal privacy. This is one of the most important sections of the Act and protects the public in many ways from identity theft and other privacy abuses. With the proposed language, these considerations can only be made in accordance with rules adopted by the attorney general. This will make the process of providing records more cumbersome and possibly be the subject of the political leanings of the person occupying that political office.

Sedgwick County strongly believes in open government and has taken many steps to ensure that records should be made available to citizens and the media in a timely manner. But without question, the provisions currently contained in K.S.A. 45-221 are there for a specific purpose—to allow for the efficient operation of government and to protect the rights of citizens. Much of the information contained in public records is private information relating to our citizens and the County is merely the custodian of such records. We take that role very seriously on behalf of our citizens.

Sedgwick County urges you to oppose HB 2922.

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Law Department
Robert J. Watson, City Attorney

TESTIMONY IN OPPOSITION TO HOUSE BILL 2922

TO: The Honorable Jene Vickrey, Chair
Members of the House Committee on Local Government

Date: March 17, 2004

RE: House Bill 2922 -- Proposed legislation regarding exceptions to the Kansas Open Records Act (KORA)

Ladies and Gentlemen:

Thank you for the opportunity to share the City of Overland Park's comments in opposition to the proposed changes to the Kansas Open Records Act (KORA) regarding the personal privacy exception.

The definition of public records under the KORA is extremely broad. It covers not only information that is made, maintained or kept by a public agency, but also information that merely comes into the possession of the agency.[1] Governmental entities come into possession of a great deal of information that is highly personal in nature, the release of which could have a devastating impact on an individual's personal privacy.

The KORA currently provides an exception to the general rule of openness regarding public records for information that would result in a "clearly unwarranted invasion of personal privacy."[2] This exclusion permits the City to refuse to disclose highly personal details that are intimate in nature that may come into its possession. The proposed language would have the Attorney General's Office create rules regarding this exception. While we have confidence in the Attorney General's Office, creation of an all-inclusive set of rules is a functional impossibility. There is simply no way that the rules could be exhaustive enough to anticipate each and every situation that the City of Overland Park may confront. The City would submit that the "clearly unwarranted invasion of personal privacy" language is the appropriate "rule" to govern this exception.

[1] K.S.A. 45-217(f)(1)
[2] K.S.A. 45-221(a)(30)

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The Constitution of the United States provides individuals with protection regarding matters involving their personal privacy. The Supreme Court has acknowledged that people have an interest in protecting their personal matters from disclosure and from having their private matters made public by a governmental entity.[3] The State of Kansas also recognizes the tort of invasion of personal privacy.[4] To put a governmental entity in a position that it is mandated to release personal, private information could potentially expose that entity to civil liability.

This exception in its current form is necessary as it permits the entity to protect the privacy of individuals as well as to protect itself from liability by closing private, personal records. The agency is permitted to acknowledge the intimate nature of such information, the potential danger the release may cause, and what that public interest is for disclosure. Unless another exception applies, the release of the records is mandated if the privacy infringement is minor or incidental. If it is a "clearly unwarranted invasion of privacy," the record may be discretionarily closed. This inquiry is, necessarily, **fact driven** and therefore must be determined on a case-by-case basis.

The City believes that the current exception is fair in its application. A decision to close a record can be contested. The individual or entity requesting disclosure can certainly take the matter to court and request that a judge determine whether or not, after an *in camera* inspection, the release of said record would create such a privacy intrusion. In addition, the City is acutely aware of its obligations to redact the information that is private and to release remaining information.[5]

The public's right to know must be tempered by an individual's right to have his or her private matters remain private. Therefore, the City of Overland Park is supportive of the discretionary exception for information that is a "clearly unwarranted invasion of personal privacy," and would respectfully request that the exception be maintained in its current form.

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[3] *See Whalen v. Roe*, 429 U.S. 589 (1977)
[4] *See Rawlins v. Hutchinson Publishing Company*, 218 Kan. 295 (1975)
[5] K.S.A. 45-221(d)

WICHITA
Public Schools
www.usd259.com

House Local Government Committee

Representative Vickery, chair

H.B. 2922 – KORA exemptions

March 18, 2004

Presented by: Diane Gjerstad
Wichita Public Schools

Mr. Chairman, members of the committee:

The Wichita Public Schools rises in opposition to H. B. 2922. Quite simply stated passage of this bill would increase the school district's exposure to needless litigation. The Wichita Public Schools specifically opposes the changes in H.B. 2922 found in:

Personnel exception: the proposed language open the personnel files of employees who have resigned, or been terminated or "otherwise has been disciplined for reason involving such matters of public trust". However all employees retain a liberty interest protected by federal law and well defined in federal case law. Furthermore, the term "public trust" is an ambiguous term. This proposed language would place Kansas school districts in a position to be sued, and often. Regardless of what a media representative might regard as "public trust", employee liberty interests are protected by federal law. A state statute will not protect the school district from the exposure schools will face in federal court. For schools increased litigation diverts taxpayer dollars from education.

Privacy exception: schools maintain many lists. School records are protected by federal law (FERPA), yet many other activities are held in schools where records are maintained. An example would be latch key programs before or after school or summer enrichment programs. Today names of the children who participate in these programs should not be assessable to the public. However under this bill a parent or former spouse who has legally lost contact with either a child or former spouse could request attendance records from school after school until the child or former spouse's name is found.

When a child is entrusted in our care we must be vigilant in keeping the names of those attending confidential.

Mr. Chairman, I would simply remind the committee that you have acted to clarify KORA. The interim committee held extensive hearings. The chairman directed the parties to meet and find a resolution. This committee held hearings and acted favorably on the agreed upon bill, H.B. 2889, which has passed the House and will be heard in the Senate committee today.

I would encourage the committee to reject this bill and stand on the bill agreed to by all parties.

Thank you for considering our concerns.

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KANSAS BOARD OF REGENTS

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Testimony regarding H.B. 2922
House Local Government Committee

March 18, 2004

Mary D. Prewitt
General Counsel, Kansas Board of Regents

Chairman Vickrey and Members of the Committee, I appreciate this opportunity to appear before you today to offer some observations on behalf of the state universities on the amendments proposed to the Kansas Open Records Act contained in House Bill 2922.

As a preliminary matter, I want to inform the Committee that the Board of Regents has not taken an official position on H.B. 2922 and does not support or oppose the bill. My testimony is intended to inform the Committee of some considerations that have been expressed by those at the state universities who deal with provisions of the Open Records Act on a regular basis and wish this Committee to be fully informed before it decides whether to act on the legislation before it.

My testimony primarily concerns the proposed amendment to subsection (a)(4) of K.S.A. 45-221, which is found on page one, line 29 of the bill. That subsection provides an exception to the general rule of open records which allows a public agency to close personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, however, the provision does require that names, positions, salaries and lengths of service of officers and employees of public agencies be made available. The proposed amendment to the subsection would add to the available information records that contain "actual compensation" and "employment contracts or agreements."

The state universities are concerned about the effect of opening all agreements concerning or involving state employees to public scrutiny. This amendment could be construed to subject disciplinary records, performance agreements or similar information that is not currently open to public disclosure. Public employees should not have to give up their personal privacy in order to keep their jobs. Morale of public employees may be negatively affected and the amendment could discourage individuals from seeking public employment.

Currently, many aspects of settlement agreements reached with employees or applicants who sue the institutions may be kept confidential under various exceptions to the Open Records Act. Information such as disciplinary history or facts that might reveal personally embarrassing information can be protected. With the addition of the "agreements" language, the entire document is subject to disclosure. Although settlement amounts are generally subject to disclosure under current law, there is a strong public policy justification for not disclosing all of

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the terms of a settlement agreement. It gives other potential litigants and their attorneys information on the "value" of particular kinds of suits and may encourage litigation. Disclosure of non-monetary terms of a settlement agreement, such as an agreement to participate in anger management training or sexual harassment education, might discourage settlements. Moreover, the public policy reasons for disclosing settlement amounts (primarily, the expenditure of public funds) do not apply to settlements paid with private dollars or reached upon non-monetary terms. If a government agency or body is able to dispose of a lawsuit without spending public money to do so, it should be able to keep the settlement terms confidential in order to discourage further litigation and encourage the resolution of claims against the state.

Similarly, there is little public policy justification for disclosing employment compensation that is derived from private sources, particularly when an employee is not a state employee but an employee of a not for profit corporation that supports a state agency. Private supplements to some employment contracts are essential to keep the state in a competitive position for some important and highly qualified applicants.

The bill also proposes amendments to the same subsection in lines 31 through 37. Unfortunately, the amendments currently consist of two incomplete sentences and therefore, the intent is unclear.

It would be helpful to agencies charged with interpreting the law to have a definition for the term "actual compensation" such as compensation which is reportable for income tax purposes or compensation which is listed by the state on an employee's total compensation statement.

Many of you are undoubtedly aware that there is currently a legal action pending involving this provision of the act. The Lawrence Journal World has sued the University of Kansas for disclosure of the terms of the contract of the new Athletic Director. Action by the Legislature on this amendment would definitely impact that litigation. In keeping with the longstanding practice of the Legislature, it would be most appropriate for this body to defer action on this amendment until the litigation is resolved.

Finally, the state universities have also expressed concern with the proposed amendment to the current subsection (a)(30), which currently protects information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The proposed amendment, found on page 5, lines 19 and 20 of the bill, allows the Attorney General to promulgate rules and regulations by which this standard would be determined. This exception is currently applicable in a wide variety of situations that are not easily quantifiable or categorized. The amendment would take away from agencies vital discretion that is needed to protect personal privacy.

Thank you for this opportunity to offer remarks on H.B. 2922. I would be happy to address any questions you might have.

Kansas Insurance Department

Sandy Praeger COMMISSIONER OF INSURANCE

February 27, 2004

The Honorable Jene Vickrey
Chairman of the House Committee on Local Government
Representative 6th District
Capitol, Room Number: 115-S
Topeka, KS 66612

Re: House Bill 2889

Dear Representative Vickrey:

As you know, House Bill 2889 amends the Kansas Open Records Act, K.S.A. 45-221. At first glance, HB 2889 might appear to remove the privacy protections given to risk-based capital reports, actuarial opinions and certain financial reports made to the Department. (*See* HB 2889 §§ 38, 39 & 40). This has caused some concern.

On February 10, 2003, Attorney General Kline and I met to discuss HB 2889. He assured me that the intent of the bill, as it related to the Insurance Code, was not to abolish the privacy protections in the above-mentioned sections, but to merely eliminate the duplication in the statutory provision of that protection.

The various Insurance Code statutes mentioned in HB 2889 all have their own privacy provisions. This protection of business and personal information is very important. And while they are not exempt from further review by the legislature, I believe that a complete study of the impact of their elimination would have to be complete before serious consideration could be given to the removal of their privacy provisions. No such study has been done for the simple reason that the elimination of the privacy provisions has not contemplated.

It is my belief that HB 2889 does not impact any of the privacy protections contained within the Insurance Code. It is my clear understanding that the Attorney General shares this opinion.

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WEBSITE
www.ksinsurance.org

I would appreciate it if this letter could be made a part of your Committee's record. If you would like further information, or for the Department to express its views in a different form, please call me

Sincerely,

Sandy Praeger
Commissioner of Insurance

cc: Attorney General Kline
Jerry Slaughter