Approved: May 4, 2004
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on Thursday, March 18, 2004, in Room 123-S of the Capitol.

All members were present except:
Senator David Haley - Arrived 9:58
Senator Derek Schmidt -Arrived 9:43
Senator Edward Pugh - Arrived 9:41
Senator Lana Oleen - Arrived 9:40
Senator Les Donovan - Arrived 9:36

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of the Revisor Statutes
Helen Pedigo, Office of the Revisor Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Jim Edwards, Kansas Association of School Boards and Kansas National Education Association
Judy Moler, Kansas Association of Counties
Kim Gulley, League of Kansas Municipalities
Rick Thames, Kansas Press Association
Terry Forsyth, Kansas National Education Association
Harriett Lange, Kansas Association of Broadcasters
Phill Kline, Attorney General (letter of support)
Mary Prewitt, Chief Legal Council, Kansas Board of Regents
Representative Janice Pauls
Judge Ernie Johnson, Wyandotte District Court
Kyle Smith, Kansas Bureau of Investigation
Keith Schroeder, Reno County District Attorney
Tim Madden, Department of Corrections
Stuart Little, Kansas Community Corrections Association

Others attending: See attached list.

HB 2889 - KORA; records not required to be open

Chairman Vratil opened the hearing on **HB 2889**. Jim Edwards, Kansas Association of School Boards and Kansas National Education Association (KNEA), testified in support of the proposed legislation. He explained that the bill that amends and extends exceptions included in the Kansas Open Records Act (KORA). He said the bill was worked on by parties the Interim Committee on Local Government last summer. The proposed bill is the result of the work of interested parties drafting changes to make available information that the parties believe should be made public while protecting the personal privacy of individuals. (Attachment 1)

Judy Moler, Kansas Association of Counties, appeared before the Committee to speak in favor of **HB 2889**. Kansas Association of Counties supports the compromise language contained in the bill, but reserves the right to oppose any amendments offered to the bill. (Attachment 2)

Kim Gulley, League of Kansas Municipalities (LKM), spoke in support of the bill. She said that **HB 2889** reflected a great deal of work and compromise regarding the KORA exemptions. (Attachment 3)

Rick Thames, Kansas Press Association, testified in favor of **HB 2889**. The Kansas Press Association wholeheartedly supported the review and was committed to working with all parties to keep Kansas government as open as possible for all citizens. (Attachment 4)

Terry Forsyth, Kansas National Education Association (KNEA), spoke in support of the proposed bill. He

said the bill represented a compromise by a wide variety of groupson recommended changes to the KORA. (Attachment 5)

Harriet Lange, Kansas Association of Broadcasters, testified in support of **HB 2889.** All the exceptions to open records in Kansas statutes are scheduled to sunset in July 1, 2005. She stated that **HB 2889** represents a positive step in reaching agreement on revisions to KORA. (Attachment 6)

Attorney General, Phill Kline, submitted a letter of support of **HB 2889**. (Attachment 7)

Mary Prewitt, Kansas Board of Regents, testified as a neutral conferee on **HB 2889**. She intended to inform the Committee of some concerns expressed by those at the state universities who deal with provisions of the Open Records Act on a regular basis. The state universities are concerned about the effect of opening to public scrutiny all agreements concerning state employees. She explained that the proposed amendment to subsection (a)(4) of KSA 45-221, found on page 1, line 30 of the bill, could be construed to open disciplinary records, performance agreements or similar information not currently open to public disclosure. Ms. Prewitt commented that with the addition of the "agreements" language, the entire document is subject to disclosure. It gives potential litigants and their attorneys information on the "value" of particular kinds of suits and may encourage litigation.

Ms. Prewitt testified that there is little public policy justification for disclosing employment compensation that is derived from private sources. She suggested that it would be helpful to agencies charged with interpreting the law to have a definition for the term "actual compensation". She referenced the current legal action pending involving provisions of KORA where "The Lawrence Journal World" sued the University of Kansas for disclosure of the terms of its contract with the new Athletic Director. She stated that in keeping with the longstanding practice of the Legislature, it would be most appropriate for the body to defer action on this amendment until the litigation was resolved. Ms. Prewitt enclosed with her written testimony copies of correspondence from the General Counsels to the University of Kansas, Kansas State University and Wichita State University provided by Reginald Robinson, President and CEO, of the Kansas Board of Regents. (Attachment 8)

Following Committee questions and discussion, the Chairman closed the hearing on **HB 2889**.

HB 2869 - Preliminary examinations, admissibility of field tests for controlled substances

Chairman Vratil opened the hearing on **HB 2869**. Representative Janice Pauls testified in support of the proposed legislation. Physical evidence accompanied by a completed evidence custody receipt showing such evidence continually in possession of law enforcement should be allowed into evidence at a preliminary hearing. It should be treated as if everyone in the chain of custody had testified in person. She explained that a preliminary exam is not required constitutionally, so the same constitutional protections do not apply at a trial. (Attachment 9)

Judge Ernest Johnson, Wyandotte District Court, testified in favor of **HB 2869**. He explained that the bill relaxes, in a very specific area, the rules of evidence as applied by the court at a preliminary hearing. To bind a defendant charged with a felony over for trial, the State's evidence must be sufficient to demonstrate that the court has probable cause to believe a felony was committed by the defendant. He said this change in the statutes was needed because of the explosion in the number of drug cases in Kansas. In addition there has been a substantial law enforcement-related response by drug-testing companies in the last 20 years. This change is a legitimate legislative attempt to make more efficient the administration of justice. He attached to his submitted written testimony a proposed draft of alternative language. (Attachment 10)

Chairman Vratil asked Judge Johnson if he wanted the Committee to consider the attached draft of alternative language which would replace sub-section (a) of the bill as requested by Representative Loyd. Judge Johnson answered "yes" if it did not conflict with the Kansas Bureau of Investigation's desires.

Kyle Smith, Kansas Bureau of Investigation, spoke in favor of **HB 2869** which he said saved money and time. He stated the system occasionally is abused and precious court time, attorney time, officer time, and

forensic scientist's time is wasted on details that aren't really necessary. A preliminary hearing was not a constitutional right, but an additional process created by the Legislature and so the rules involved can be set by the Legislature. (Attachment 11)

Keith Schroeder, Reno County District Attorney and on behalf of the Kansas County and District Attorneys Association, testified in support of **HB 2869**. The number of cases filed on adult criminal matters has doubled in Reno County over the past 15 years, and the number of drug related prosecutions has doubled over the past 5 years. Mr. Schroeder said that the amendments to **HB 2869** by the House permit an evidence custody receipt to be admitted as heresay evidence at a preliminary hearing without requiring an evidence custodian or business records custodian to lay a foundation for its admission. (Attachment 12)

Chairman Vratil closed the hearing on **HB 2869**.

HB 2638 - Amendments to the community corrections act

Chairman Vratil opened the hearing on **HB 2638**. Tim Madden, representing Secretary of Corrections, Roger Werholtz, testified in support of the proposed legislation. Secretary Werholtz submitted written testimony urging favorable consideration on **HB 2638**. Mr. Madden explained that this bill reinstates an eligibility criterion for community corrections placement repealed pursuant to passage of SB 123 last session, codifies a limitation of the use of community corrections grant funds to programs that relate to the criminogenic aspects of an offender, requires the community corrections advisory committee to recommend performance indicators and measurable objects for community corrections programs; extends to July 1, 2006, the Johnson County Community Corrections pilot program for community placement criteria pursuant to the District Court Rules of the 10th Judicial District, and emphasizes the role of counties in the supervision of their community corrections programs. (Attachment 13)

Stuart Little, Kansas Community Corrections Association, spoke in support of **HB 2638**. He said that this bill would clarify the duties of community corrections agencies to include substance abuse and mental health services, as well as employment and residential services. He added the changes would also bring in line the definition of the community corrections population to include SB 123 offenders. (Attachment 14)

Committee members were given copies of a statement of support from Patricia Biggs, Executive Director, Kansas Sentencing Commission. (Attachment 15)

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is Friday, March 19, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Thurs. March 18, 2004

NAME	REPRESENTING
Natalie Haag	Security Benefit
Christina Collins	KMS
Diana Gierstad	Wichita Public Schools
[illegible]	KMS
[illegible]	KAC
Dick Seaton	KSU
Mary Brunt	KBOR
[illegible]	Ks Assn of B'casters
Tim Madden	KDOC
Kathleen Graves	KDOC
Kyle Smith	KBI
Did Loder	TCG
Sue Peterson	K-State
[illegible]	KU
[illegible]	KUCT
[illegible]	Horn Law Firm
Karen Watney	DPS
Michael White	KCDAA
Mike Jennings	"

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Thurs, March 18, 2004 Pg. 2

NAME	REPRESENTING
Mike Pepoon	Sedgwick County
Danielle Noe	Johnson County
Erik Sartorius	City of Overland Park
Jim Clark	KBA
Chip Wheelen	Assn of Osteopathic Medicine
Kathy Porter	Judicial Branch
Beth Lange	SRS
Terry Lowrey	ITA
KEITH SCHROEDER	RENO COUNTY DISTRICT ATTORNEY
Terry Bruce	Majority Leader's office

KANSAS ASSOCIATION OF SCHOOL BOARDS

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

Testimony on **HB 2889**
before the
Senate Judiciary Committee

by

Jim Edwards, Governmental Relations Specialist
Kansas Association of School Boards

March 18, 2004

Chairman Vratil and members of the Committee:

I appreciate the opportunity to appear in front of you today to support **HB 2889**, a measure that amends and extends exceptions included in the Kansas Open Records Act (KORA). When the Interim Committee on Local Government met this past summer, it heard from many of the individuals that you will hear from today. Upon hearing the testimony, the chair and co-chair both instructed all of the parties that appeared to sit down before the session started and see if there were items that could be agreed to. What you have in front of you today is the outcome of several meetings between the groups.

What the parties found, after a couple of meetings, was that there was middle ground and there were definite areas that we could work together on. We believe that the changes made will make available the information that should be made public while still protecting the personal privacy of individuals.

We urge your support of this measure so that a large portion of the work that needs to be done in the area of review of the KORA statute can be completed.

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

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Attachment 1

KANSAS
ASSOCIATION OF
COUNTIES

Testimony on HB 2889
Before the Senate Judiciary 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 2889. This bill is the result of several meetings with the Kansas Press Association and other interested parties. The parties included in working on the compromise were those that presented testimony during the interim hearing on the Kansas Open Records Act exemptions. The Kansas Association of Counties supports the compromise language contained in this bill. We would, however, reserve the right to oppose any amendments offered to the bill.

The Kansas Association of Counties urges you to act favorably on HB 2889.

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.

6206 SW 9th Terrace
Topeka, KS 66615
785•272•2585
Fax 785•272•3585
email kac@ink.org

Senate Judiciary
3-18-04
Attachment 2

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

To: Senate Judiciary Committee
From: Kim Gulley, Director of Policy Development & Communications
Date: March 18, 2004
Re: Support for HB 2889

Thank you for the opportunity to appear today on behalf of the League of Kansas Municipalities and our 556 member cities. We appear today in support of HB 2889.

In 2000, the Kansas Legislature adopted a number of new provisions to the Kansas Open Records Act (KORA), including a requirement that all of the exemptions to the Act would expire on July 1, 2005 (K.S.A. 45-229). Review of the statutory exemptions to KORA began during the 2003 interim, with hearings held on a number of specific exemptions. It became quite clear during these hearings that the challenge of balancing the general public's right-to-know with the privacy rights of individuals can be a daunting task. At the conclusion of the interim committee's work on this issue, the various stakeholders involved were asked to get together and to determine whether we could find any common ground on these very important public policy issues.

The League of Kansas Municipalities, the Kansas Association of Counties, the Kansas Association of School Boards, the Kansas Press Association, and a variety of other entities at various times, met on numerous occasions to review the exemptions. Our goal was simple: to reach a greater understanding of each others' concerns and to draft a piece of legislation on which all of us could agree.

I am pleased to report that HB 2889 reflects a great deal of work and compromise regarding the KORA exemptions. The parties involved in these discussions believe that this legislation represents solid public policy in this area. The bill repeals a number of exemptions which are considered to be redundant with other statutes. It also makes substantive changes to a number of exemptions in an attempt to address concerns raised by the Kansas Press Association without compromising the need to protect certain privacy interests.

As you can well imagine, it was not easy to reach the compromise reflected in HB 2889. For that reason, we respectfully request that HB 2889 be considered without substantive amendment. Adding new provisions or repealing other exemptions would tip the balance away from the compromise and put in jeopardy the support of the various associations who appear before you today in complete agreement.

In conclusion, the League of Kansas Municipalities asks your favorable consideration of HB 2889. I would be happy to stand for questions at the appropriate time.

Senate Judiciary
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Attachment 3

Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

March 18, 2004

To: The Senate Judiciary Committee
From: Rick Thames, editor, Wichita Eagle; legislative chair, Kansas Press Association
Subj: House Bill 2889

What a difference a few months makes.

Last summer, the Interim Committee on Local Government needed a place to begin the important work of reviewing every statutory provision that restricts the public's access to government records.

As you know, there are more than 350 of them -- and all are scheduled to sunset in July of 2005 under legislation passed by the 2000 Legislature.

The Kansas Press Association wholeheartedly supports this review and is committed to working with all parties to keep our government as open as possible for all Kansans.

That brings us to the relatively easy work before you today.

Last summer, the Interim Committee wisely suggested that all parties with an interest in this process come together to find as much common ground as possible. That would conserve as much committee energy as possible for exemptions that are in dispute.

The bill before you is the result of some very hard work by those agencies and organizations, among them the League of Municipalities, the Association of Counties, the Association of School Boards, the Association of Broadcasters and the press association.

These groups are in agreement with the changes before you. And if the changes passed muster with these very different groups, that should only add to assurances that they are also in the best interests of a majority of Kansans.

You'll see that the negotiations led to consensus on eliminating four of the 46 exemptions. In addition, the group narrowed the scope of several exemptions that remain.

All sides took a reasonable, balanced approach on these issues. They balanced the public's right to know what its government is doing against the rare exception when restricting access to certain records is in the public's best interest.

As an example, I want to note the change to exemption No.4. Certainly, there are portions of a public employee's personnel file that should be private under normal circumstances. But, as amended, this exception appropriately allows the public access to contracts and other written commitments to public employees, who are working for all the citizens of this state.

We all still have a lot of hard work ahead to fulfill the commitment of the

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Attachment 4

2000 Legislature to open government. And, yes, we will be back to discuss issues that we were unable to resolve outside of hearings.

But, right now, I urge you to take advantage of the hard work already done. Vote to send H.B. 2889 to a vote by the full Senate, knowing that there is broad agreement that it is the right thing to do.

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

Terry Forsyth, Testimony
Senate Judiciary Committee
March 18, 2004
House Bill 2889

Mr. Chairman, members of the committee, thank you for the opportunity to appear before you today in support of **House Bill 2889**.

This bill represents the work of a wide variety of groups who met at the suggestion of Representative Jene Vickrey to work out differences on recommended changes to the Kansas Open Records Act. Kansas NEA was represented by our General Counsel David Schauner and Governmental Relations Director Mark Desetti. As you can probably imagine, these meetings were not easy and sometimes downright difficult!

In the end, however, everyone did come to agreement. The result of that agreement is before you today in **House Bill 2889**.

Kansas NEA supports **House Bill 2889** as it is before you and without further amendment. We urge this committee to pass the bill out as it is favorably for passage.

Senate Judiciary
3-18-04
Attachment 5

Telephone: (785) 232-8271 FAX: (785) 232-6012

KAB
KANSAS ASSOCIATION OF BROADCASTERS

1916 SW Sieben Ct, Topeka KS 66611-1656
(785) 235-1307 * FAX (785) 233-3052
Web site: *www.kab.net* * E-mail: *harriet@kab.net*

Testimony
Before Senate Judiciary Committee
Regarding HB 2889
March 18, 2004
By
Harriet Lange
President/Executive Director
Kansas Association of Broadcasters

Mr. Chairman, Members of the Committee, I am Harriet Lange with the Kansas Association of Broadcasters. KAB's membership is comprised of radio and television broadcast stations which serve Kansas. We appreciate the opportunity to appear before you today in support of HB 2889.

The bill represents a compromise reached by a working group of organizations interested in Kansas Open Records Act. This working group was sanctioned by the 2003 Interim Committee on Local Government which began the monumental task of reviewing all of the exceptions to open records in Kansas statutes. All of these exceptions are scheduled to sunset on July 1, 2005.

Participation in this working group was open to anyone who participated in the Interim Committee's review last fall, or who had an interest in KORA. Working on the compromise contained in HB 2889 were representatives of Kansas Association of Counties, League of Kansas Municipalities, Kansas Association of School Boards, Kansas National Education Association, Attorney General Phill Kline, Kansas Bureau of Investigation, Kansas Press Association, Kansas Sunshine Coalition for Open Government, and Kansas Association of Broadcasters . HB 2889 represents a very positive step in reaching agreement on revisions to KORA and we urge you to pass it without amendment.

Thank you for your consideration.

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Attachment 6

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597

Phill Kline
Attorney General

Main Phone: (785) 296-2215
Fax: 296-6296

March 18, 2004

To: Senate Judiciary Committee
From: Attorney General Phill Kline

Re: HB 2889 Concerning the Open Records Act

Chairman Vratil and Members of the Committee:

Thank you for the opportunity to express my support of this important piece of legislation. I regret not being able to appear before you today in full support of HB 2889. However, other duties of my job require me to be elsewhere at this time.

Over the last several weeks, I have met, along with individuals from my office with members of the Kansas Sunshine Coalition. The meetings were held with the purpose of finding areas of common interest in addressing the exceptions in the Kansas Open Records Act (KORA). It quickly became apparent, that I shared a common desire with the Sunshine Coalition. A desire to ensure transparency in government, while at the same time acknowledging the need to protect records of a secure nature.

HB 2889 represents a responsible effort to broaden public access to records. It is my hope, that the committee will consider passage of HB 2889.

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Attachment 7

KANSAS BOARD OF REGENTS

1000 SW JACKSON • SUITE 520 • TOPEKA, KS 66612-1368

TELEPHONE – 785-296-3421
FAX – 785-296-0983
www.kansasregents.org

Testimony regarding H.B. 2889
Senate Judiciary Committee

March 18, 2004

Mary D. Prewitt
General Counsel, Kansas Board of Regent

Chairman Vratil 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 as contained in House Bill 2889.

As a preliminary matter, I want to inform the Committee that the Board of Regents has not taken an official position on H.B. 2889 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 concerns only the proposed amendment to subsection (a)(4) of K.S.A. 45-221, which is found on page one, line 30 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 which 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 the

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3-18-04
Attachment 8

terms of an 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 (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.

Similarly, there is little public policy justification for disclosing employment compensation that is derived from private sources. Private supplements to some employment contracts are essential to keep the state in a competitive position for some important and highly qualified applicants.

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.

Finally, 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.

Thank you for this opportunity to offer remarks on H.B. 2889. I would be happy to address any questions you might have.

KANSAS BOARD OF REGENTS

1000 SW JACKSON • SUITE 520 • TOPEKA, KS 66612-1368

TELEPHONE – 785-296-3421
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www.kansasregents.org

February 24, 2004

Representative Jene Vickrey
Chairman
House Local Government Committee
State Capitol – Room 115-S
Topeka, KS 66612

Dear Chairman Vickrey:

Today your Committee will hear testimony on HB 2889. As you know, this legislation addresses the Kansas Open Records Act.

I have attached a letter from each of the General Counsels to the University of Kansas, Kansas State University and Wichita State University that presents you with a reasoned reflection of the impact that a change in these exceptions would have not only on the operations of the institutions, but, more importantly and more particularly, on the state employees who conduct those operations. The General Counsels, on the basis of their extensive experience in these matters, composed the letter jointly.

Thank you for the opportunity to comment on this legislation. Please let me know if I can be of further assistance.

Sincerely,

Reginald L. Robinson
President and CEO

VIA FACSIMILE

November 14, 2003

Ms. Mary D. Prewitt
General Counsel
Board of Regents
Curtis State Office Building
1000 SW Jackson Street, Suite 520
Topeka, KS 66612-1368

Dear Mary:

We are writing to provide our recommendations regarding the upcoming legislative review of exceptions to disclosure under the Open Records Act, as required by K.S.A. 45-229. We understand that four of these exceptions will be reviewed by a legislative committee this coming Monday. These exceptions are subsections (a)(4) personnel records, performance ratings or individually identifiable records; (a)(10) criminal investigation records; (a)(30) records affecting personal privacy; and (a)(32) architectural engineering estimates for public improvement projects. Each of these exceptions was put into the law for a specific beneficial purpose and only after careful consideration by the Legislature. They have passed the test of time, and while we understand the Legislature's responsibility to revisit and review the Act, it is important to recognize that each exception was written, considered, debated and enacted for sound reasons.

Our clients have asked us to provide specific comments and recommendations regarding each of these subsections. With respect to the personnel records exception, subsection (a)(4), it has, at its core, an implicit recognition that employees in state service should be afforded some privacy regarding their personnel records. The exception makes available for public inspection matters that are of clear public interest, including names, positions, salaries, and length of service. This is understandable given that many, although not all, of our employees receive state general funds as the source of their salary.

At the same time, however, these employees should be accorded privacy in their actual personnel records and their performance ratings. This recognition that records of performance as well as discipline, sick leave, and other matters of a personal nature should be respected as private enhances the efficiency and fairness of our state employment system. Disclosure of these records in response to routine inquiries under the Open Records Act would be contrary to our employees' reasonable expectation of privacy and inimical to efficient and fair operation of our personnel management system, including progressive discipline. Open and fair discussion and evaluation of employees is essential to growth and development in a job. This includes honest

critiques and corrective action plans found both in performance appraisals and disciplinary matters. Were these matters open to public scrutiny, even after the fact, the result is likely to discourage candid and effective feedback and counseling. These activities, as well as contractual matters involved in terminations and settlements, require mutual trust and commitment from the beginning of an employment relationship through its end. Making these documents public would impede our ability to achieve fair and efficient resolution of employment disputes and could result in more, rather than less, litigation and at a higher corresponding cost.

Similarly, we urge that the exception found in subsection (a)(10) for investigation records be retained, either in its current form or a slightly modified form. While some narrowing of the exception may be appropriate, at a minimum it must be recognized that effective law enforcement investigations cannot be conducted in a fishbowl. Public disclosure of incomplete investigations can impede the ability of investigators to effectively conduct and complete their investigations. Additionally, protecting the identity of confidential sources and undercover agents is imperative for informants' safety as well as law enforcement's ability to acquire these sources in the first place. This protection from disclosure should be maintained, as should confidential investigative techniques and procedures. Further, any law enforcement information whose release would endanger the life or physical safety of a person should never be open to public inspection. Finally, as a matter of good public policy, reflecting our obligation to respect and protect the victims of sexual offenses, we believe their names, addresses, and other identifying information should be excluded from public release.

While our institutions do not assert subsections (a)(30) (records affecting personal privacy) and (a)(32) (architectural engineering estimates) as commonly as the other two under consideration, these exceptions deserve careful review. State agencies benefit from having a practical means to prevent an invasion of privacy from occurring, and subsection (a)(30) provides that means. Having such a provision is a tool that can be used to limit and avoid litigation against the institutions we advise and represent. Similarly, the elimination of subsection (a)(32) could have a substantial negative impact on state agencies' ability to obtain the best engineering and architectural estimates possible. In our view, knowledge that all bids and estimates would be open to the general public, as well as to competing firms, would serve to have an immediate chilling effect on the interest and willingness of such professionals to participate.

We hope you share our concerns, and we ask that you provide this letter and any endorsement or comments you wish to make to the appropriate committee officials.

Sincerely,

Ted D. Ayres
Vice President and
General Counsel
Wichita State University

James P. Pottinger, Jr.
University General Counsel
University of Kansas

Richard H. Seaton
University Attorney
Kansas State University

TAD:JPP:RHS:bkm

8-5

NICE L. PAULS
REPRESENTATIVE, DISTRICT 102
TOPEKA ADDRESS:
STATE CAPITOL, SUITE 272-W
TOPEKA, KANSAS 66612-1504
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HUTCHINSON ADDRESS:
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HUTCHINSON, KANSAS 67501-5621
(620) 663-8961

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER:
JUDICIARY
MEMBER:
HOUSE RULES AND JOURNAL
TRANSPORTATION
JOINT HOUSE AND SENATE COMMITTEE ON JUVENILE JUSTICE AND CORRECTIONS OVERSIGHT
JOINT HOUSE AND SENATE COMMITTEE ON ADMINISTRATIVE RULES AND REGULATIONS
JOINT HOUSE AND SENATE COMMITTEE ON REDISTRICTING

KANSAS SENTENCING COMMISSION

Testimony before the
Senate Judiciary Committee
Regarding
House Bill 2869
on
March 18, 2004

Chairman Vratil, Vice Chairman Pugh, Ranking Minority Member Greta Goodwin, and members of the committee, thank you for the opportunity to testify again before your committee. I've only testified on two bills this year, both of which are in your committee.

I support this complete bill, but will testify only as to the provision which concerns the admission into evidence of physical evidence at the preliminary hearing. Physical evidence with a completed evidence custody receipt showing that such evidence has continually been in possession of law enforcement would be allowed into evidence at a preliminary hearing, as if everyone in the chain of custody had testified in person.

As you are all aware, a preliminary exam is not required constitutionally, so the same constitutional protections do not apply as would apply at a trial. If the defendant wants to challenge the chain of custody for the physical evidence, that can certainly be addressed at the time of trial.

Thank you for your attention, and I'd be glad to stand for questions.

Respectfully submitted,

Rep. Janice L. Pauls
District 102

JLP/cjc

Senate Judiciary
3-18-04
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To: The Senate Judiciary Committee

From: Judge Ernest L. Johnson

Re: House Bill 2869

Date: March 18, 2004

House Bill 2869 relaxes, in a very specific area, the rules of evidence as applied by the court at a preliminary hearing. For a defendant charged with a felony to be bound over for trial the State's evidence must be sufficient to demonstrate to the court probable cause to believe that a felony was committed and defendant committed it. K.S.A. 60-402 states that the rules of evidence apply to "every proceeding, both criminal and civil, conducted by a court ..." unless the rules are relaxed by other procedural rules or statutes. In *State v. Cremer*, 234 Kan. 594 (1983) our Supreme Court confirmed that those rules must be applied at the preliminary hearing. However, in *State v. Sherry*, 233 Kan. 920 (1983), the court confirmed the constitutionality of a legislative relaxation of the rules of evidence. In 1982 the Legislature enacted a relaxation of the hearsay rules by passing K.S.A. 22-2902a. Under that statute the court can admit into evidence at a preliminary hearing a forensic report prepared by an authorized laboratory without requiring that the reporting chemist actually appear. In *Sherry* the defendant asserted that the legislature did not have the power to relax the rules of evidence, even at a preliminary hearing. The Supreme Court disagreed with the defendant, finding that the legislation led to a more efficient administration of criminal justice while still adequately protecting defendant's rights.

The explosion in the number of drug cases in Kansas since passage of K.S.A. 22-2902a is well known to you. Most of the laboratories authorized under that statute are at best extremely busy, even though they are relieved by that statute of the requirement that the chemist testify in person at the preliminary hearing. That builds into the system necessary delay in conducting the preliminary hearing, which is still under K.S.A. 22-2902 to be held within ten days of the first appearance and continued only for good cause.

In the last twenty years there has also been a substantial law enforcement-related response by drug-testing companies. There are now readily available, affordable, field test kits for many contraband drug substances. When these tests are performed by an officer, properly trained in their use, their results determining the presumptive presence (or absence) of the tested-for substance are highly reliable. Although I do not have statistical verification of this reliability, I have anecdotal support from numerous sources among officers and lab personnel throughout the State. The false positives on such tests are extremely rare, and most are attributed to operator error rather than test defect.

I think HB 2869 is a legitimate legislative attempt to make more efficient the administration of justice. If field test positive results were admissible at a preliminary hearing as a foundation for the admission of the alleged contraband, the inherent delay in obtaining the forensic report would be avoided. Laboratory chemists could devote their time to those cases that would go to trial. The defendant who contended that the alleged contraband was not such could still conduct his or her own test by a defense expert. From my own experience, the issue at a preliminary hearing is almost never

whether the substance is contraband but rather whether the State can prove that it is.

The State's burden at a preliminary hearing is just to demonstrate probable cause. Under the current state of the law, in drug cases, the courts applying the rules of evidence must require that the State prove this one element of a drug offense beyond a reasonable doubt. Defense attorneys are justifiably reluctant to stipulate to the existence of contraband at the preliminary hearing, even when the real issue in the case may be, e.g., the legality of the search. In my experience judges rely on the field tests to find probable cause to issue an arrest warrant. Acceptance of these test results at a probable cause preliminary hearing seems judicially economical while still being fair to the defendant.

Respectfully submitted,

Ernest L. Johnson

Alternative to the current HB 2869 proposed by Judge Johnson.

DRAFT ONLY

HOUSE BILL NO. 2869

AN ACT concerning criminal procedure; relating to preliminary examinations.

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

Section 1. At any preliminary examination pursuant to K.S.A. 22-2902, and amendments thereto, the magistrate may admit into evidence an alleged controlled substance if, prior to the preliminary examination, the alleged controlled substance:

(a) has been subjected to a field test, which test has been approved by the director of the Kansas bureau of investigation,

(b) the field test has been administered by a law enforcement officer trained in the use of such field test by a person certified by the manufacturer of that field test, and

(c) the result of such field test was positive for the presumptive presence of the alleged controlled substance.

Sec. 2. A positive result on a field test described in and conducted pursuant to Section 1 above shall be deemed sufficient to establish probable cause to believe that the tested substance is the controlled substance alleged.

Sec. 3. The director of the Kansas bureau of investigation shall adopt by rules and regulations the approved field tests.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

10-3

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Testimony in Support of HB 2869
Before the Senate Judiciary Committee
Kyle G. Smith
Director of Public and Governmental Affairs
Kansas Bureau of Investigation
March 18, 2004

Senator Vratil and Members of the Committee:

On behalf of the KBI I am please to appear in support of HB 2869, a bill that would save money, in particular substantial court, attorney and investigative resources, while not infringing on any constitutional rights.

The problem that needs to be addressed is the waste of time that sometimes occurs when preliminary hearings are turned into preliminary trials. Preliminary examinations are supposed to be a quick check to make sure that there is some evidence, probable cause, to believe that person committed the crime. It is not supposed to be another trial or a substitute for discovery. Unfortunately, the system is being occasionally abused and precious court time, attorney time, and officer time is wasted on details that aren't really necessary. A preliminary hearing is NOT a constitutional right – it is an additional process created by the legislature and so the rules involved can be set by the legislature. HB 2869 seeks a slight change in those rules to save resources.

As Judge Ernest Johnson has probably already testified, Judge Johnson suggested this legislation originally to clarify that the standard of probable cause applies to all the elements needed to be proved at preliminary hearing. Some courts and counsel want the full and final KBI

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forensic laboratory analysis to be presented at preliminary hearing – in other words they wanted this one issue decided beyond a reasonable doubt. By imposing this higher, and improper, standard for this one issue, additional demands for the limited time of our chemists were created. In addition, the conflicting subpoenas forced courts to continue cases until the scientist could be available, again creating waste. Judge Johnson sought this legislation to clarify that probably cause is really the standard and that a positive response to a legitimate field test is sufficient. HB 2869 would allow agents and other trained law enforcement officers to conduct field tests and testify to the results at preliminary hearing. Cases could proceed more quickly as the prosecutor wouldn't have to wait until the lab tests were back. As many of these cases are plead out, this should save court time, attorney fees and forensic scientist's time. In addition it should also reduce lab costs by reducing the number of cases where the forensic scientists have to actually do the tests.

The House Corrections and Juvenile Justice committee also added provisions from another bill from last year that addresses the problem of extended preliminary hearings: HB 2375 would waive 'Chain of custody' witnesses unless their testimony was necessary for the issue before the court at preliminary hearing. While the testimony of the person who found and seized the evidence is normally necessary at an evidentiary hearing, 'Chain of custody' refers to everyone who had access to the evidence from when it was seized until analyzed or brought to the hearing. This can be crucial at times when there is a question of tampering, but is normally a boring parade of witnesses who only acknowledge their signatures and testify the evidence wasn't tampered with while in their custody.

Unfortunately, cases are frequently continued due to the unavailability of one or more of the members of this parade. Continuances delay justice, frustrate victims and witnesses, and

waste valuable court time and resources. Cases aren't normally dismissed at this stage, as jeopardy hasn't attached, as dismissal would only result in the charges being filed again, an even bigger waste of court and attorneys time.

The amended bill would allow physical evidence to be admitted without requiring the parade of witnesses establishing the chain of custody, but only at preliminary hearing. Any real issues concerning the chain of custody could still be explored during suppression hearings or trial.

Passage of HB 2869 would save court time and money, it would reduce the cost for public defenders, allow officers to be out on the street protecting the public rather than waiting to testify, would allow forensic scientists to spend more time on the bench and speed justice. Preliminary hearings will still resolve the issues they were designed to address so we can have justice and save the public money by focusing such hearings only on relevant issues.

I would be happy to stand for any questions.

Kansas County & District Attorneys Association

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March 15, 2004

Senate Judiciary Committee
Kansas State Legislature

RE: Testimony in support House Amendments to HB 2869

Dear Chairman Vratil and Members of the Committee,

I was elected by my constituents to be the District Attorney of the 27th Judicial District, Reno County, Kansas, and took office on January 8, 2001. I began working in the District Attorney's Office (then County Attorney's Office) on August 1, 1989. I have personally prosecuted 132 jury trials and hundreds of preliminary hearings.

The number of cases filed on adult criminal matters has doubled in Reno County over the past 15 years. The number of drug related prosecutions has doubled over the past 5 years.

Prosecution of drug cases is strangling prosecutor's offices throughout Kansas. For example, Reno County prosecuted 2 cases relating to clandestine methamphetamine laboratories in 1998. The number has doubled every year thereafter. In 2002, we prosecuted 95 cases related to clandestine methamphetamine laboratories. This year we are on a pace to double that number again.

As the drug prosecutions rise, so do the demands on prosecutors and law enforcement agencies. The defense bar has learned to recognize that the prosecution has limited time and resources. Demanding an evidentiary preliminary hearing is a common tactic used to force the prosecutor to plea bargain the case. In particular, prosecutions of clandestine methamphetamine laboratories place unique burdens on the criminal justice system not seen 15 years ago. Most of the prosecutions relating to meth labs involve multiple co-defendants. Each defendant has separate counsel, each requires separate discovery, each tends to file separate pretrial motions and multiple defendant preliminary hearings demand an incredible amount of time of overburdened district courts.

It has become a common tactic for defense attorneys to refuse to stipulate to any witness's testimony. The State is put in the position of issuing subpoenas and scheduling

witnesses for preliminary hearings. Once defense counsel observes all witnesses are present, the defendant more often than not decides to waive his/her preliminary hearing. While refusing to stipulate to the chain of custody on drugs and laboratory reports before the hearing is scheduled, often the defendant changes his/her mind when the evidence custodian is observed to be present.

The Evidence Custodian for Reno County's law enforcement agencies is Ron Moore, a retired officer of the Hutchinson Police Department. On average, he receives 50 to 60 subpoenas a month to testify regarding information that already exists on the evidence custody receipt associated with physical evidence or laboratory reports. Rarely is he actually required to testify. Instead, he sits on benches outside the doors of the Reno County District Court for hours on any given day while prosecutors, defense attorneys and defendants make last minute decisions about the future of the case. He has become a professional witness. He does not have sufficient time to do the duties of the Evidence Custodian because he is constantly subpoenaed to testify at preliminary hearings.

The House Amendments to HB 2869 are designed to stop this problem. They essentially permit an evidence custody receipt to be admitted as hearsay evidence at a preliminary hearing without requiring an evidence custodian or business records custodian to lay a foundation for its admission. It saves time and frees up needed assets for law enforcement agencies.

The Legislature previously addressed a similar issue when it made forensic laboratory reports admissible hearsay evidence at a preliminary hearing, under K.S.A. 22-2902a. This saved the expense and inconvenience of requiring the laboratory technician to testify at a preliminary hearing. Likewise, HB 2869 does the same thing for evidence custodians and evidence custody receipts.

The right to a preliminary hearing is purely statutory, therefore general Constitutional privileges or requirements of constitutional due process are not mandatory. At a preliminary hearing, the accused does not have the Constitutional right to confront witnesses. The Constitution does not forbid the States from authorizing the use of hearsay evidence in determining probable cause at a preliminary hearing. Thus, statutes such as K.S.A. 22-2902a (forensic laboratory reports admissible hearsay at a preliminary hearing) and K.S.A. 22-2902 (hearsay statements of children less than 13 years of age admissible at preliminary hearing) have been enacted.

House Bill 2869 will not infringe upon a criminal defendant's due process rights and it will free up valuable assets and time for the court system. I wholeheartedly support its passage.

Respectfully Submitted,

_____

Keith E. Schroeder
Reno County District Attorney

12-2

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2638
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections

March 18, 2004

HB 2638 amends provisions of the Community Corrections Act found at K.S.A. 75-5291, K.S.A. 75-5292, and K.S.A. 75-52,105. HB 2638 reinstates an eligibility criterion for community corrections placement that was repealed pursuant to passage of SB 123 last session (L. 2003 ch. 135); codifies a limitation of the use of community corrections grant funds to programs that relate to the criminogenic aspects of the offender; requires the community corrections advisory committee to recommend performance indicators and measurable objectives for community corrections programs; extends the Johnson County Community Corrections pilot program for community placement criteria; and emphasizes the role of counties in the supervision of their community corrections programs. HB 2638 also amends references to various divisions within the Department and community corrections regions; staggered terms of appointment to the advisory committee; and the deadline for the submission of fiscal reports to the Department.

HB 2638 was passed by the House by a vote of 125 – 0. HB 2638 has the support of the Community Corrections Advisory Committee. That committee is comprised of representative from the

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southeast, northeast, central, and western community corrections regions as well as two members from the state at large.

The Department of Corrections and the Community Corrections Advisory Committee believe that public safety is best achieved by identification of the risk posed by an offender and specifically addressing those risks in a proactive manner. HB 2638 embodies that objective.

Risk/Needs as Criteria for Community Corrections Utilization

- HB 2638 amends K.S.A. 75-5291 to reinstate an eligibility criterion for community corrections placement that existed prior to adoption of L. 2003 ch. 135 (SB 123 drug treatment for possession offenders). Upon adoption of SB 123, the provision of K.S.A. 75-5291 classifying offenders with a high risk or high needs assessment as eligible for community corrections placement was amended to reflect the requirement that drug possession offenders be placed into community corrections programs. However, rather than provide independent disjunctive criteria allowing for community corrections placement of both high risk/high needs offenders and offenders required to participate in substance abuse treatment, K.S.A. 75-5291 was amended to only address drug abuse assessments. HB 2638 amends K.S.A. 75-5291 to permit offenders who have either a high risk for reoffending or an assessment of substance abuse to be eligible for community corrections placement.

- HB 2638 amends K.S.A. 75-5291 to extend to July 1, 2006 the Johnson County Community Corrections pilot program that provides for the placement of offenders into that Community Corrections program pursuant to the District Court Rules of the 10th Judicial District This pilot program will provide data to compare the effectiveness of community corrections placement criteria established by the statewide risk assessment and those established by the District Court in reducing recidivism.

- HB 2638 amends K.S.A. 75-5291 to restrict the expenditure of community corrections grant funds to programs and services that address the criminogenic needs of felony offenders. The Department and the Community Corrections Advisory Committee believe that curtailment of crime committed by offenders in community corrections programs must be the focus of the public safety mission of community corrections. Addressing the criminogenic attributes of offenders in community corrections programs directly effects continued criminal behavior. While, school outreach programs and services for crime victims serve a public purpose, those goals can be addressed through other avenues thus reserving the limited resources of community correction grant funds to the unique role of community corrections in the prevention of continued criminal behavior by offenders under the supervision of community corrections. Historically, community corrections grant funds have not been available for use for programs that do not address the criminogenic aspects of community corrections offenders.

- HB 2638 amends K.S.A. 75-5291 to direct the community corrections advisory committee to identify performance indicators with measurable objectives expected to be accomplished by community corrections programs. The establishment of measurable performance objectives provides for the effective use of grant funds and addresses the concerns raised by the Legislative Post Audit of Juvenile Justice Prevention Programs.

Administration of Community Corrections Programs

- HB 2638 amends K.S.A. 75-5292 to clearly establish that boards of county commissioners retain oversight authority over their respective community corrections programs. This clarification is contained in HB 2638 to avoid issues identified by the Legislative Post Audit of Juvenile Justice grant programs regarding oversight of local programs funded by state grants. Additionally, the continued oversight role of each county commission, particularly if several counties have joined in a cooperative community corrections program, reinforces the authority and responsibility of each participating county in regard to the operation of an effective community corrections program.

- HB 2638 amends K.S.A. 75-5292 to repeal the statutory requirement that fiscal quarterly reports be submitted within 10 days of the end of each calendar quarter. Extensions for the submission of those reports are usually necessary. The submission of reports required for the administration of Community Corrections programs by the Department may be established by regulations of the Secretary.

- HB 2638 also amends the Community Corrections Act to reflect that a variation in the initial length of the terms of the original members of the community corrections advisory committee in order to achieve staggered terms when the Act was first enacted is no longer necessary. Finally, HB 2638 updates the designations of various divisions within the Department and the local community corrections regions.

The Department urges favorable consideration of HB 2638.

STUART J. LITTLE, Ph.D.
Little Government Relations

March 18 2004

Senate Judiciary Committee

House Bill 2638

Chairman Vratil and Members of the Committee,

I am here today on behalf of the Kansas Community Corrections Association. Community corrections programs provide cost-effective community-based supervision for adult and juvenile offenders with lower severity level offenses (although the offenders are increasingly more severe and high-risk). The courts determine whether an offender is assigned to regular probation (through the courts) or intensive supervise probation in a community corrections program. Key community corrections' programs include adult and juvenile intensive supervised probation and programs and adult residential programs in Sedgwick and Johnson counties. Juvenile programs also include graduated sanctions programs for juvenile offenders as well as operating some of the prevention programs and some intake and assessment services

HB 2638 will clarify the duties of community corrections agencies to include substance abuse and mental health services, as well as employment and residential services. The changes will also bring in line the definition of the community corrections population to include SB 123 offenders.

The provisions of HB 2638 have been reviewed by the Department of Corrections' Community Corrections Advisory Committee, who raised no objections to the provisions.

I would be happy to stand for questions.

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KANSAS

KANSAS SENTENCING COMMISSION
Honorable Ernest L. Johnson, Chairman
District Attorney Paul Morrison, Vice Chairman
Patricia Ann Biggs, Executive Director

KATHLEEN SEBELIUS, GOVERNOR

MEMORANDUM

To: Senate Judiciary Committee

From: Patricia Biggs, Executive Director

Date: March 16, 2004

RE: HB 2638

At the most recent meeting of the Kansas Sentencing Commission, held February 13, 2004, HB 2638 was discussed. The Commission voted in unanimous support of the proposed extension to the Johnson County Risk/Needs pilot project from July 1, 2004 to July 1, 2006. This extension is listed in the bill in Section 1 (a) (3).

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