

MINUTES OF THE SELECT COMMITTEE ON KANSAS SECURITY

The meeting was called to order by Chairman Lee Tafanelli at 8:03 a.m., February 20, 2004 in Room 519-S of the Capitol.

All members were present except:

Representative Carl Holmes, Excused

Committee staff present:

Robert Waller, Senior Fiscal Analyst, Legislative Research Department

Bruce Kinzie, Office of Revisor of Statutes

Cathy Conn, Committee Secretary

Conferees appearing before the committee:

Mark Tomb, League of Kansas Municipalities

John M. Douglas, Chief of Police, Overland Park

Bud Burke, City of Olathe

Tammy M. Owens, City of Overland Park

Harriet Lange, Kansas Association of Broadcasters

Doug Anstaett, Exec. Dir., Kansas Press Association

Others attending:

Richard Gannon, KPA

Michael Merriam, KS Press Assoc. & KAB

Mike Pepoon, Sedgewick Co

Dan Riley, KDA

Danielle Noe, Johnson County

Others attending: See attached list.

Chairman Tafanelli stated the Committee would hold hearings on **HB 2393**, which would create a standing joint committee for Kansas Security. The Chairman noted, if time allowed, the committee would also hold hearings on **HB 2489 and HB 2490**.

**HB 2393: AN ACT establishing the joint committee on Kansas security, which would consist of five members of the House of Representatives and five members of the Senate, appointed by Legislative leadership.**

A motion was made by Rep. Jack to amend HB 2393 to direct the Kansas Bureau of Investigation to conduct a history record check and background investigation of all committee members and committee staff members, and would authorize the Joint Committee on Kansas Security access to the review and monitoring of federal monies received by the state for the purposes of homeland security. (Attachment 1) Rep. Shriver seconded

CONTINUATION SHEET

MINUTES OF THE SELECT COMMITTEE ON KANSAS SECURITY

the motion.

Discussion followed.

Motion to amend HB 2393 passed.

Rep. Krehbiel discussed the need for the Committee to be able to meet anywhere at any time. HB 2393 requires that all meetings be held in Topeka, unless authorized by the legislative coordinating council.

A motion was made by Rep Krehibel to strike the words "legislative coordinating council" from section (c) and change the language to that which applies to the Joint Committee on Information Technology, which would allow the committee to meet anywhere with the state.

The motion was seconded by Rep. Goico.

Motion passed.

Rep. Dahl moved that HB2393 be passed out of committee favorably as amended. The motion was seconded by Rep. Hayzlett.

The committee voted to pass HB2393 out of committee favorably.

**HB 2489: AN ACT amending the open meetings act; relating to closed meetings, amending K.S.A. 2003 Supp. 75-4319 and repealing the existing section to allow a formal motion to be made, which would allow a closed or executive meeting for the purpose of a special closed security meeting.**

**HB 2490 AN ACT amending the open records act; relating to certain closed records; amending K.S.A. 2003 Supp. 45-221 and repealing the existing section. Section 1. K.S.A. 2003 Supp. 45-221, a public agency shall not be required to disclose sensitive information.**

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Chairman Tafanelli called upon staff gave a brief overview of **HB 2489** and **HB 2490**.

Proponents of the bill were:

Mark Tomb, League of Kansas Municipalities spoke in support of **HB 2489** and **HB 2490**. (Attachment 2)

John M. Douglas, Chief of Police, Overland Park spoke in support of **HB2489** and **HB 2490** and testified that he had requested similar legislation last year. He noted that an amendment to the bill to be proposed by the Press Association would be a favorable change. (Attachment 3)

Committee questions followed.

Bud Burke, City of Olathe, stated that they also supported both amendments to the open meetings and open records act. (Attachment 4)

Committee questions followed.

Tammy M. Owens, City of Overland Park appeared before the committee in support of **HB 2489**. Mrs. Owens stated that K.S.A. 75-4319 needed to be clarified and felt that **HB 2489** would provide the needed clarification. The City's position is that the current provisions of the Kansas Open Records Act should be amended and believes that **HB 2490** would allow for the legal coverage to close certain records. (Attachment 5)

Committee questions followed.

Written testimony was also provided by Danielle Noe, Johnson County, (Attachment 6) and Michael Pepoon, Sedgwick County. (Attachment 7)

Chairman Tafanelli turned to the opponents of the bill to provide testimony.

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Doug Anstaett, Executive Director of Kansas Press Association handed out testimony from their attorney Mike Merriam, (Attachment 8) proposing amending **HB 2490** to allow the closure of records pertaining to security measures other than criminal investigation records that protect transportation, private property, or Kansas citizens. The security measures would include, but would not be limited to, intelligence information, tactical plans, responses to actual events, resources deployment, and vulnerability assessments.

They also desired to expand **HB 2489**, Section 1, subsection (b)(13) to allow the closure of meetings pertaining to security measures that protect: systems, facilities, or equipment used in the production transmission, or distribution of energy, water, or communications systems; transportation and sewer or wastewater treatment systems; a public body or agency, public building; and private property or persons.

Committee discussion followed.

Harriet Lange, President/Executive Director with Kansas Association of Broadcasters also spoke in opposition of **HB 2490** and **HB 2489** and the changes proposed by the Kansas Press Association(Attachment 9).

Chairman Tapanelli closed the hearings on **HB 2489** and **HB 2490**.

Rep. Dahl wanted to ask the proponents of the two bills, if they had any problems with the proposed changes offered by the Kansas Press Association. There were no objections.

Rep. Krehbiel moved that **HB 2489** be amended as requested by the Kansas Press Association, and reinserted the words "responses to actual events". Seconded by Rep. Dahl.

Discussion followed.

Rep. Goico made a motion to add the amendments of Rep. Krehbiel and the Press Association to **HB 2489**.

Rep Krehbiel seconded the motion.

CONTINUATION SHEET

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The motion passed.

Rep Judy Loganbill wished to be recorded as voting "NO".

Rep Goico motioned that the Committee pass out **HB 2489** and **HB 2490, as amended, favorably for passage.** Rep. Krehbiel seconded the motion.

The bill passed.

Rep. Judy Loganbill wished to be recorded as voting "NO".

Chairman Tapanelli adjourned the meeting at 8:58 AM.

**SELECT COMMITTEE ON KANSAS SECURITY**

**GUEST LIST**

DATE: Feb. 20, 2003

NAME	REPRESENTING
John m. Douglass	Chief of Police - Overland Park
Danielle Woe	Johnson County
Tammy Owens	City of Overland Park
Harriet Zang	K's Association of Castles
Richard Hannan	KPA
Michael Murnain	KPA / KAB
Bud Burke	City of Olathe
Mike Repoon	Sedwick Co.
DAN RILEY	KDA

# HOUSE BILL No. 2393

By Select Committee on Kansas Security

2-14

9 AN ACT establishing the joint committee on Kansas security.

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

11 Section 1. (a) There is hereby established a joint committee on Kan-  
12 sas security which shall consist of five members of the house of repre-  
13 sentatives and five members of the senate. Three of the members who  
14 are representatives shall be appointed by the speaker of the house of  
15 representatives, three members who are senators shall be appointed by  
16 the president of the senate, two members who are representatives shall  
17 be appointed by the minority leader of the house of representatives and  
18 two members who are senators shall be appointed by the minority leader  
19 of the senate. The speaker of the house of representatives shall designate  
20 a representative member to be chairperson or vice-chairperson of the  
21 committee as provided by this section. The president of the senate shall  
22 designate a senator member to be chairperson or vice-chairperson of the  
23 joint committee as provided by this section.

24 ~~(b)~~ A quorum of the joint committee on Kansas security shall be six.  
25 All actions of the committee may be taken by a majority of those present  
26 when there is a quorum. In odd-numbered years the chairperson of the  
27 joint committee shall be the designated member of the house of repre-  
28 sentatives from the convening of the regular session in that year until the  
29 convening of the regular session in the next ensuing year. In even-num-  
30 bered years the chairperson of the joint committee shall be the designated  
31 member of the senate from the convening of the regular session of that  
32 year until the convening of the regular session of the next ensuing year.  
33 The vice-chairperson shall exercise all of the powers of the chairperson  
34 in the absence of the chairperson.

35 ~~(c)~~ The joint committee on Kansas security shall meet on call of the  
36 chairperson as authorized by the legislative coordinating council. All such  
37 meetings shall be held in Topeka, unless authorized to be held in a dif-  
38 ferent place by the legislative coordinating council. Members of the joint  
39 committee shall receive compensation and travel expenses and subsis-  
40 tence expenses or allowances as provided in K.S.A. 75-3212, and amend-  
41 ments thereto, when attending meetings of such committee authorized  
42 by the legislative coordinating council.  
43

(b) The Kansas bureau of investigation shall conduct a criminal history record check and background investigation of all committee members and committee staff members of the legislative research department and the office of the revisor of statutes.

(c)

(d)

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Attachment 1

1 ~~(d)~~ Amounts paid under authority of this section shall be paid from  
 2 appropriations for legislative expense and vouchers therefor shall be pre-  
 3 pared by the director of legislative administrative services and approved  
 4 by the chairperson or vice-chairperson of the legislative coordinating  
 5 council. (e)

6 ~~(e)~~ The joint committee on Kansas security may introduce such leg-  
 7 islation as deemed necessary in performing such committee's functions. (f)

8 ~~(f)~~ The joint committee on Kansas security shall have the services of  
 9 the legislative research department, the office of the revisor of statutes  
 10 and other central legislative staff serviced agencies. (g)

11 ~~(g)~~ The joint committee on Kansas security shall study, monitor, re-  
 12 view and make recommendations for the following: (h)

- 13 (1) Matters relating to the security of state officers or employees;
- 14 (2) security of buildings and property under the ownership or control
- 15 of the state of Kansas;
- 16 (3) matters relating to the security of a public body or agency, public
- 17 building or facility;
- 18 (4) matters relating to the security of the infrastructure of Kansas,
- 19 including any information system; and
- 20 (5) ~~measures for the improvement of security for the state of Kansas.~~

21 ~~(h)~~ The joint committee on Kansas security shall report to the legis-  
 22 lature on or before December 31 each year any findings and recommen-  
 23 dations concerning Kansas security which the joint committee deems  
 24 appropriate.

25 Sec. 2. This act shall take effect and be in force from and after its  
 26 publication in the statute book.

(i) The joint committee on Kansas security shall review and  
 monitor federal monies received by the state for the purposes of homeland  
 security and other related security matters.

(j)

Select Committee on Kansas Security

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Attachment 1-2

Select Committee on Kansas Security





League of Kansas Municipalities

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

**To:** Select Committee on Kansas Security  
**From:** Mark Tomb, Intergovernmental Relations Associate  
**Re:** Support for HB 2489 & HB 2490  
**Date:** February 20, 2004

Thank you for the opportunity to appear today on behalf of the 555 member cities of the League of Kansas Municipalities (LKM). We appear today in support of HB 2489 and HB 2490.

As we all know, recent years have posed new and difficult challenges for cities with regard to homeland security issues. City elected officials, law enforcement professionals, and many others at the local level are working together to address these new security concerns and to protect the citizens of Kansas to the best of their ability.

The changes which have been proposed in HB 2489 and HB 2490 are necessary in order to continue the process of reviewing and updating our security procedures at the local level. Because the League and our member cities are strong advocates for open government, we do not take the language of the Kansas Open Meetings Act or the Kansas Open Records Act lightly.

Some may argue that the existing language which was adopted a few years ago is sufficient to cover the security issues that cities have raised. However, to take that interpretation would be to stretch the language of KOMA and KORA beyond the plain meaning of the words. The cities who appear before you today asking for a change or doing so because they believe strongly in supporting the open government provisions which have been adopted by the Kansas Legislature. We believe that the most appropriate course of action would be to amend the language so that the meanings are clear and that cities may take the necessary steps to protect their citizens.

For these reasons, we stand in support of HB 2489 and 2490 and respectfully request that you recommend them favorably for passage. I would be happy to stand for questions at the appropriate time.

Select Committee on Kansas Security

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Attachment 2

W. Jack Sanders Justice Center  
12400 Foster  
Overland Park, Kansas 66213  
913/895-6000 • Emergency 911  
www.opkansas.org

**To: Chair Lee Tafanelli and Members of the Kansas Security Committee**

**From: Overland Park Police Chief John Douglass**

**Date: Friday, February 20, 2004**

**RE: Testimony Supporting HB 2489 and HB 2490**

Chairman Lee Tafanelli and Members of the Kansas Security Committee

I am here today in support of HB2489 and HB2490, which provides exceptions to the Open Records Act and the Open Meetings Act to allow for matters of Homeland Security to be discussed privately with elected governing bodies and to protect sensitive written documents from disclosure. These changes would clarify for state and local public entities the instances in which records and meetings concerning homeland security could be shielded.

It is obvious that when the framers of these statutes envisioned the limited circumstances in which the public's business could be conducted outside the public view, the idea of the need for discussing homeland security was not yet even a consideration. September 11 opened our eyes to the fact that in many ways we are a vulnerable society living in extraordinarily dangerous times.

This time last year the United States was preparing to go to war in Iraq. Across the Country, cities such as Overland Park were making detailed plans for the protection of its citizens for the potential of terrorists' attacks. Since Overland Park is my only real point of reference, I will use it as an example. In our City, we created detailed plans and

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analysis designed to protect the public against potential terrorists' strikes in response to hostilities. Detailed deployment strategies were devised. Staff allocations were designed. In doing all of this we came to realize that the best laid plans of the City were totally vulnerable to disclosure. We could not discuss them with the Governing Body because to do so was to make them accessible to public record. We could not go into executive session to protect them because the Open Meetings Act did not allow it. We were also very cautious about what could be written down because the Open Records Act did not protect it.

Our need to withhold this information from the public purview is not based upon a desire to withhold the public's business from the public. Rather, the certain knowledge that this very limited and sensitive information, should it be known to our adversaries would render it helpless and ineffective. Ironically, the mechanisms we have in place for review by the people ensured that no review by its elected officials could safely occur.

Though I strongly believe that the public's business should be conducted in the public, I equally believe that there are limited instances where exceptions must be made for the safety of that very public. These bills impact not only municipal governments, but also private corporations, religious institutions, hospitals, schools and others that we partner with on contingency planning and additional security matters. For example, we have worked with Sprint World Headquarters, Black and Veatch, the Jewish Community Center, St. Luke's South Hospital, and the three public school districts within our boundaries. Consequently, I request your serious consideration on this matter and urge you to adopt these very necessary changes.

February 20<sup>th</sup>, 2004

TO: The Select Committee on Kansas Security  
FROM: The City of Olathe, Kansas  
SUBJECT: HB 2489

On September 11, 2001, the unthinkable happened. As our nation watched in horror, our local first responders took action. Olathe, Kansas was no exception.

There was a great deal of uncertainty that day. We all wondered what could be next, and we immediately began assessing our vulnerabilities. In Olathe, our first responders took action. They began protecting a major target of opportunity that if attacked, could have rendered a blow to millions of people across the country. Specific information about that target is something we do not wish to make public.

That response was from the local government. The tactics and strategies were developed and investment of manpower and money were deliberated at the local level. The decisions to make those investments were made at the local level based on intelligence shared at the local level.

Olathe, Kansas is far from unique in the duties of first responders to ensure not only local but national security. Each jurisdiction in Kansas could be making decisions to protect the safety of thousands. Be it protecting our water supplies and our power sources to our schools or places where crowds assemble, we are charged with making critical decisions that impact national security.

The decisions to take action are at the local level. The information used to make those decisions is the topic of this testimony.

That information tells us where we are most vulnerable, where an attack could have the greatest impact in terms of loss of life, and not only how we prepare to prevent an attack, but how we respond to it.

It is essential that the public has access to information about their government, and how their government conducts business with their dollars. However, it is equally essential that their well-being is protected for the greater good. Sharing information involving public safety could be tragic if it falls in the wrong hands.

On September 11<sup>th</sup>, the unthinkable happened. Today, we must learn from that lesson to ensure we are taking action to prevent future tragedies and be able to do so while not providing a blueprint for our enemies to follow.

The City of Olathe recognizes the importance of holding government accountable to ensure discussions and decision are made in the open and subject to public scrutiny. However, we have concerns about efforts to make information important to protecting our citizens available to anyone who wishes to view it.

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Attachment 640

Select Committee on Kansas Security

City Hall•8500 Santa Fe Drive  
Overland Park, Kansas 66212-2899  
TEL 913.895.6080/6087•FAX 913.895.5095  
E-MAIL tmwillia@opkansas.org

February 19, 2004

TO: Chairperson Lee Tafanelli  
Members of the Special Committee on Kansas Security

FROM: Tammy M. Owens, Assistant City Attorney II

RE: HB 2489/HB 2490<sup>1</sup>

Thank you for the opportunity to testify in support of HB 2489 and HB 2490 regarding the proposed homeland security exemptions to the Kansas Open Meetings and Kansas Open Records Acts.

Kansas Open Meetings Act

The Kansas Open Meetings Act requires generally that all meetings of a public body be open to the public.<sup>2</sup> In the last year, the Chief of Police of the City of Overland Park has expressed a desire to discuss, in closed session, matters of security relating to private businesses and other security issues within the City of Overland Park unrelated to the security of City buildings or the Governing Body. The current text of the Kansas Open Meetings Act contains a provision permitting an executive session for the purpose of discussing “matters relating to the security of a public body or agency, public building or facility or the information system of a public body or agency, if the discussion of such matters at an open meeting would jeopardize the security of such public body, agency, building, facility or information system . . .”<sup>3</sup> This provision is interpreted very narrowly by City staff who find that it is limited by its terms to the security of the Governing Body of the City of Overland Park, a City owned building or facility or the information system of the City. A logical reading reveals that this exception is not broad enough to encompass security matters that may be

<sup>1</sup> Please note that the definition of security measures in these house bills tracks the language added by the legislature in the 2002 session to the Kansas Open Records Act provision related to utilities. The language prior to the definition has been changed to accurately reflect the purpose of the “homeland security” exception and the examples that follow include many of the primary tools law enforcement uses to prepare for potential threats.

<sup>2</sup> K.S.A. 75-4318 (a)

<sup>3</sup> K.S.A. 75-4319(b)(13)

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associated with the security of the municipality as a whole, its infrastructure or private buildings. Law enforcement has been called upon to respond to security concerns in an effort to protect the citizenry and law enforcement officials desire to keep the elected officials abreast of their efforts in this area. It is the position of the City of Overland Park that to permit a discussion of such security matters in a closed meeting would require that the language of K.S.A. 75-4319 be clarified and HB 2389 provides the needed clarification.

### Kansas Open Records Act

The Kansas Open Records Act requires generally that all records of a public agency be open to the public.<sup>4</sup> The definition of public records 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.<sup>5</sup> The current text of the Open Records Act provides an exemption from mandated disclosure for “[r]ecords of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.”<sup>6</sup> A narrow reading of this provision leads one to believe that by its terms it is limited to protecting the public agency’s own security or that of the public agency’s building or facility, or information in the possession a public agency which is related to a “building or facility which is used for purposes requiring security measures . . .” or a facility providing the listed utilities.<sup>7</sup> It appears questionable at best that community-wide homeland security issues would come within this exception.

The current text also provides an exemption for “[p]lans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.”<sup>8</sup> If the governmental entity is working with a private agency relative to security matters, the public agency could refuse to disclose “plans, designs, drawings or

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<sup>4</sup> K.S.A. 45-216

<sup>5</sup> K.S.A. 45-217(f)(1)

<sup>6</sup> K.S.A. 45-221 (a) (12)

<sup>7</sup> *Id.*

<sup>8</sup> K.S.A. 45-221 (18)

specifications . . .”<sup>9</sup> There is no provision, however, that clearly permits closure of the governmental entity’s analysis of that information or additional information the private entity may provide the agency. In addition, some information in the security arena may also be analyzed and protected under the criminal investigation exception to the open records act, however, this provision in no way covers all possible records associated with security measures.<sup>10</sup>

Therefore, while it appears some security information may be closed pursuant to current exemptions, it is the City’s position that the current provisions of the Kansas Open Records Act should be clarified to permit the closure of all records relating to community-wide security issues. The City believes HB 2490 will provide this needed clarity.

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<sup>9</sup> Id.

<sup>10</sup> K.S.A. 45-221 (a)(10)



Johnson County, Kansas

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OFFICE OF THE COUNTY MANAGER

Written testimony in support of HB 2489 & HB 2490  
presented to the

**Select Committee on Kansas Security**

by  
Danielle Noe  
Intergovernmental Relations Coordinator

**February 20, 2004**

Thank you for the opportunity to present testimony in support of HB 2489 and HB 2490.

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.

Since September 11, 2001, the role of county government – as emergency planner, coordinator, financier, and first responder – has taken on heightened significance. It is imperative that local officials have the option to keep certain sensitive information private. In order to safeguard the public, Johnson County supports clarifying the Kansas Open Meetings Act to authorize executive sessions to discuss certain sensitive information which if released may jeopardize the safety of citizens. Likewise, Johnson County supports clarifying the Kansas Open Records Act to prevent the release of certain documentation or records, which if released may jeopardize the safety of citizens.

Both HB 2489 and HB 2490 provide an important safeguard for citizens. While current law has some safeguards for protecting information which relate to the security of the public body or public buildings etc., it is not clear that information which may also protect the citizenry at large could be excluded from the open meetings and open records requirements.

Johnson County believes that the new language offered in both HB 2489 and HB 2490 provides a clear guideline for local units of government to follow when making the important decision of whether or not to meet in executive session or to close certain records. Therefore, we request your favorable consideration of both HB 2489 and HB 2490.

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Attachment 6





## GOVERNMENT RELATIONS

Sedgwick County Courthouse  
525 N. Main, Suite 365  
Wichita, KS 67203  
Phone: (316) 660-9378  
Fax: (316) 383-7946  
[mpepoon@sedgwick.gov](mailto:mpepoon@sedgwick.gov)

Michael D. Pepoon  
Director

**TESTIMONY ON HB 2489 and HB 2490**  
**Before The House Select Committee on Kansas Security**  
**February 20, 2004**

Chairman Tafanelli and members of the committee, I appreciate the opportunity to submit written testimony in support of two bills that give local governments increased flexibility to address issues of security and public safety for the benefit of the citizens of the state of Kansas. HB 2489 amends the Kansas Open Meetings Law to allow a public body to go into a closed or executive sessions for matters relating to security measures "...if the discussion of such matters at an open meeting would jeopardize the safety and security of the lives, physical safety or property of the citizens of the state." HB 2490 uses similar language to exempt records from public disclosure under the Kansas Open Records Act, and in accordance with the same criteria. Both the Kansas Open Meetings Law and the Kansas Open Records Act currently provide for security exemptions relating to public bodies, buildings and facilities. These proposed bills will expand this protection to the people of the state of Kansas.

Like all cities and counties in Kansas, Sedgwick County has had to adapt and react to a post September 11<sup>th</sup> world. Sedgwick County has taken a number of steps to prepare itself for terroristic attacks. Whenever the security threat goes from yellow to orange, we assemble a group of representatives from the local security community, including but not limited to: the FBI, local law enforcement (Sheriff and police), Fire, EMS, Emergency Management, Transportation security (Mid Continent Airport) and the Secret Service. If they determine that a credible threat exists to the citizens in our area, they go through a checklist of proposed measures. Obviously, if they were to determine that official government action was necessary, the Board of County Commission would need to be apprised and involved in making these decisions. It is of critical importance that these decisions not be made in public and available to the very people we are trying to protect the public against. So far this group has not had to take any proposed action to the County Commission, but it is important to have these safeguards available if needed.

The proposed legislation before you is not unique to the state Kansas. Attached to my testimony is a review of open meetings laws in other states from a book entitled Open Meetings Laws, by Ann Taylor Schwing. This book came out in 1994, so you can imagine the increase in the number of states that now have such laws.

In summary, HB 2489 and 2490 are necessary pieces of legislation for the protection of the citizens of our state and Sedgwick County urges you to support both bill

"Sedgwick County...working for you."

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Attachment 7

Select Committee on Kansas Security

VII EXECUTIVE SESSIONS

§ 7.82 9. Emergency Communications and Security Issues

A number of states authorize executive sessions to discuss matters relating to emergency and safety issues. The language of the authorizations varies from state to state, but the essence of the various grounds for permitted executive session remains much the same.

§ 7.84 a. Natural Disasters, Health and Public Safety

A number of states authorize executive sessions to address natural disasters and public health and safety issues. The California Earthquake Prediction Evaluation Council and other bodies appointed to advise the Director of Emergency Services or the Governor as to volcanic or earthquake predictions may meet in executive session to consider the evaluation of possible predictions.<sup>34</sup> Delaware authorizes executive sessions for discussion of "potential or actual emergencies related to the preservation of the public peace, health and safety."<sup>35</sup> Hawaii authorizes closed sessions for discussion of "sensitive matters related to public safety or security."<sup>37</sup> Louisiana provides for executive sessions for discussion of emergency limited to natural disaster, threat of epidemic, civil disturbances, and the like.<sup>38</sup> Maryland provides for closed sessions to "discuss public security, if the public body determines that public discussion would constitute a risk to the public or to public security, including (i) the deployment of fire and police services and staff; and (ii) the development and implementation of emergency plans."<sup>39</sup> Mississippi provides for executive session for "extraordinary emergency which would pose immediate or irrevocable harm or damage to persons and/or property within the jurisdiction of such public body."<sup>40</sup> Montana excepts from the open meeting and notice requirements "an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety."<sup>41</sup> Vermont permits consideration of

34. Fla.Stat. Ann. § 119.07(5) (West 1993 Cum. PP) ("An exemption from [the public records act] does not imply an exemption from or exception to [the open meeting law]. The exemption from or exception to [the open meeting law] must be expressly provided.")  
35. Cal. Ann. Gov't Code § 11126(y) (West 1993 Cum. PP).  
36. Del. Code Ann. tit. 29, § 10004(b)(11) (1991).  
37. Haw. Rev. Stat. § 92-5(a)(5), (6) (1985).  
38. La. Rev. Stat. Ann. tit. 42, §§ 6.1(A)(5), 6.2(A)(6) (West 1990).  
39. Md. Ann. Code State Gov't § 10-505(a)(10) (1993). Maryland also excepts the Appalachian States Low Level Radioactive Waste Commission. Md. Ann. Code State Gov't § 10-502(b)(3) (1993).  
40. Miss. Code Ann. § 25-41-7(4)(d), (f) (1991).  
41. Mont. Code Ann. § 2-3-112(1) (1993).

a "clear session" § 7.88

security, suppression, information, except public, except executive, prevent

42. VI. Stat. 43. See go Official Inf Interest, 3: Information: Specified in 552(b)(7)(D) of Informa Enforcement Investigate (1973).

44. Hyde v S.Ct. 1293 Publishing

45. Cal. An crime code enforcement Ann. § 50. Investigate Page Corp., law and th investigate act; Ga. Op excepted fr officials", e attempted e agencies); 4

46. E.g., C matters aff buildings as Cal. Ann. Cr safety and a used by the sessions fo disclosure c committing (West 1993 (West 1993

## EXECUTIVE SESSIONS VII

a "clear and imminent peril to the public safety" in executive session.<sup>42</sup>

**§ 7.88 b. Internal Security, Police Investigations and the Like**

Another common exception is drawn for issues of internal security, confidential police sources, and the like.<sup>43</sup> Efficient suppression and punishment of crime, protection of victims and informants, effective investigation and similar purposes underlie exceptions from the open meeting requirements and from parallel public records requirements in many states.<sup>44</sup> States may simply exempt law enforcement personnel or agencies<sup>45</sup> or provide for executive session for matters relating to crime detection and prevention.<sup>46</sup> In addition, states may include specialized exceptions

42. *Vt.Stat.Ann. tit. 1, § 313(a)(5)* (1998 Cum.Supp.).

43. *See generally* Annot., Court's Power to Determine, upon Government's Claim of Privilege, Whether Official Information Contains State Secrets or Other Matters Disclosure of Which Is Against Public Interest, 82 A.L.R.2d 391 (1953); Annot., What Constitutes "Confidential Source" Within Freedom of Information Act Exemption Permitting Non-Disclosure of Identity of Confidential Source and, in Specified Instances, of Confidential Information Furnished Only by Confidential Source (5 U.S.C.S. § 552(b)(7)(D)), 59 A.L.R.Fed. 550 (1982); Annot., What Are "Enforcement Proceedings" Within Freedom of Information Act Exemption from Disclosure of Investigatory Records That Would Interfere with Enforcement Proceedings (5 U.S.C.S. § 552(b)(7)(C)), 55 A.L.R.Fed. 585 (1981); Annot., What Constitute Investigatory Files Exempt from Disclosure under Freedom of Information Act, 17 A.L.R.Fed. 522 (1973).

44. *Hyde v. City of Columbia*, 637 S.W.2d 251, 259-64 (Mo.App. 1982), cert. denied, 459 U.S. 1026, 108 S.Ct. 1233, 75 L.Ed.2d 467 (1982) (collecting examples from many states); *Caledonian Record Publishing Co. v. Walton*, 154 Vt. 15, 573 A.2d 296 (1990).

45. *Cal. Ann. Gov't Code § 11126(l)* (West 1993 Cum.FP) (Board of Corrections may consider reports of crime conditions in closed sessions); *Del. Code Ann. tit. 29, § 10004(b)(3)* (1991) "[a]ctivities of any law-enforcement agency in its efforts to collect information leading to criminal apprehension"; *Ga. Code Ann. § 50-14-3(c)* (1993 Cum.Supp.) (executive session for meetings of the Georgia Bureau of Investigation or any other law enforcement agency, including grand jury meetings); *see Kilgore v. R.W. Page Corp.*, 261 Ga. 410, 405 S.E.2d 655 (1991) (a coroner's inquest is a meeting under the open meeting law and the coroner is not a law enforcement agency; there is no exception for pending criminal investigations); *Napper v. Georgia Television Co.*, 257 Ga. 156, 356 S.E.2d 640 (1987) (public records act); *Ga. Op. Atty. Gen.* U86-35 (Nov. 3, 1986) (meetings of the Organized Crime Prevention Council are exempted from the open meeting requirement); *Miss. Code Ann. § 25-41-3(a)* (1991) ("law enforcement officials"), construed in *Miss. Op. Atty. Gen.* 853 (May 3, 1991) (the Metro Narcotics Task Force is exempted as "law enforcement officials"); *N.C. Gen. Stat. § 143-318.18(5)* (1993) (law enforcement agencies); *Va. Code Ann. § 2.1-345* (Michie 1993 Cum.Supp.) (Virginia State Crime Commission).

46. *E.g.*, *Cal. Const. Art. 4, § 7(c)(1)* (California Legislature may meet in closed session to consider matters affecting the safety or security of a member or employee and the safety or security of the buildings and grounds used by the Legislature); *Cal. Ann. Gov't Code § 54957* (West 1993 Legis.Serv.); *Cal. Ann. Gov't Code § 90329(a)(2)* (West 1992) (executive sessions to consider matters affecting the safety and security of members of the state legislature and its employees and any buildings and grounds used by the legislature); *Colo. Rev. Stat. Ann. § 24-6-402(3)(a)(IV)* (West 1993 Cum.Supp.) (executive sessions for state public bodies to discuss "[s]pecialized details of security arrangements where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law"); *Colo. Rev. Stat. Ann. § 24-6-402(4)(d)* (West 1993 Cum.Supp.) (local public bodies may enter executive session to discuss "[s]pecialized details of security arrangements or investigations."); *Conn. Gen. Stat. Ann. §§ 1-18a(e)(3), (e)(5), 1-19b(5)* (West 1993 Cum.FP) (executive sessions for "matters concerning security strategy or the deployment of

February 19, 2004

House Select Committee on Security

Statement in opposition to HB 2489 AND HB 2490

I am Mike Merriam, a lawyer in Topeka. My clients include many newspapers, broadcasters, wire services, media associations, and other newsgathering interests. I have been practicing media law for over 27 years, and answering open records questions from reporters and citizens around the State on three legal telephone hotlines as well. I have represented the press in litigation under the Kansas Open Records Act at least ten times, and in innumerable KORA requests for access. Today I appear on behalf of the Kansas Press Association.

I will limit my focus today to the technical problems we perceive in these bills, leaving the impractical consequences they present for the testimony of others. Because HB 2489 is really just a companion to HB 2490, incorporating the same language as a justification for executive sessions under the Open Meetings Act, I direct my attention to HB 2490 and incorporate the same reasoning as to HB 2489. Without belaboring the point, we certainly agree that the Terrorist War has awakened us all to a new sensitivity to security measures. But if we effectively reject the principle of an informed electorate as a consequence, we only exchange one evil for another.

1. HB 2489 is obviously redundant of K.S.A. 45-221(a)(45) to some extent, so the first question must be what this new proposal adds, or conversely, what Exception 45 is lacking. First, the standard for evaluating the record is changed. Exception 45 permits exception to disclosure based on a substantial likelihood of revealing security measures . . .; whereas Proposed 47 would refer to records that only relate to security measures . . . A. The difference is critical. Many Kansas court decisions use the phrase Asubstantial likelihood,@ which has a generally accepted meaning: it means the predicted result has authority and sound legal reasoning, and it is most likely to succeed procedurally, substantively, and factually. ARelate,@ by contrast, is a vague term that is defined by the judgment and biases of the individual doing the relating. It is a term lawyers try to avoid when asking questions because it asks the responder to make his own judgments about what is relative.

Exception 45 excepts records that would reveal security measures that protect specific public infrastructures: systems, facilities and equipment. Proposed 47 would expand the list to any security measures that address the lives, physical safety or property of the citizens of the state.@ This description is nothing more than a shorthand way of describing the general police power of the state. Law enforcement agencies at all levels are already charged with the duty of protecting the lives, safety and property of the citizens, so the ability to refuse access to records could mean that no law enforcement records of any kind at any time must be disclosed. The difference is that Exception 45 addressed public infrastructure; whereas Proposed 47 would address private persons and property. The policy reasons for opposing this are addressed by

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others, but the short answer is that private records are not subject to disclosure anyway, and if the purpose is to exempt public records about protection of private persons and property, it is an ill-considered law that keeps the people ignorant of the means of their own protection.

2. Proposed 47 would expand the definition of security measures, as they affect these private matters, from the *protect against* language currently in Exception 45, to *preparing for, preventing or responding*. Probably there is no practical distinction to be made between *protecting against* something and *preparing for* or *preventing* it, other than someone's preference of words. So the new issue in defining *protect against* contained in this proposal is the notion of response. Response, in the language of the proposal (copied in this instance from Exception 45), is response to *criminal acts*. In the United States, government response to crime is not secret. The public interest in the core governmental function of law enforcement can never be served, for example, by secret arrests, trials, convictions and sentences. As discussed later, Exception 10, excepting criminal investigation records, already protects legitimate law enforcement records that would prejudice effective police functioning.

3. The antepenultimate sentence in Proposed 47 includes an illustrative list of security measures. Others will address the practical problems with the various measures listed. The question I address is how Proposed 47 would change existing Exception 45. Some of these terms are technical, and judgments could be made about whether the various elements listed are necessary to address the threat posed against security. But apart from matters of degree, the one element listed that cannot fit within the notion of *protect against* is *responses to actual events*. For the same reasons set forth before, government response in any public manner must remain public. Should the focus be shifted to secret methods and means a public agency might develop for future events in reaction to current events, they are already protected by other exceptions.

For example, suppose that in response to the terrorist attacks of 2001, secret failsafe measures are installed at Wolf Creek that operate automatically to shut down the reactor upon the unauthorized approach of certain aircraft. This may be a response to the actual events of September 11, 2001, but it is already protected from disclosure by Exceptions 45, 12, and 18 (as well as the fact that KORA does not apply to this privately owned facility). And if a public facility was involved, it would be further protected against disclosure by Exceptions 10(d) and 20. What if the expertise and assistance of a public agency was part of the protection plan? Again, existing exceptions such as 10(D), 12, 18, 20 and 45 cover the situation.

4. Other provisions of law already address the legitimate concerns in Proposed 47. Exception 10 excepts criminal investigation records and has a well-defined procedure for allowing disclosure. To the extent Proposed 47 would create a greater level of denial of access for records already covered by 10, it is not only redundant, but dangerous. Exception 12, some of which was part of the original 1984 KORA, is not limited to security for *public* facilities, but extends to *any*

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building or facility which is used for purposes requiring security measures ... and protects information, procedures, plans, drawing, specifications or related information. Exception 18 excepts plans prepared by private persons which are private property. Exception 20 covers recommendations Aor other records@ in which Apolicies or actions are proposed@ which is probably broad enough to cover emergency response and security plans, at least for public agencies. Exception 45 is already broad enough to cover public infrastructure. No attempt has been made here to discuss the non-KORA statutes that may apply (e.g., K.S.A. 66-1234-1236 on secret utility rates for security).

The following is a proposal to address the concerns raised without adding a new exception to KORA and KOMA:

2490 (KORA)  
KSA 45-221(a)

(45) Records, *other than criminal investigation records*, the disclosure of which would pose a substantial likelihood of revealing security measures that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; ~~or~~ (B) *transportation and sewer or wastewater treatment systems, facilities or equipment; or* (C) *private property or persons, if the records are submitted to the agency for purposes of this paragraph.* For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. *Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.*

2489 (KOMA)  
KSA 75-4319

(13) ~~matters relating to the security measures of a public body or agency, public building or facility or the information system of a public body or agency, if the discussion of such matters at an open meeting would jeopardize the such security measures, of such public body, agency, building, facility or information system; that protect:~~ (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; (B) *transportation and sewer or wastewater treatment systems, facilities or equipment; or* (C) *a public body or agency, public building or facility or the information system of a public body or agency; or* (D) *private property or persons, if the matter is submitted to the agency for purposes*

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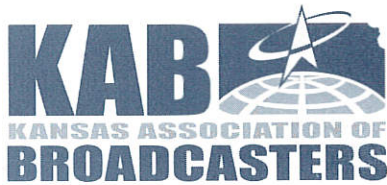
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*of this paragraph. For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.*

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

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Testimony before Select Committee on Kansas Security  
Regarding HB 2489 and HB 2490  
February 20, 2004  
Harriet Lange  
President/Executive Director

Mr. Chairman, Members of the Committee, I am Harriet Lange with the Kansas Association of Broadcasters. KAB serves a membership of radio and television broadcast stations in Kansas.

We have no problem with the intent of HB 2489 and HB 2490. However, we think they are overly broad and would result in erosion of the public trust in our governmental agencies. When government conducts the people's business in secret, or withholds records about the functioning of government, it only increases the chances for mistrust and misinformation. The public should have access to information about potential threats to its safety, whether through terrorism or otherwise; and the public should have access to information about how it is being protected, at least to the extent that current law provides.

HB 2489 and HB 2490 have unintended consequences by allowing for broad interpretation of what constitutes "security measures" and our fear is that the result will be, not a more safe Kansas, but a less free and open Kansas.

It is impossible to legislate away all of the risks of living in an open and free society. When we do, we no longer have a free and open society. We encourage you to reject these far-reaching bills in their current form in favor of a narrower approach.

Thank you for your consideration.

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