

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Pete Brungardt at 10:40 a.m. on Thursday, January 20, 2005, in Room 231-N of the Capitol.

All members were present.

Committee staff present: Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Dee Woodson, Committee Secretary

Conferees appearing before the committee: Barb Hinton, Legislative Post Auditor
Doug Anstaett, Executive Director, Kansas Press Association
Senator John Vratil
Senator Anthony Hensley

Chairman Brungardt noted that Committee members had in their Committee folders copies of various handouts referred to in Dennis Hodgins' overview last week regarding 2004 Interim Indian Gaming Compact, Governor's Executive Summary on Gaming Compact, and Interim Report for the Joint Committee on State-Tribal Relations. He also announced the agenda for next week's meetings.

SB 19 - Legislative post audits, confidentiality of surveys

Chairman Brungardt opened the hearing on **SB 19**. Barb Hinton, Legislative Division of Post Audit, testified in support of the bill on behalf of her office and the Legislative Post Audit Committee, which introduced the bill. She explained that **SB 19** would make all surveys Post Audit administers during the course of an audit confidential by law. Under current law, such surveys generally become public records once the audit is completed. Ms. Hinton reviewed the attached memorandum to her written testimony, which provided the rationale for why this bill represents an important step in promoting good government in Kansas. **SB 19** would help protect employees' identity when they report or make allegations of mismanagement, waste, inefficiencies, abuse, or other potential problems in a survey document. (Attachment 1)

Ms. Hinton explained that under the Kansas Open Records Act (KORA), all workpapers that support Post Audit findings become public after the audit report is issued, except for information that is confidential or privileged by law or that can be discretionarily closed under one of the exemptions of KORA. She reviewed the three sections of KORA that apply to Post Audit situations. She stated that Post Audit can and has used these exemptions to try to protect employees' confidentiality, but they aren't sufficient or specific enough in many situations Post Audit is faced with to protect employees' identity when those individuals have reported certain problems within their agencies. Included with Ms. Hinton's written testimony was a table summarizing workpaper confidentiality provisions in selected states.

Ms. Hinton added that consideration should be given to possibly adding a revision to the bill relating to the confidentiality of the responses to surveys, and it was not Post Audit's intention to keep individuals from getting a blank document of the survey.

Committee questions related to subpoena powers of the Legislative Division of Post Audit, and whether Post Audit would report to law enforcement officials if information within a survey discloses the commission of a crime and whether it caused a conflict with proposed **SB 19**.

Doug Anstaett, Kansas Press Association (KPA), testified in support of **SB 19**. He said that generally KPA opposes most moves to make records confidential, but that this bill was the result of a good faith effort by the Post Audit Division to find ways to improve government. He stated that KPA was supporting its goal of freeing public employees and others from the fear of retaliation by their employers should they honestly fill out questionnaires and surveys for Post Audit. Mr. Anstaett concluded by saying this bill protects those employees without unduly trampling on the people's right to know., and KPA encouraged the Committee to vote for the passage of **SB 19**. (Attachment 2)

CONTINUATION SHEET

MINUTES OF THE Senate Federal and State Affairs Committee at 10:40 a.m. on Thursday, January 20, 2005, in Room 231-N of the Capitol.

Chairman Brungardt asked Ms. Hinton to review with the Revisor the suggested questions or concerns regarding language within **SB 19**, and possibly consider drafting a balloon amendment.

The Chairman closed the hearing on **SB 19**.

SB 26 - Deleting from the list of legal holidays Washington's birthday and Lincoln's birthday and adding Martin Luther King Jr. Day and President's day

Chairman Brungardt opened the hearing on **SB 26**. Senator Vratil testified in support of and sponsored **SB 26**. He explained the proposed bill amends the existing statute which designates legal public holidays. He said that currently the statute lists Lincoln's birthday and Washington's birthday as legal public holidays even though those dates are no longer observed as such. Senator Vratil stated that currently Martin Luther King, Jr. Day and President's Day are observed as legal public holidays. This proposed bill would bring that statute up to date regarding the legal holidays observed in the State of Kansas. (Attachment 3)

Having no questions from Committee members, Chairman Brungardt closed the hearing on **SB 26**. He announced if there were no objections, the Committee would take final action on **SB 26**.

Senator Reitz made a motion to pass SB 26 out favorably and place it on the Consent Calendar. The motion was seconded by Senator Brownlee, and the motion passed.

SB 17 -Meetings of party caucuses of the house of representatives and the senate caucuses are to be open meetings

Chairman Brungardt opened the hearing on **SB 17**. Senator Hensley testified that he introduced a bill like **SB 17** two years ago in the 2003 Legislative Session. He explained that the proposed bill would amend the Kansas Open Meetings Act (KOMA) to require that all meetings of political party caucuses within the Legislature would be open to the public. It would also require any meeting of the Senate Committee on Organization, Calendar and Rules (OCR) or any successor committee of that OCR group would be subject to KOMA. He referred to last week's thorough discussion in the Senate Chamber regarding openness in government, and in his opinion these two areas are omissions of that within the legislative process. He stated that he believed in the spirit of open government, and the Legislature should make both caucuses and the OCR subject to KOMA.

Senator Hensley referred the Committee members to the balloon amendment that the Revisor drafted at his request, and asked the Committee to consider in the same spirit of open government. He said that Senator Schodorf also two years ago introduced what was **SB 76** which was referred to Senate Elections and Local Government Committee. He explained that **SB 76** is included in the balloon version, and would require meetings of task forces, advisory committees, or subcommittees of advisory committees created by an incoming governor to be open to the public. Senator Hensley related that when the incoming Governor, Governor Sebelius, could not establish task forces by Executive Order because she had not been sworn in. There was quite a bit of concern expressed through the news media and a law suit filed in order to try and require the incoming Governor's task forces, that were dealing with specific issues, to have open public meetings. (Attachment 4)

Senator Hensley testified that **SB 76** also included Boards of County Commissioners, governing bodies of a city, and Boards of Education of a Unified School Districts; and these units of local government are also included in the balloon for **SB 17**. Chairman Brungardt clarified that KOMA does have a series of things that a meeting can be closed for, i.e. personnel discussions, acquisition of real estate, etc. He asked if those exceptions would still be allowable under this provision as long as they are designated and specified. The Revisor confirmed those exceptions would still be allocable.

Senator Vratil inquired about balloon Sections 3, 4, and 5. He used Section 3 as an example relating to members of a Board of Education up for re-election in April, and four new members are elected. He asked if that would make the law applicable to eleven members of that Board of Education, where there were seven to start with and four newly elected. Senator Hensley responded in the affirmative, but stated that the four newly elected would not take office until July. Senator Vratil said that as he read the balloon

CONTINUATION SHEET

MINUTES OF THE Senate Federal and State Affairs Committee at 10:40 a.m. on Thursday, January 20, 2005, in Room 231-N of the Capitol.

amendment, for purposes of the KOMA, this would change the majority of a quorum. He explained that right now there are three, and if this bill passes it would be changed to four. Senator Vratil asked if that would mean three members of the existing Board of Education could meet privately and without being in violation of the KOMA. Senator Hensley agreed, and stated that it would be a problem and probably something he and the Revisor should review closely. Senator Ostmeyer stated that this issue did happen in Manhattan in regard to a task force appointed by the Board of Education wherein they closed the meetings and a lot of people got very upset. The Chairman said that if the group had cause to close the meeting for stated reasons they could do that. Commission discussion continued on clarifying this issue.

Doug Anstaett, Kansas Press Association, related an example of a School Board election in Kansas wherein four of the seven board members were replaced, and the newly elected members started having private meetings for three months and plotting strategy before they took office. He said he thought that was part of what Senator Schodorf's bill was aimed at accomplishing. Mr. Anstaett stated that the Kansas Press Association supports Senator Hensley's bill.

Harriet Lange, Kansas Association of Broadcasters (KAB), stated that KAB also supported the passage of **SB 19**.

Senator O'Connor expressed concern about opening up the political caucuses and OCR meetings because of certain subjects discussed, i.e. political strategies. She commented that in those instances the meetings should be able to be closed for discussion of sensitive party issues.

Chairman Brungardt stated that he wanted to retain **SB 19** within the Committee for a while as he was sure there would be more conferees to speak to this bill and more thorough discussion to be held before any action would be taken.

The meeting was adjourned at 11:25 a.m. The next meeting is scheduled for January 25, 2005, at 10:30 a.m.



LEGISLATURE OF KANSAS
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Testimony for the Senate Federal and State Affairs Committee on SB 19

Barb Hinton, Legislative Post Auditor

January 20, 2005

Mr. Chairman and members of the Committee, thank you for allowing me to appear before you in support of SB 19. I'm testifying on behalf of my office and the Legislative Post Audit Committee, which introduced the bill.

SB 19 would make all surveys we administer during the course of an audit confidential by law. Under current law, such surveys generally become public records once the audit is completed.


As part of my testimony, I'd like to briefly walk you through the **attached memorandum** from me to the Legislative Post Audit Committee, which provides the rationale for why I think this bill represents an important step in promoting good government in Kansas.

In the 27 years I've been in this office—the last 13 as Legislative Post Auditor—I would guess that agency officials have reviewed survey responses about a dozen times. Most often it happens after an audit when we've been asked to review serious personnel or managerial problems at an agency, and agency management want to see what their employees said. The latest review involved the Fire Marshal's Office. That may not seem like a lot, but when you're a State employee, I can assure you that just the knowledge that your boss can review what you write in a survey creates a chilling effect.

To help us protect employees' identify when they report or make allegations of mismanagement, waste, inefficiencies, abuse, or other potential problems in a survey document, I would urge the Committee to give favorable consideration to this bill.

Senate Federal & State Affairs
Committee
1-20-05
Attachment 1

DISCUSSION MEMO

From: Barb Hinton, Legislative Post Auditor 
To: Members, Legislative Post Audit Committee
Subject: Protecting the confidentiality of people who report or allege mismanagement, waste, abuse, inefficiencies, or other problems within agencies we audit
Date: December 7, 2004

Legislative Post Audit is seeking to address an issue we've faced for years:

- **how to encourage State employees to be more open and candid about the problems they think exist in their agencies**
- **how to protect those employees who do speak out from being identified and potentially retaliated against** (the Whistleblowers Act offers a recourse to employees who are retaliated against for talking with our audit staff, but that recourse is only after-the-fact)
- **how to balance the desire to accomplish the first 2 goals against the State's long-standing policy of openness and accountability**

Background

Under the Kansas Open Records Act (KORA), all workpapers that support our audit findings become public after the audit report is issued, except for information that is confidential or privileged by law or that can be discretionarily closed under one of the exemptions in KORA. Documents and other materials collected or prepared that do not support our audit findings are discarded in accordance with a records retention schedule we've adopted.

The primary problem we face is with information we solicit from employees through surveys. Over the years, State employees have told us they often don't feel they can be candid about the problems they perceive in their agencies because those documents become public records and officials from their agencies can review them. Even when surveys aren't signed, agency officials often can figure out who the respondent was.

Current Protections

Under KORA, we can discretionarily close some information we receive during audits. The sections of the law that apply to our situations:

| | |
|--|--|
| K.S.A. 45-221(a)(5) allows us to close any "information which would reveal the identify of any undercover agent or any informant reporting a specific violation of law." <u>According to Attorney General staff, this section generally would relate to information we solicit from an employee.</u> | This section allows us to make confidential those parts of a survey (or interview) that allege violations of law. <u>However, much of what employees report to us falls more into the broad category of mismanagement, waste, or abuse, not violations of law.</u> |
|--|--|

| | |
|---|---|
| <p>K.S.A. 45-221(a)(14) allows us to close any “correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.” <u>Attorney General staff say this section generally relates to unsolicited information we receive from an employee.</u></p> | <p>This section allows us to make confidential anything a private individual sends to us. <u>However, it’s not clear that a person sending us something in their role as a State employee would be considered a “private individual” under this section. Also, it’s not clear whether the term “correspondence” would cover surveys.</u></p> |
| <p>K.S.A. 45-221(a)(30) allows us to close “public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”</p> | <p>This section allows us to make confidential those parts of a survey in which an employee alleges something about another employee’s personal life (i.e., someone is having an affair). <u>According to the AG’s Office, however, the courts have interpreted this section very narrowly, typically allowing closure only when there’s demonstrable harm.</u></p> |

We can and have used these exemptions to try to protect employees’ confidentiality, but they aren’t sufficient or specific enough in many situations we’re faced with to protect employees’ identity when they report or make allegations of mismanagement, waste, inefficiencies, abuse, or other potential problems within the agency being audited.

What Other States Have Done To Protect Employees’ Identities

We obtained information from 14 other state audit offices. (SEE ATTACHED)

The laws in 10 of those states make all audit workpapers confidential, so they have no need for additional protections.

The laws in 4 of those states—Montana, Georgia, Utah, and Minnesota—are similar to Kansas. The **Utah Legislative Auditor General’s Office** has specific statutory authority to close records to protect the identity of employees who allege certain problems within their agencies, as follows:

“The following records in the custody or control of the legislative auditor general shall be protected records under Title 63, Chapter 2, Government Records Access and Management Act:...(b) Records and audit workpapers to the extent they would disclose the identify of a person who during the course of a legislative audit, communicated the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the laws of this state, a political subdivision of the state, or any recognized entity of the United States, if the information was disclosed on the condition that the identity of the person be protected.”

The Auditor General's attorneys have said the "best case scenario for documenting this protection would be for the individual to request, in writing, to have their identity protected. Also defensible is an auditor's written note indicating that the individual gave the information to the auditor on the condition that their identity would be protected. Finally, the auditor's contemporaneous notes could also give evidence that confidentiality was sought. For example, in the interview record, the auditor could note that 'the person closed the door and whispered, indicating that he did not want to be overheard.'"

The **Minnesota Legislative Auditor's Office** is able to protect certain data as follows:

"Data on individuals that could reasonably be used to determine the identity of an individual supplying data for an audit are private if the data supplied by the individual were needed for an audit and the individual would not have provided the data to the legislative auditor without an assurance that the individual's identity would remain private, or the legislative auditor reasonably believes that the subject would not have provided the data."

Proposed Protection

We are proposing that the Legislature amend the Legislative Post Audit Act to make confidential all survey responses received during the course of an audit approved by the Committee. This authority would be more specific than the current exemptions allowed under KORA. Jim Wilson is preparing draft legislation for the Committee's consideration at the December 13th meeting.

It's important to keep in mind that, under generally accepted government auditing standards, we can't consider an allegation of wrongdoing that someone might report in a survey response to constitute sufficient evidence—it often can simply point us to certain documents to look at or questions to ask. If we find an allegation to be true and report the problem as a finding in our audit, the audit work we do that supports the finding **still will be kept in the public workpapers.**

Summary of Workpaper Confidentiality Provisions in Selected States

| State | WPs Confidential? | Provisions |
|---|-------------------|--|
| Kansas | Sometimes | Only workpapers containing info exempted under open records law or other law; all others public at time of report release |
| Georgia | Sometimes | Georgia law is similar to current Kansas law |
| Minnesota | Sometimes | All records presumed to be public, but state law allows auditors to protect certain info from surveys or interviews if the respondent requests anonymity |
| Montana | Sometimes | Montana law similar to current Kansas law. |
| Utah | Sometimes | All records presumed to be public, but state law allows auditors to protect certain info from surveys or interviews if the respondent requests anonymity |
| | | |
| Arizona | Yes | State law makes all WPs confidential |
| Colorado | Yes | State law makes all WPs confidential (Committee can direct their release) |
| Florida | Yes | State law makes all WPs confidential (Committee can direct their release) |
| Mississippi | Yes | State law makes all WPs confidential |
| Nebraska | Yes | State law makes all WPs confidential (Committee can direct their release) |
| Oregon (Secretary of State Audits Division) | Yes | State law makes all WPs confidential |
| South Carolina | Yes | State law makes all WPs confidential |
| Texas (Sunset Commission) | Yes | State law makes all WPs confidential |
| Texas (St. Auditor's Office) | Yes | State law makes all WPs confidential |
| Wyoming | Yes | WPs strictly confidential; no provision for release. |

Sources: Correspondence with individual audit office officials as well as "Question of the Month" responses solicited from NCSL's National Legislative Program Evaluation Society members, April-June, 2004. See following detailed responses.



Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

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Jan. 20, 2005

To: Senate Federal and State Affairs Committee

From: Doug Anstaett, executive director, Kansas Press Association

Re: SB 19

The Kansas Press Association wants to go on record today in support of Senate Bill 19.

Generally, we oppose most moves to make records confidential, but we believe this bill to be the result of a good faith effort by the Legislative Post Audit Division to find ways to improve government, which in the end is of benefit to all Kansans.

Sen. Derek Schmidt and Legislative Post Auditor Barb Hinton met with me this past fall to discuss this topic and I go on record today supporting its goal of freeing public employees and others from the fear of retaliation by their employers should they honestly fill out questionnaires and surveys for post audit.

We had three topics to address:

- (1) How can we encourage state employees to be more open and candid about the problems they think exist in their agencies?
- (2) How can we protect those employees who do speak out from being identified and potentially retaliated against?
- (3) How can we balance the desire to accomplish the first two goals with the state's long-standing policy of openness and accountability?

Barb Hinton said many state employees are reluctant to speak out because they fear for their jobs. To have good government, however, we need for employees to be able to honestly point out management weaknesses and waste and fraud in their agencies and programs.

We think this bill protects those employees without unduly trampling on the people's right to know, so we offer our support and encourage you to vote "yes" on SB 19.

Senate Federal & State Affairs
Committee
1-20-05
Attachment 2

State of Kansas

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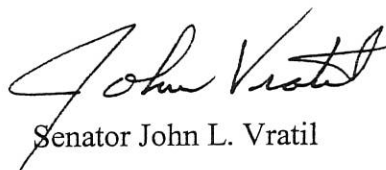
COMMITTEE ASSIGNMENTS
CHAIR: JUDICIARY
VICE CHAIR: EDUCATION
MEMBER: FEDERAL AND STATE AFFAIRS
ORGANIZATION, CALENDAR
AND RULES
SENTENCING COMMISSION
INTERSTATE COOPERATION

Vice President Kansas Senate

TESTIMONY IN SUPPORT OF S.B. 26

January 20, 2005

Senate Bill 26 amends the existing statute which designates legal public holidays. Currently, the statute lists Lincoln's birthday and Washington's birthday as legal public holidays even though they are no longer observed as such. It fails to mention Martin Luther King, Jr. Day or President's Day which are actually observed as legal public holidays. Senate Bill 26 corrects that oversight.


Senator John L. Vratil

Senate Federal & State Affairs
Committee
1-20-05
Attachment 3

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SENATE BILL No. 17

By Senator Hensley

1-10

9 AN ACT concerning open meetings; amending K.S.A. 2004 Supp. 75-
10 4318 and repealing the existing section.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 2004 Supp. 75-4318 is hereby amended to read as
14 follows: 75-4318. (a) Subject to the provisions of subsection (f), all meet-
15 ings for the conduct of the affairs of, and the transaction of business by,
16 all legislative and administrative bodies and agencies of the state and
17 political and taxing subdivisions thereof, including boards, commissions,
18 authorities, councils, committees, subcommittees and other subordinate
19 groups thereof, receiving or expending and supported in whole or in part
20 by public funds shall be open to the public and no binding action by such
21 bodies shall be by secret ballot. Meetings of task forces, advisory com-
22 mittees or subcommittees of advisory committees created pursuant to a
23 governor's executive order shall be open to the public in accordance with
24 this act. l

25 (b) Notice of the date, time and place of any regular or special meet-
26 ing of a public body designated hereinabove shall be furnished to any
27 person requesting such notice, except that:

28 (1) If notice is requested by petition, the petition shall designate one
29 person to receive notice on behalf of all persons named in the petition,
30 and notice to such person shall constitute notice to all persons named in
31 the petition;

32 (2) if notice is furnished to an executive officer of an employees' or-
33 ganization or trade association, such notice shall be deemed to have been
34 furnished to the entire membership of such organization or association;
35 and

36 (3) the public body may require that a request to receive notice must
37 be submitted again to the body prior to the commencement of any sub-
38 sequent fiscal year of the body during which the person wishes to continue
39 receiving notice, but, prior to discontinuing notice to any person, the
40 public body must notify the person that notice will be discontinued unless
41 the person resubmits a request to receive notice.

42 (4) It shall be the duty of the presiding officer or other person calling
43 a meeting, if the meeting is not called by the presiding officer, to furnish

(1)

(2) Meetings of task forces, advisory committees or subcommittees of advisory committees created by an incoming governor shall be open to the public in accordance with this act. For the purposes of this paragraph, "incoming governor" shall have the meaning ascribed to it in K.S.A. 75-132, and amendments thereto.

(3) Meetings of a board of county commissioners or any task forces, advisory committees or subcommittees of advisory committees created by a board of county commissioners shall be open to the public in accordance with this act. For the purposes of this paragraph, "board of county commissioners" shall have the meaning ascribed to it in K.S.A. 19-202, and amendments thereto, except that the term "county commissioner" shall include any person who is the apparent successful candidate for the office of county commissioner, as ascertained by the secretary of state following the general election for such office. The secretary of state shall make such determination on the day next following such election or as soon thereafter as such fact can be ascertained.

(4) Meetings of the members of the governing body of a city or any task forces, advisory committees or subcommittees of advisory committees created by the members of the governing body of such city shall be open to the public in accordance with this act. For the purposes of this paragraph, "member of the governing body of a city" shall include any person who is the apparent successful candidate for such elected city office as provided by law, as ascertained by the secretary of state following the general election for such office. The secretary of state shall make such determination on the day next following such election or as soon thereafter as such fact can be ascertained.

(5) Meetings of the members of the board of education of a unified school district or any task forces, advisory committees or subcommittees of advisory committees created by the members of the governing body of such board of education of a unified school district shall be open to the public in accordance with this act. For the purposes of this paragraph, "member of the board of education of a unified school district" shall include any person who is the apparent successful candidate for such elected position on the unified school district as provided by law, as ascertained by the secretary of state following the general election for such office. The secretary of state shall make such determination on the day next following such election or as soon thereafter as such fact can be ascertained.

the notice required by subsection (b).

3 (d) Prior to any meeting hereinabove mentioned, any agenda relating
4 to the business to be transacted at such meeting shall be made available
5 to any person requesting said agenda.

6 (e) The use of cameras, photographic lights and recording devices
7 shall not be prohibited at any meeting mentioned by subsection (a), but
8 such use shall be subject to reasonable rules designed to insure the or-
9 derly conduct of the proceedings at such meeting.

10 (f) The provisions of the open meetings law shall not apply:

11 (1) To any administrative body that is authorized by law to exercise
12 quasi-judicial functions when such body is deliberating matters relating
13 to a decision involving such quasi-judicial functions;

14 (2) to the parole board when conducting parole hearings or parole
15 violation hearings held at a correctional institution;

16 (3) to any impeachment inquiry or other impeachment matter re-
17 ferred to any committee of the house of representatives prior to the report
18 of such committee to the full house of representatives; and

19 (4) if otherwise provided by state or federal law or by rules of the
20 Kansas senate or house of representatives *except that meetings of political*
21 *party caucuses of the Kansas senate or house of representatives shall be*
22 *open meetings and meetings of the senate committee on organization,*
23 *calendar and rules, or any successor committee to the senate committee*
24 *on organization, calendar and rules, shall be open meetings.*

24 Sec. 2. K.S.A. 2004 Supp. 75-4318 is hereby repealed.

25 Sec. 3. This act shall take effect and be in force from and after its
26 publication in the statute book.

4-2