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To: Sen. Rick Wilborn, chairman of the Senate Judiciary Committee, and the members of the committee

From: Maxwell Kautsch, legal hotline attorney for the Kansas Press Association, the Kansas Association of Broadcasters, and the Kansas Sunshine Coalition for Open Government

RE: Hearing on HB 2070

Chairman Wilborn and members of the committee:

I have read SB 2070 and hereby respectfully offer my analysis of the bill as an opponent in the hope that it might be helpful to the committee. Although my opinion is based in part on my experience in my role as hotline counsel, the views I express are my own and do not necessarily represent the views of the organizations for which I perform legal services.

I am opposed to this bill primarily because it is unnecessary. The Commission on Peace Officers' Standards and Training (CPOST) is a public agency, and records in its possession that are related to its activities are public records as defined by the Kansas Open Records Act. However, KORA also contains a myriad of exemptions that already allow CPOST to refuse to disclose public records under certain circumstances. There is no need for new language that essentially seeks to reiterate KORA.

However, the problem here is not only that the bill is unnecessary, but also that it cites the wrong provisions of KORA as purported bases to deny disclosure. The version of HB 2070 that passed the House would allow CPOST to consider all "registry" records under K.S.A. 74-5611a to be "personnel records that are not required to be disclosed under K.S.A. 45-221(a)(4)." HB 2070, K.S.A. 74-5611a(f). Based on the testimony from CPOST, that agency believes the primary benefit of this language would be that CPOST would no longer have to spend as many resources responding to requests under the Kansas Open Records Act (KORA) for the "Notice of Termination or Change of Status" forms that make up the "registry." Rather, if the bill becomes law, CPOST would simply be able to categorically deny such requests, as all registry documents,

including the “Notice of Termination or Change of Status” forms would be considered “personnel records.”

However, a strong argument can be made that the “Notice of Termination or Change of Status” forms that make up the “registry” are not personnel records. CPOST is not the employer of any of the officers to whom the “Notice of Termination or Change of Status” forms relate. The attorney general's office has stated that personnel records are “an individually identifiable public record that relates to a specific public employee and is maintained by the agency *because that person is an employee* (emphasis added).” AGO 2006-8. Common sense also suggests that an agency that is not an employer does not have standing to assert the exemption because the records are not related to employment with that agency. Finally, K.S.A. 45-217(a) of the KORA requires that it be “liberally construed,” and defining the “Notice of Termination or Change of Status” forms as personnel records is not consistent with liberal construction.

Instead of the “personnel records” exemption, the “personal privacy” exemption contained in the KORA at K.S.A. 45-221(a)(30) would make much more sense. In response to KORA requests, public agencies are justified in refusing to disclose “intimate details of a person’s private life...having no bearing on matters of public interest.” *Data Tree v. Meek*, 279 Kan. 445, 109 P.3d 1226, HN 3, 4 (2005). By utilizing that exemption, CPOST could still protect the subjects of the “Notice of Termination or Change of Status” from disclosure of information that would constitute a “clearly unwarranted invasion of personal privacy,” but all other information contained in the “Notice of Termination or Change of Status” forms would be subject to disclosure under KORA.

Such a solution would still require CPOST to respond to KORA requests for “Notice of Termination or Change of Status” as required by law, and would not allow for the categorical denial of the “Notice of Termination or Change of Status” forms. However, CPOST is a public agency as defined by KORA, and the “Notice of Termination or Change of Status” forms are public records under the KORA. As such, CPOST is required under K.S.A. 45-221(d) to “delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act.”

As such, I propose the following amendment to the language that appears as new proposed section K.S.A. 74-5611a(f) in HB 2070 as passed by the House:

(f) Any material contained in the registry maintained in accordance with subsection (a) or and the report submitted in accordance with subsection (d) that would constitute a clearly unwarranted invasion of privacy as defined by K.S.A. 45-217(b) shall be considered personal records personnel records that are not required to be disclosed under K.S.A. 45-221(a)(30) K.S.A. 45-221(a)(4), and amendments thereto. The provisions of this subsection shall expire on July 1, 2021, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto, or any other statute.

The committee might note that my proposal also includes a slight modification to the beginning of subsection (f). The version of the bill passed by the House provides that “the registry” shall be subject to a particular provision of KORA. However, as outlined above, this “registry” is made up of “Notice of Termination or Change of Status” forms that are “recorded information” subject to discretionary disclosure under KORA as a public record. Thus, it is technically more accurate to apply KORA to such “recorded information” rather than to an undefined “registry” that is really just a collection of public records. Also, the word “material” is used in connection with redacting and disclosing information under K.S.A. 45-221(d), so it might be more palatable to use that word rather than the term “recorded information.”

Finally, it's important to note that it is not a solution for the public to ask the law enforcement agencies themselves for “Notice of Termination or Change of Status” forms. Unlike CPOST, the law enforcement agencies are the employers or former employers of the subjects of the forms, and as such, those agencies clearly have the authority to refuse to disclose the “Notice of Termination or Change of Status” forms under KORA’s personnel records exemption.

HB 2070 also seeks to amend K.S.A. 74-5607. The goal for amending this statute is to preserve the confidentiality of CPOST's prospective investigations and hearings, and the version that passed the House seeks to do so by incorporating the criminal investigation records exemption found in K.S.A. 45-221(a)(10). However, K.S.A. 45-221(a)(11) is a ready-made exemption for what CPOST is attempting to accomplish, because it expressly pertains to prospective administrative investigations. That exemption provides that “a public agency shall not be required to disclose...Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.”

As such, I propose the following amendment to the language that appears as new proposed section K.S.A. 74-5607(g) in HB 2070 as passed by the House:

(g) Any complaint or report, record or other information relating to a complaint that is received, obtained, created or maintained by the commission shall be a record not required to be disclosed under *K.S.A. 45-221(a)(11)*~~*K.S.A. 45-221(a)(10)*~~, and amendments thereto. The provisions of this subsection shall expire on July 1, 2021, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto, or any other statute.

In conclusion, I believe the bill is unnecessary, but if it must advance, I am hopeful the committee will consider the changes I have proposed. Thank you for the opportunity to testify.