

MINUTES

SPECIAL COMMITTEE ON LOCAL GOVERNMENT

November 17-18, 2003
Room 313-S—Statehouse

Members Present

Representative Jene Vickrey, Chairman
Senator Barbara Allen, Vice Chairman
Senator Mark Gilstrap
Senator Kay O'Connor
Representative Ralph Ostmeyer
Representative Roger Reitz
Representative Roger Toelkes
Representative Jim Yonally

Staff Present

Mike Heim, Kansas Legislative Research Department
Theresa Kiernan, Revisor of Statutes Office
Ken Wilke, Revisor of Statutes Office
Dennis Hodges, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes
Maureen Stinson, Committee Secretary

Others Present

Kyle Smith, Kansas Bureau of Investigation
A.J. Kotich, Kansas Department of Human Resources
Randall Allen, Kansas Association of Counties
Kristie Evans, Reno County
Mike Pepoon, Sedgwick County
Mike Merriam, Kansas Press Association
Jim Edwards, Kansas Association of School Boards
Mark Desetti, Kansas National Education Association
Michael Santos, City of Overland Park Law Department
Captain Bob Keller, Johnson County Sheriff's Office
Kim Gulley, League of Kansas Municipalities
Harriet Lange, Kansas Association of Broadcasters
Rick Thames, Wichita Eagle, Kansas Press Association
Jared Maag, Office of the Attorney General
Rose Rozmiarek, Kansas State Fire Marshal's Office
Mark Kessler, City of Overland Park Police Department
Greg Schauner, Sedgwick County Sheriff's Department

Tom Bartee, Northeast Kansas Conflicts Office
Christine Kenney, District Attorney, Douglas Attorney
William Kennedy III, County Attorney, Riley County
Ed Klumpp, Department of Police, City of Topeka
Ken Keen, Kansas Government Management Information Sciences
Marilyn Nichols, Register of Deeds, Shawnee County
Peggy Hanna, Office of the State Treasurer
Tammy Owens, Law Department, City of Overland Park
Bill Meek, Register of Deeds, Sedgwick County
Dianne Gwen, State Board of Nursing
Bob Lowry, City of Overland Park Engineering Department
Warren Sick, Kansas Department of Transportation
Diane Gjerstad, Wichita Public Schools
Molly Bernhardt, City of Lenexa

**Morning Session
Monday, November 17**

Kansas Open Records Act (KORA) Personnel Exception

Kyle Smith, Special Assistant Attorney General and Special Agent, Kansas Bureau of Investigation (KBI), and Legislative Chair for the Kansas Peace Officer's Association (KPOA) testified in support of maintaining the personnel records exception of the Kansas Open Records Act (KORA). Repealing the exception Number 4 would be contrary to the public interest and certainly, contrary to the safe and effective operations of the criminal justice system. He noted that under KSA 45-221, these exceptions are not mandatory. He said that if there is relevant material and information that is not damaging, a governmental entity is certainly free to release any information in the personnel record.

Mr. Smith also testified in opposition to the removal of the criminal investigation records exception which allows government agencies to protect criminal investigative records from disclosure (Attachment 1). He stated that the open records act already provides a way to get any investigative records of public interest. He said that the criminal investigative record exception, specifically authorizes a court to override an agency's decision not to release investigative records if the court finds that disclosure is:

- in the public interest;
- would not interfere with any perspective law enforcement action;
- would not reveal the identity of any confidential source or undercover agent;
- would not reveal confidential investigative techniques and procedures not known to the general public;
- would not endanger the life or physical safety of any person; and
- would not reveal the name, address, phone number or other information of a victim of sexual assault.

A.J. Kotich, Chief Counsel for the Kansas Department of Human Resources, ([Attachment 2](#)), said that the State of Kansas and the Kansas Department of Human Resources have a duty to employees and applicants to protect their individual privacy. He explained that the exception does allow a public agency to disclose the following information:

- name of the employee;
- position(s) held;
- salaries; and
- length of service.

He said that the standard personnel file for a state employee/job applicant contains a large amount of personal information that would be a “gold mine” for identity theft.

Randall Allen, Executive Director, Kansas Association of Counties, urged the committee to fully retain the statutory exception for personnel records, performance ratings or individually identifiable records of employees or applicants ([Attachment 3](#)). He noted that employee’s performance appraisals are strictly the business of the employee, his or her supervisor, and management of the organization.

Alberta Klaus, Ellis County Clerk and Election Officer, appeared on behalf of the Kansas County Clerk’s and Election Officials Association ([Attachment 4](#)). Ms. Klaus is also a member of the Kansas County Clerks and Election Officials Association Legislative Committee and spoke on their behalf as well. She stated that employee’s personnel records should remain exempt from KORA. She also said that disciplinary action and employee evaluations should not be open for public scrutiny.

Kristie Evans, Personnel Director, Reno County, and the Vice-President and Legislative Representative of the Kansas County Human Resource Association (KCHRA) stated that open personnel records could erode the government’s ability to hire qualified staff. She said that an applicant has the expectation of privacy and confidentiality from a prospective employer ([Attachment 5](#)).

Mike Pepoon, Director, Government Relations, Sedgwick County, appeared on behalf of Mike Mueller, Employment Manager, Sedgwick County Human Resources Division ([Attachment 6](#)). He testified in support of retaining the personnel records exemption. He said the exemption is important because personnel records include a myriad of information that could be personally damaging to an employee if divulged. Mr. Pepoon said that release of personal information such as home address or name of spouse and children could place employees and their families in danger or expose them to harassment.

Mike Merriam, a Topeka lawyer representing newspapers, broadcasters, wire services, media associations, and other news gathering interests suggested certain amendments to the following statutes ([Attachment 7](#)): KSA 45-221 (a)(4) Personnel records; KSA 45-221 (a)(10) Criminal investigation records, KSA 45-217 (b) “Criminal investigation records definition”; and KSA 45-221 (a)(30) privacy.

Jim Edwards, Kansas Association of School Boards, presented testimony for Mark Tallman, Kansas Association of School Boards (KASB) ([Attachment 8](#)). He stated that the KASB believes board deliberations and actions should be taken in public session and that all records of decisions be open to public inspection. He explained that certain documents which are not official in nature,

such as those compiled for the board's consideration should not be subject to public disclosure before board action. Mr. Edwards said any open records statute should ensure the privacy of information about individual employees, patrons and students, particularly that which is protected by the Family Educational Rights and Privacy Act. He said that KASB will oppose repeal of the exceptions for employee personnel records, information that would invade personal privacy, and engineering and architectural estimates.

Mark Desetti, Kansas National Education Association, said that they oppose disclosure of employees' personnel files ([Attachment 9](#)). He said that information revealed from personnel files proven to be incorrect would expose school districts to serious legal challenges.

Michael Santos, Senior Assistant City Attorney, City of Overland Park, appeared in support of retaining the Kansas Open Records Act exception for personnel records ([Attachment 10](#)). He said because Kansas recognizes the tort of "invasion of privacy," if public employers were required to disclose information in personnel files, they could be sued by their employees or applicants for releasing damaging information while attempting in good faith to fulfill their obligations under KORA.

Captain Bob Keller, Johnson County Sheriff's Office, appeared in support of retaining the exemption for (personnel records) ([Attachment 11](#)). He stated that the risk of public disclosure of personal information of job applicants would impair the willingness of applicants to be truthful about certain areas of conduct that are very relevant to employment as officers. He said that applicants will not apply for public safety positions if there is the risk of public disclosure of medical and social circumstances of the applicants.

Kim Gulley, League of Kansas Municipalities, requested that the Committee recommend that the personnel records exception to KORA be retained in its current form ([Attachment 12](#)). She stated that employees have certain liberty interests which are violated if personal information is released by an employer. She said that Kansas taxpayers will be footing the bill for the lawsuits which will inevitably ensue.

Harriet Lange, President/Executive Director, Kansas Association of Broadcasters (KAB), stated that it is not KAB's position that the exception regarding personnel records be repealed in its entirety, but that it be narrowed in scope ([Attachment 13](#)).

Rick Thames, Editor, *The Wichita Eagle*; Chair, Kansas Press Association Legislative Committee, presented testimony on KORA concerns regarding personnel files ([Attachment 14](#)).

Afternoon Session

KORA Criminal Investigation Records

Jared Maag, Deputy Attorney General for the Criminal Litigation Division appeared on behalf of the Attorney General and offered testimony in opposition to the removal of an exception dealing with criminal investigation records ([Attachment 15](#)). He stated that providing unfettered access to these types of files of files would undoubtedly have a direct impact on the manner in which criminal activity is investigated in Kansas.

Rose Rozmiarek, Chief of Investigations for the Kansas State Fire Marshal's Office, testified in opposition of the removal of the exception ([Attachment 16](#)). She stated that criminal reports need

to remain as an exception to public records to allow law enforcement officers to complete a thorough investigation free of interference.

Lieutenant Colonel Mark Kessler, City of Overland Park Police Department, said that because of the necessity to accurately document information and sources of information in the course of investigating criminal activity, names and additional information related to innocent individuals including but not limited to those who are witnesses, possible suspects, victims or informants, become a part of the criminal investigation records (Attachment 17).

Kim Gulley, League of Kansas Municipalities, offered comments supporting the existing language of the criminal investigation records exception (Attachment 18).

Captain Greg Schauner, Sedgwick County Sheriff's Department, presented testimony on behalf of Sheriff Gary Steed, in support of retention of the criminal investigation records exceptions (Attachment 19). He said there are several sound public policy reasons for limiting disclosure of criminal investigation records:

- Restricting public access to certain criminal investigation information reduces incidents of false confessions and false accusations;
- Release of criminal investigation records will make it more difficult to get people to report a crime;
- Release of some criminal investigation records may jeopardize investigations by revealing confidential investigative techniques used by law enforcement; and
- Informants (not necessarily "confidential informants") listed in reports also need protection from public disclosure of their identity.

Captain Greg Schauner said the Kansas Supreme Court has recognized the importance of keeping criminal investigation records protected from public disclosure. He stated that in *Harris Enterprises, Inc. V. Moore*, 241 Kan. 59, 67 (1987) the court commented, "We note that the legislature's intent in enacting KSA 45-221 (a)(10) is clear. Criminal investigation files are sensitive. Raw investigative files nearly always include the names of many innocent people. Where the files are open to public scrutiny, the potential for injury is great. In addition, if criminal investigation files are open, many people with information which might lead to a resolution of the investigation will refuse to disclose such information. Investigations will be badly hampered. Thus, only under very restricted circumstances may the district court require disclosure."

Tom Bartee, Chief Defender, Northeast Kansas Conflict Office, offered testimony on behalf of the State Board of Indigents' Defense Services in opposition to a proposed amendment regarding the attorney work product exception to the Kansas Open Records Act (Attachment 20).

Christine Kenney, Douglas County District Attorney, said that a number of the KORA provisions have direct application to law enforcement if not direct impact on prosecutors, and have clear implications regarding the integrity of investigations as well as the personal safety of those involved:

- (5) the identity of an undercover agent or informant;
- (12) the plans, drawings or specifications of public buildings which are used for the transmission of power, water, fuels or communications;

- (45) records regarding public buildings that could provide information about security measures used to protect the public at large from terrorism; and
- (30) records containing information of a personal nature that could constitute a clearly unwarranted invasion of personal privacy.

Ms. Kenney, on behalf of the Kansas County and District Attorneys Association said that the Legislature should extend all exceptions to the disclosure requirements applicable to their membership and the law enforcement community (Attachment 21).

Captain Bob Keller, Johnson County Sheriff's Office, supported retaining the investigations records exemption (Attachment 22).

Harriet Lange, Executive Director, Kansas Association of Broadcasters (KAB), stated that her association supported proposed language which narrows the definition of criminal investigation records which would expand the disclosure requirement to include logs and dispatch records (See Attachment 13).

Rick Thames, Editor, *The Wichita Eagle*; Chair, Kansas Press Association Legislative Committee, presented testimony on KORA regarding criminal investigation records (See Attachment 14). Mr. Thames proposed changes to KSA 45-221 (a) (10) would provide the following to be open:

- The narrative on initial police reports, which explain why the government has launched an investigation or placed an individual under arrest;
- Records of 911 calls, which are often critical to understanding how authorities responded to emergencies;
- Records of cases that have been fully resolved and are now closed; and
- Probable cause affidavits.

William Kennedy III, County Attorney, Riley County, said that Subsection 10 as written adequately protects both the interest of the public, and the interest of law enforcement (Attachment 23).

Ed Klumpp, Chief of Police, City of Topeka, testified in support of the current language of the criminal investigation records (Attachment 24). He said that opening of these records not only allows it into the hands of the media, but also to any member of the public that requests.

KORA Personal Privacy Exception

Ken Keen, President, Kansas Management Government Information Sciences, testified regarding individual privacy concerns in relation to the Kansas Open Records Act (Attachment 25). He said that governments in Kansas do not currently provide even the most basic of warnings now found on government web sites, namely a privacy policy. He stated that governments do not tell citizens when they register to vote or purchase property that their personal information is subject to disclosure.

Randall Allen, Executive Director, Kansas Association of Counties, urged the committee to extend the statutory exception for public records containing information of a personal nature where

the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy (Attachment 26). He pointed out that hundreds if not thousands of records are maintained by county governments as the official depository of records. He said that various military and real estate records are filed every day in courthouses across Kansas, many with birth dates, social security numbers, addresses, physical descriptions and perhaps other personal information. Mr. Allen asked what legitimate purpose could be served for such records to be open. He said other than Subsection (30) of section (a) of KSA 45-221, it appears there is no authority for records custodians to withhold such records from the public.

Marilyn Nichols, Shawnee County Register of Deeds, appeared on behalf of the Kansas Register of Deeds Association (Attachment 27). She said that the Register of Deeds Office is responsible for the recording of documents concerning real estate transactions in each county and the preservation of those records as "public records." She stated that those documents, once recorded for record, are subject to various statutes that declare them open to the public, and call for the preservation thereof and for unrestricted access by the public to them.

Peggy Hanna, Deputy Assistant State Treasurer, testified on behalf of State Treasurer, Lynn Jenkins (Attachment 28). She said two programs rely on the exception to protect the citizens who deal with those programs:

- Bond Service Program—The Treasurer's office acts as paying agent for almost 90 percent of the municipal and state bonds issued in Kansas. Because of this, their office maintains a database that contains not only the basic information regarding the bonds, which is subject to the Open Records Act, but also the personal financial information for the investors who have purchased those bonds, including their home addresses, social security numbers, and possibly also banking information.
- Unclaimed Property Program—Companies are required to report and remit certain types of financial assets to the Treasurer's Office if the company loses track of the owner of that property. The Treasurer's office then becomes the custodian of that property and attempts to locate the rightful owners of their heirs. When the companies report, they are required to send the last known address of the owner as well as the social security number if available. The Treasurer's Office does not reveal the social security number or dollar amount on their website.

Ms. Hanna stated that the Treasurer's Office has always relied on the exception to the Open Records Act as their authority to protect investor's very private information.

Jim Edwards, Kansas Association of School Boards, (See Attachment 8), said that courts have recognized personal privacy rights for individuals and release of information that intrudes upon those rights could open the school board to legal action by individuals harmed by that release. He stated that the personal privacy exception protects information regarding students and that Federal law would require the confidentiality of student records even if State law is amended. Mr. Edwards said the privacy exception also protects private information concerning parents and patrons not covered by the personnel records exceptions and repeal of this exception could inhibit communications between the schools and parents or concerned citizens who wish to provide confidential or sensitive information.

Tammy Owens, Assistant City Attorney, Overland Park, said the definition of public records is extremely broad (Attachment 29). She stated 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. She explained that governmental entities come into possession of a great deal of

information that is highly personal in nature, the release of which could have a devastating impact on an individual's personal privacy. Ms. Owens said that the City of Overland Park believes that the current exception is fair in its application. She said that the public's right to know must be tempered by an individual's right to have his or her private matters remain private. Therefore, the City of Overland Park is supportive of the current discretionary exception for information that is a "clearly unwarranted invasion of personal privacy" and requests that the exception be maintained.

Kim Gulley, League of Kansas Municipalities, said that many cities and counties operate summer recreational programs for children (Attachment 30). She said as a result, the names, addresses, emergency contact information, and in some cases, medical information are held by the governmental entity which operates the program. She said it is obvious that to release this information would not only be an invasion of the privacy rights of the child, but could also pose a serious danger if the personal information were released to someone with nefarious motives.

Harriet Lange, President/Executive Director, Kansas Association of Broadcasters (KAB) testified concerning the personal privacy exception in KSA 45-221 (a)(30) (See Attachment 13). She stated that this exception to openness is often too broadly interpreted to close entire documents, portions of which should be open. Ms. Lange conveyed that this exception should either be eliminated or the legislature should define what constitutes "clearly unwarranted invasion of privacy." Concerning the question of how the legislature should proceed to fulfill the requirements of the sunset law passed in 2000, she stated that it's KAB's opinion that those agencies which take advantage of the exceptions be required to justify them. She informed that KSA 45-229 states that all exceptions to disclosure in place on July 1, 2000 will expire on July 1, 2005, unless the legislature acts to reenact them.

Rick Thames, Editor, *The Wichita Eagle* and Chair, Kansas Press Association Legislative Committee, presented testimony on KORA concerns regarding the personal privacy exemption (See Attachment 14-morning session). Mr. Thames said that this exemption is often invoked as a "catch-all" clause for matters they would like to keep confidential, but are now specifically exempted by KORA or elsewhere in the statutes. He said that custodians of records arbitrarily apply this exemption, based on their individual views of what is a "clearly unwarranted" invasion of privacy.

The question was posed concerning what is the expectation by the Kansas Press Association for the level of review for each of the many exceptions to KORA. Mr. Thames recommended that the legislature proceed with hearings on each of the exceptions with the opportunity for testimony from proponents and opponents.

Morning Session Tuesday, November 18

KORA Public Improvements Architectural and Engineering Estimates Exception No. 32

Jim Edwards, Kansas Association of School Boards, presented testimony concerning architectural and engineering estimates (See Attachment 8-morning session November 17). Mr. Edwards stated that school boards should be allowed to keep estimates confidential until the bidding process on a public project has been completed. He said if estimates are open to the public, they could create a "floor" for construction contractors. He said there is concern that contractors would tend to write bids at the amounts contained in estimates provided to the school board and that this

could discourage bids that turn out to be below estimates reducing the “effective and efficient administration of a governmental program.”

Bob Lowry, City of Overland Park Engineering Department, testified in support of the exception for architectural and engineering estimates ([Attachment 31](#)). He concluded that the competitive procurement process for public improvements has served federal, state, and local taxpayers very well for many years, due to the procedural safeguards built into the system. The confidentiality of the engineering estimate is a critical aspect of this process, which protects governments and its citizens from waste, fraud, and abuse in the award of construction contracts. Mr. Lowry encouraged the Committee to recognize the merits of the present process and reject any well-intended efforts to fix a system that is not broken.

Warren Sick, Assistant Secretary and State Transportation Engineer, Kansas Department of Transportation (KDOT) urged the Committee to retain the KORA exception because releasing this information will increase construction costs ([Attachment 32](#)). He said that KDOT provides contractors with a thorough description of the work involved in any given project, and trusts that contractors have the experience and expertise necessary to submit a competitive proposal based on the information provided to them. Mr. Sick stated that the competitive bid process is critical to controlling costs.

Diane Gjerstad, Wichita Public Schools, said that the ability to get the lowest responsible bid and have true competition for the district’s work has meant that today they are about \$3 million under budget on the current \$284.5 million bond construction issue ([Attachment 33](#)). She said that school boards are stewards of taxpayers funds and that the exception maximizes tax-payer dollars.

Ms. Gjerstad also clarified comments made the previous day by a representative of the Kansas Press Association ([Attachment 34](#)). She said that to imply that USD 259 kept a known rapist in the classroom was extremely misleading.

Molly Bernhardt, City of Lenexa, said they are concerned the proposed legislation will facilitate bid rigging and collusion on the part of some unethical contractors ([Attachment 35](#)). She said that the federal acquisition requirements do not allow for the engineer’s estimate to be made public until after the bids are received and opened. She stated that by not following these requirements, cities and the State would forgo the opportunity to receive federal matching funds.

The following did not appear November 17 or 18 but submitted written testimony:

- Joann Corpstein, Kansas Department on Aging ([Attachment 36](#))
- Mary Prewitt, Kansas Board of Regents ([Attachment 37](#))
- Jack Rickerson, Kansas Department of Administration, Division of Personnel Services ([Attachment 38](#))
- Lisa Mendoza, Kansas Juvenile Justice Authority ([Attachment 39](#))
- Donnita Thomas, Kansas Department of Revenue ([Attachment 40](#))
- Patricia Michaelis, Kansas State Historical Society ([Attachment 41](#))
- Cynthia Laframboise, Kansas State Historical Society ([Attachment 42](#))
- Office of the Secretary, Kansas Department of Wildlife & Parks ([Attachment 43](#))
- Scott Heidner, Kansas Consulting Engineers ([Attachment 44](#))

- Trudy Aron, AIA Kansas ([Attachment 45](#))
- Kenneth Sissom, Merriam Police Department ([Attachment 46](#))
- Mark Stafford, Kansas Board of Healing Arts ([Attachment 47](#))
- David Spears, Sedgwick County Public Works ([Attachment 48](#))
- Douglas King, Sedgwick County Records Management Services ([Attachment 49](#))

Representative Yonally made the motion to approve the minutes of the September 15, 2003 and October 23, 24, 2003 meeting minutes with the understanding that the Legislative Research Department will make any needed technical corrections. Representative Reitz seconded the motion. The motion carried.

Norm Furse, Revisor of Statutes, stated he will be submitting the list of exceptions to the Legislature by June 1, 2004. The number of exceptions now listed is approximately 380.

It was suggested by a member of the Committee that there be a Working Group which could meet prior to the 2004 Session with the charge to review the list of exceptions and to determine which exceptions might be allowed to sunset as provided by statute. They also may be able to work out some compromises between opposing views concerning the various exceptions. Suggested members of the Working Group are:

- Kim Gulley, Randall Allen, Jim Edwards, Jared Maag, Kyle Smith, Harriet Lange, Rick Thames, Mike Merriam

It was stated by a member of the Committee that the charge was to review each one of the exceptions, that it will probably take two years, and is a huge task.

Representative Yonally made the motion that the Committee recommend to the House Speaker and to the Senate President that for the 2004 Session, both the Senate and House establish separate Select Committees dealing with the topic of the KORA. Senator O'Connor seconded the motion. The motion carried.

Senator O'Connor made the motion that the Committee recommend to the House Speaker and to the Senate President that a Working Group of members of public and private entities be brought together to address the topic of exceptions to the KORA. Representative Reitz seconded the motion.

Senator O'Connor made the motion to modify the motion to make the recommendation to the Legislative Coordinating Council rather than to the House Speaker and the Senate President and to state that the suggested representatives of the following selected state agencies and interest groups comprise the Working Group:

- *Kansas Press Association;*
- *Kansas Association of Broadcasters;*
- *League of Kansas Municipalities;*

- *Kansas Association of School Boards;*
- *Kansas Attorney General's Office;*
- *Kansas Bureau of Investigation;*
- *Kansas Division of Personnel Services; and*
- *other groups or persons with an interest.*

They are asked to meet together prior to the 2004 Legislative Session in an effort to reach a consensus on changes, if any, that are needed to the Kansas Open Records Act (KORA). They are further asked to try and arrive at a consensus recommendation regarding how the Legislature should conduct its review of the nearly 400 exceptions to KORA. For example, should hearings be scheduled for each exception to KORA or only on the exception that there is some specific recommendation for change.

Representative Reitz seconded the motion. The motion carried.

Modernization of Local Governments

Representative Yonally made the motion to recommend legislation be introduced during the 2004 Session which would allow local governments to consolidate without the necessity of special legislation. Representative Reitz seconded the motion.

A substitute motion was made that it is the consensus of the Committee to make no recommendation concerning Topic No. 2—Modernization of Local Governments. The motion carried.

Local Government Publication Requirements

The motion was made that it is the consensus of the Committee to make no recommendation concerning Topic No. 3—Local Government Publication Requirements. The motion carried.

The meeting was adjourned.

Prepared by Maureen Stinson
Edited by Mike Heim

Approved by Committee on:

February 4, 2004

(date)

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