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**Testimony in Support of Senate Bill 206
Presented to the Senate Judiciary Committee
By Attorney General Derek Schmidt
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Mr. Chairman, members of the committee, thank you for conducting this hearing today on Senate Bill 206.

After four years of enforcing the Kansas Open Records Act (KORA) and the Kansas Open Meetings Act (KOMA) as attorney general, I have reached the conclusion that the investigation and enforcement mechanisms in both statutes are inefficient and, because of that, too often are ineffective. To be blunt, the statutes are just plain clunky.

Senate Bill 206 contains the recommendations of our office to encourage, obtain and enforce compliance with the KORA and the KOMA. This is predominantly a process bill, but I believe it proposes changes that, if enacted, will be important to advancing the substantive purposes of both statutes.

The bill's proposals include the following:

First, I believe the vast majority of violations of both statutes arise out of ignorance or misunderstanding, not out of malicious intent. Therefore, training in the requirements of both statutes is critically important for the interests of open government. Senate Bill 206 proposes several changes to strengthen training about, and knowledge of, the requirements of KORA and KOMA:

- It expressly authorizes either courts or the attorney general ***to require that persons who violate either statute undergo training*** and provide proof they have satisfied the requirement.
- To promote uniformity in training, it authorizes the attorney general to ***review and approve training programs***. This is *not* a circumstance where *only* attorney general-approved trainings could be conducted; rather, the notion here is that qualified training programs could obtain a "stamp of approval" from the attorney general. Currently, there is nothing standard about the trainings provided by various entities, individuals,

organizations or others throughout the state. I anticipate approaching this authority by coordinating with various stakeholders throughout the state, which would be authorized by the legislation.

- To make training readily available, it authorizes the attorney general to establish a ***system of online training***. I anticipate modeling this approach generally upon the approach of the Ohio attorney general's office, which now has training available through its website.

Second, I believe the *certainty* of enforcement is more important than the *severity* of the penalty for violations. Unfortunately, the “clunky” nature of the current enforcement mechanism renders enforcement uncertain. Therefore, we propose the following:

- Replace the current all-or-nothing system – in which the State either pleads for voluntary compliance or files a full-fledged lawsuit – with a series of ***graduated enforcement options*** between those two extremes. Under this proposal, options to resolve violations, listed in order of increasing severity, would be: (1) Settlement through an out-of-court consent order entered between the attorney general and the violator, (2) resolution by an out-of-court finding of violation issued by the attorney general and served upon the violator, (3) settlement through a consent judgment entered between the attorney general, or county or district attorney, and the violator and filed with the court, or (4) the current-law option of filing a traditional lawsuit.
- ***Encourage the resolution*** of violations through lesser means (rather than the filing of a lawsuit) by limiting the liability of a violator (to fines, costs or other remedies) if he or she resolves the dispute through lesser means. For example, disputes settled by out-of-court consent order would have fines capped at \$250 per violation rather than the current-law \$500, and in a consent order the attorney general could not recover investigation or enforcement costs. However, if at the other extreme the case is resolved in the State's favor after litigation, the court could order the maximum fine of \$500 and would be required to order full reimbursement of the state's enforcement costs, and other remedies.
- ***Enforce out-of-court settlements and findings of violation*** by establishing a mechanism by which out-of-court resolution of KORA and KOMA disputes may be enforced through judicial review. Without this recourse, which is common throughout administrative law, the proposed graduated system would have little effect on obdurate violators, who of course are those most in need of enforcement actions.

Third, the current tools available for investigation of alleged violations are identified but ill-defined in the statutes. For example, both KORA and KOMA grant the attorney general, or county or district attorney, authority to subpoena information, but neither statute establishes a mechanism to *enforce* a pre-filing subpoena. Therefore, we propose the following changes to investigative tools:

- Establish a mechanism to *enforce investigative demands*, such as subpoenas, that currently are authorized by law. The proposed mechanism is borrowed from the well-established procedures of the Kansas Consumer Protection Act.
- Make express that when the attorney general, or a county or district attorney, is investigating alleged violations, he or she may review all relevant records but any *assertion of confidentiality by the alleged violator must be respected by the prosecutor*, who may not release them without a court order. This important provision addresses a real-world problem that frequently arises in investigations such as this: A citizen complains that a public agency has improperly redacted information in a record it produced. In order to investigate the propriety of the redaction, the attorney general (or county or district attorney) needs to know what information was redacted so he or she may determine whether the redaction was permitted by law. However, the public agency is reluctant – sometimes significantly reluctant – to produce unredacted information to the attorney general (or county or district attorney) – out of concern that it may be improperly released. This provision allays that concern and allows a full investigation in circumstances such as this, with the release ultimately being subject to judicial determination as it is under current law.
- Require that requests for investigation filed with the attorney general be *submitted under penalty of perjury on a form approved by the attorney general*. It is reasonable to require that a person asking that an investigation be initiated be willing to assert the facts he or she thinks show the KORA or KOMA has been violated and affirm those asserted facts are, to the best of his or her knowledge or belief, true and correct. Requiring uniformity in complaints will minimize problems that currently arise from communications that seem to be complaining in nature but do not include enough information to evaluate what action the complainant is seeking.

Fourth, permit the state to recover reasonable investigation and litigation costs. Investigations and enforcement actions under KORA and KOMA are not free. They not only require significant staff time but also incur related expenses such as travel costs, deposition and court reporter costs, service or process and mailing costs, the cost of providing trainings, and various others. Currently, the entirety of the cost of investigation and enforcement is borne by state taxpayers generally. Senate Bill 206 proposes that in certain circumstances, those costs may be shared with the violator by requiring reimbursement of the attorney general's, or county or district attorney's, reasonable investigation costs, litigation costs, expenses and attorney fees. This principle that the violator bears part of the cost of enforcing the law is common and is implemented in various ways, and to various extents, throughout the statutes. Costs, fees, expenses and penalties recovered by the attorney general would be deposited to a newly created Open Government Fund, which would be used to support the purposes of KORA and KOMA, including through training and enforcement actions.

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Mr. Chairman, I believe the overall effect of this bill, if enacted, will be that enforcement of the current requirements of the KORA and the KOMA will be stepped up throughout the state, both by the attorney general's office and by county and district attorneys. I also believe a net effect will be a significant increase in training about KORA and KOMA requirements, both before and after violations have occurred, and therefore inadvertent violations will be reduced.

This bill proposes to address practical problems encountered with enforcement of the state's current open government laws. I encourage the Committee to recommend it favorably, and I would stand for questions.

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